No. 10-0209

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DOMINIC CHOATE, Plaintiff-Appellee, v. INDIANA HARBOR BELT RAILROAD COMPANY, an Indiana corporation; THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corporation; and CSX TRANSPORTATION, INC., a Virginia corporation, Defendants-Appellants.	)))))))))))))))	On Appeal from the Circuit Court Cook County, Illinois County Department, Law Division No. 03-L-12237 Honorable William J. Haddad, Judge Presiding.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

The central issue here is *duty*—whether defendants owed a duty to Choate, a trespassing adolescent who admittedly "was train hopping and not merely crossing" defendants' tracks (Pl. Br. 25) when he came to harm while showing off for his girlfriend (Defts. Br. 5). When "no duty exists, it is axiomatic that no recovery can occur." *Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc.*, 169 Ill. 2d 110, 116 (1995). Here, the circuit court should have determined as a matter of law that defendants owed no duty to Choate because the danger of jumping on a moving train is *objectively* obvious to children generally. Moreover, Choate admitted that he *subjectively* appreciated the danger. That admission is dispositive. Tellingly, nowhere does Choate acknowledge—much less attempt to distinguish—*Colls v. City of Chicago*, 212 Ill. App. 3d 904 (1st Dist. 1991), the leading First District authority on this point.

ARGUMENT

I. Defendants Are Entitled To Judgment Because They Owed No Duty To Choate Under *Kahn*.

The *Kahn* doctrine of premises liability permits a child trespasser to recover from a property owner only if he can prove, *inter alia*, that (i) the danger of the condition was not objectively obvious; (ii) he did not subjectively appreciate it; and (iii) the condition could have been remedied at an expense that was slight.[1] *See Mt. Zion*, 169 Ill. 2d at 117; Defts. Br. 15. Though Choate asserts otherwise (at 27), defendants' opening brief demonstrated that he satisfied none of these elements. His response serves only to confirm that conclusion.

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[1] Choate's references to "defendants' train" (Pl. Br. 2) are misleading, as the train was operated by another entity that has settled and hence is not a party to this appeal (Defts. Br. 4; C10, 584, 682, 1445).

A. The danger of jumping onto a moving train is objectively obvious to the general class of children of Choate's age and experience.

"[W]hether a duty exists is a question of law, and this court has held that whether a condition is open and obvious is also a question of law where there is no dispute about the physical nature of the condition." *Wilfong v. L.J. Dodd Constr.*, 401 Ill. App. 3d 1044, 1053 (2d Dist. 2010); Defts. Br. 14, 19. There is no factual dispute here: Choate admits that he tried three times to "hop," or jump on board, a train moving at 9 or 10 miles per hour. Pl. Br. 5, 22. The courts consistently have held that certain dangers are so manifestly open and obvious that, as a matter of law, minors are deemed capable of appreciating them. Defts. Br. 19. The danger of jumping onto a moving train is one of them. *Id.* at 19-24 & n.2; *see also* AAR Br. 5-13; ATRA Br. 4-8.

In response, Choate relies principally on *Engel v. Chicago & North Western Transportation Co.*, 186 Ill. App. 3d 522 (1st Dist. 1989). Pl. Br. 21-22. *Engel* does not, however, hold that the danger of jumping on a moving train is never objectively obvious. To the contrary, this Court specifically stated that "[u]nder different facts than are present in this case … a judge could find that the danger was obvious … and find no duty existed as a matter of law." 186 Ill. App. 3d at 531.

This case presents those "different facts" because the train Choate attempted to vault aboard was travelling at least twice as fast as the train in *Engel*, and Choate (unlike Engel) had never seen anyone successfully hop a train.[2] Defts. Br. 22. Additional

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[2] ITLA compares the 9 to 10 m.p.h. speed of the train with *adult world-record* times for the 100-meter dash. ITLA Br. 6 n.1. A more appropriate comparison is the President's Council on Fitness, Sports, and Nutrition's *Award Benchmarks*, which were "validated … through comparison with a large nationwide sample." A 12-year-old boy is faster than 85% of his peers if he can run faster than 8 m.p.h. *See* http://www.presidentschallenge.org/challenge/physical/benchmarks.shtml.

considerations that were "determinative of the dut[y]" in *Engel*, yet that "are not present in this case," include: (i) *Engel* involved a park "owned … by municipal corporations" and "specifically devoted" to use "by children," whereas "the property involved here is owned by private entities and used in a proprietary manner" (*Calhoun v. Belt Ry.*, 314 Ill. App. 3d 513, 527-27 (1st Dist. 2000)) and (ii) the Park District in *Engel* had "voluntarily undertaken" to "construct and maintain a fence," which was in disrepair (*Colls*, 212 Ill. App. 3d at 959-60), whereas there was no such undertaking by defendants here. *Cf. Iseberg v. Gross*, 366 Ill. App. 3d 857, 865 (1st Dist. 2006) ("[t]he essential element of the voluntary undertaking doctrine is an undertaking"). Although Choate brushes aside such differences as "insignificant" (Pl. Br. 22), he offers no alternative explanation for what the *Engel* court could have meant when it said that "Engel could not be presumed to have realized the dangers of flipping the train *because he had seen others … successfully mount and dismount the slow-moving trains*" (186 Ill. App. 3d at 528 (emphasis added)).

That Choate "thought he could do it" (Pl. Br. 23) also has no bearing on whether the risk was obvious. "[M]any children tragically die or are seriously injured" from obvious risks, such as "fire and water, or falling from a height." *Hootman v. Dixon*, 129 Ill. App. 3d 645, 649 (2d Dist. 1984). "[I]f the standard for determining the obviousness of risks to children was measured by the frequency of cases involving them, the obvious risks of water, fire and falling from a height would have to be eliminated." *Hagy v. McHenry County Conservation Dist.*, 190 Ill. App. 3d 833, 845 (2d Dist. 1989). Some children (and, for that matter, some adults) unfortunately do things even when they know of the dangers—*e.g.*, smoking or text messaging while driving. Like Choate, they no doubt believe that they would not come to harm despite the danger.

For its part, ITLA cites a potpourri of cases, none of which addresses *Kahn*'s *objective* obviousness element. ITLA Br. 5-7, 11-12. In *LaSalle National Bank v. City of Chicago*, 132 Ill. App. 3d 607 (1st Dist. 1985), for example, the court was concerned only with whether a finding of partial comparative fault meant that the plaintiff *subjectively* appreciated the risk of jumping on moving trains. Defts. Br. 23-24. *LaSalle*, moreover, specifically relied on the city's preexisting contractual duty to erect and maintain a fence. *Calhoun*, 314 Ill. App. 3d at 526-27; *see Johnston v. Ill. Bell Tel. Co.*, 195 Ill. App. 3d 501, 504-05 (1st Dist. 1990).[3] Likewise, both *Pellegrini v. Chicago, Rock Island & Pacific R.R.*, 91 Ill. App. 3d 1091, 1093-94 (1st Dist. 1980), and *Dickeson v. Baltimore & Ohio Chicago Terminal R.R.*, 73 Ill. App. 2d 5, 18-20 (1st Dist. 1965), turned on contributory negligence, not on what constitutes an objectively obvious danger under *Kahn*. Defts. Br. 18, 27-28; *see infra* p. 5. Moreover, those cases were decided "before the adoption of comparative negligence," which has eroded "[w]hatever validity [their] rationale" may once have had. *Colls*, 212 Ill. App. 3d at 932, 949. Another case ITLA cites, *American National Bank & Trust Co. v. Pa. R.R.*, 52 Ill. App. 2d 406 (1st Dist. 1964), merely rejects the contention that children injured by "objects in motion" (as opposed to "stationary objects") can never recover under *Kahn*; it does not address whether the danger of jumping onto a moving train is objectively obvious.[4] *Id.* at 421.

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[3] Similar considerations distinguish *Maskaliunas v. Chicago & Western Indiana R.R.*, 318 Ill. 142 (1925), where the "negligence charged … [was] the failure … to comply with [a] fencing ordinance" imposing an "absolute" duty to fence the tracks. *Id.* at 146. Furthermore, *Maskaliunas* held merely that a child between the ages of 7 and 14 is not contributorily negligent as a matter of law. It predated *Kahn*, and so did not address whether moving trains present a danger that is objectively obvious to children.

[4] In affirming the *result* in *Dickeson* and *American National Bank*, the Illinois Supreme Court declined to address "important" questions regarding "the applicability of … *Kahn* … to moving trains" because the defendants were liable on other grounds.

(cont'd)

And like *LaSalle* and *Maskaliunas*, *American National Bank* also involved a "special ordinance" imposing upon the railroad "the duty to fence the area." *Id.* at 431.[5]

B. The only reasonable inference from the evidence is that Choate personally appreciated the risk of jumping onto a moving train.

Under the *Kahn* doctrine, "regardless of comparative negligence, the particular child's appreciation of the risk, if established in fact, has consistently been recognized as sufficient to free a defendant landowner of all liability for the child's injuries." *Colls*, 212 Ill. App. 3d at 933; Defts. Br. 18, 26-27; *see* ICJL Br. 7-12. Choate's efforts to evade the consequences of this bedrock principle of law are misdirected.

First, Choate and ITLA assert that Choate's "subjective understanding of the danger of the train was relevant only to his comparative fault." Pl. Br. 29; ITLA Br. 12, 17. The Illinois Supreme Court has squarely rejected this argument at least three times, however. *See Bucheleres v. Chi. Park Dist.*, 171 Ill. 2d 435, 447 (1996); *Mt. Zion*, 169 Ill. 2d at 112, 117-18; *Deibert v. Bauer Bros. Constr. Co.*, 141 Ill.2d 430, 448 (1990). As that Court explained, "[t]he existence of a defendant's legal duty is separate and distinct from . . . the parties['] comparative fault" (*Bucheleres*, 171 Ill. 2d at 447), and "[t]he [*Kahn*] exception for obvious dangers is not merely a matter of contributory negligence … , but of *lack of duty to the child*" (*Mt. Zion*, 169 Ill. 2d at 117-18; *Colls*, 212 Ill. App.

Dickeson v. Balt. & Ohio Chi. Terminal R.R., 42 Ill. 2d 103, 109 (1969); *Am. Nat'l Bank & Trust Co. v. Pa. R.R.*, 35 Ill. 2d 145, 153-54 (1966).

[5] In the event the Court concludes, notwithstanding the discussion above, that *Engel* or any other First District case stands for the proposition that a moving train does not present an objectively obvious danger as a matter of law, that case should not be followed. Defts. Br. 22 n.3. *Stare decisis* "does not bind courts to follow decisions of equal … courts," such as other divisions of the same district. *Schiffner v. Motorola, Inc.*, 297 Ill. App. 3d 1099, 1102 (1st Dist. 1998). Consistent with the *Kahn* doctrine and the great weight of authority (Defts. Br. 21 n.2; AAR Br. 5-13; ATRA Br. 4-8), this Court should hold that a moving train presents an objectively obvious danger to the general class of children old enough to be "at large" (*see Mt. Zion*, 169 Ill. 2d at 126).

3d at 933). When, as here, there is no duty, the issue of comparative fault never arises.

Second, Choate and ITLA invoke extra-record "neurological" research (Pl. Br. 26; ITLA Br. 14-17), which they may "not rely on … to support [Choate's] position on appeal." *Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009). This Court should either "strike [those portions of] the brief[s]" or "disregard the inappropriate material." *Id.*

In any event, the cited research—which defendants never had the opportunity to challenge below—shows *at most* that some adolescents are prone to impulsive behavior because of their immaturity. Such a propensity is immaterial to whether adolescents are *capable of appreciating risk* and, as such, is immaterial to whether a landowner has a legal duty to a trespassing child. The very study that ITLA quotes confirms that appreciation of risk and intentional risk-taking are not synonymous:

> [A]dolescents *are able to reason and understand risks* of behaviors in which they engage…. [W]hen a poor decision is made in an emotional context, the *adolescent may know better*, but the salience of the emotional context biases his or her behavior in [the] opposite direction….

ITLA Br. 16 (emphasis added; quoting B.J. Casey et al., *The Adolescent Brain*, 1124 ANN. N.Y. ACAD. SCI. 111 (Mar. 2008)). Thus, Choate's and ITLA's belatedly-introduced "neurological" research actually supports *defendants'* position. "[W]hat is important is the fact that the minor can appreciate the risk, not that he will in fact avoid it." *Swearingen v. Korfist*, 181 Ill. App. 3d 357, 363 (2d Dist. 1989); Defts. Br. 27, 43-44. "[A] lack of 'mature judgment' does not negate the ability to *recognize or appreciate* an obvious risk." *Hagy*, 190 Ill. App. 3d at 845. As this Court made clear in *Colls*, the *Kahn* doctrine imposes no duty when a plaintiff acts with "immature recklessness in the case of known and appreciated danger." 212 Ill. App. 3d at 933.

Third, ITLA contends that Choate's appreciation of the risk is not by itself

sufficient to preclude the imposition of a duty. ITLA Br. 9-10. According to ITLA, defendants also were required to show that Choate knew just as much, if not more, about the risk than they did. The Illinois Supreme Court has expressly rejected previous efforts to engraft onto Illinois law a comparison of the plaintiff's level of understanding with that of the defendant. *See Mt. Zion*, 169 Ill. 2d at 126 (rejecting contention that "to find that [the defendant] owed no duty is to foster a rule that a child … is better able to recognize and appreciate danger than is [the defendant]"). Instead, as this Court has explained, the relevant question is whether the particular "child has some greater understanding than a *typical child of his age*," such that he or she "in fact did appreciate" the danger. *Colls*, 212 Ill. App. 3d at 945-46 (emphasis added); *see also* Defts. Br. 26-27.

Finally, Choate takes issue with defendants' argument that the only reasonable conclusion to be drawn from the record evidence is that he subjectively appreciated the danger of jumping onto a moving train. Pl. Br. 29-32. But he cannot avoid the consequences of his own admissions.

1. Choate's statement at his deposition that he appreciated at the time of the accident that the "train … [he was] grabbing onto was dangerous" (A29) is a binding judicial admission that is dispositive of this issue. Defts. Br. 28, 42-46. Choate's contentions to the contrary lack merit.

Choate first asserts that only testimony regarding *intent*, and not *knowledge*, can be considered a judicial admission. Pl. Br. 40. It is well-established, however, that a party's "state of mind, his *knowledge* and intent," can be established from his "own testimony." *People v. West*, 102 Ill. App. 3d 50, 56 (2d Dist. 1981) (emphasis added). Whether a person did or did not have "knowledge" of something is a "question of fact,"

not a conclusion, and therefore a fit subject for a judicial admission. *Steiner Elec. Co. v. NuLine Techs., Inc.*, 364 Ill. App. 3d 876, 882 (1st Dist. 2006); Defts. Br. 42.

Choate next contends that the word "dangerous" is ambiguous. Pl. Br. 41. Yet Choate himself agreed that something is "dangerous" if it "could *take a body part*" or "hurt" or "kill" him.[6] Tr. 1757-58 (emphasis added); A22-23; Defts. Br. 42-43. Furthermore, Choate admitted that, on the day of the accident, he would have understood the "DANGER [¶] NO TRESPASSING [¶] NO DUMPING" sign to mean that it was "harmful" to proceed. Tr. 1735-6; A24. (In quoting the sign, Choate misleadingly omits the word "DANGER." Pl. Br. 5, 12.) Choate plainly understood the meaning of "dangerous," an ordinary and commonplace word.

Finally, Choate argues that the circuit court's failure to give effect to his judicial admission was not prejudicial because defendants were able to use his deposition testimony for "impeachment." Pl. Br. 42. That misses the point. Because of the circuit court's error, Choate was able to change stories on the stand and claim that he did not know "while … doing it" that jumping onto a moving train was dangerous. Tr. 1758. Yet the defining characteristic of a judicial admission is that a party is *conclusively bound* by it: A judicial admission cannot be contradicted or "qualified" (*cf.* Pl. Br. 43) and

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[6] As the italicized passage makes clear, Choate did understand that he "might lose a leg if he fell off the [moving] train." *Cf.* Pl. Br. 41. In any event, a child "cannot be heard to say that he did not realize the danger because he did not expect harm to occur exactly as it did." *Tex. Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191, 195 (Tex. 1997). Under *Kahn*, there is no duty if the particular child "'discover[s] the condition or realize[s] the risk involved … in *coming within the area made dangerous by it*.'" *Colls*, 212 Ill. App. 3d at 927 (quoting Restatement (Second) of Torts § 339(c)). Choate realized that moving trains are dangerous and harmful and could hurt or kill him if he approached them, and that is enough. *See Alston v. Balt. & Ohio R.R.*, 433 F. Supp. 553, 569 n.102 (D.D.C. 1977) ("[p]laintiff need not have foreseen the precise injury … if the possibility of harm was clear") (internal quotation marks omitted).

definitively withdraws the matter from contention. *Sohaey v. Van Cura*, 240 Ill. App. 3d 266, 281 (2d Dist. 1992); Defts. Br. 29-30, 44. Therefore, the prejudice is plain. Correctly recognized as a judicial admission, Choate's statement that he subjectively appreciated the risk of moving trains *by itself* entitled defendants to judgment.

2. In any event, Choate's statement is at least an *evidentiary* admission, which, when coupled with the other evidence, compelled the conclusion that Choate appreciated the risk. Choate largely accepts that the only contrary evidence is his conclusory statement at trial that "he did not know the danger while he was doing it." Pl. Br. 43; *see* Defts. Br. 28-31. Judgment *n.o.v.* does not, however, require the complete absence of evidence favoring the plaintiff. Especially when the "plaintiff's case 'stands or falls'" on the testimony of an interested party, courts are free "to decide when [such] weak evidence has so faded in the strong light of all of the proof" that judgment *n.o.v.* must be granted. *Belleville Nat'l Sav. Bank v. Gen. Motors Corp.*, 20 Ill. App. 3d 707, 712-13 (5th Dist. 1974).

Choate concedes that he heard warnings—*over a dozen of them*—from his mother and from the railroad police about the danger of moving trains.[7] Pl. Br. 31, 42-43; Defts. Br. 7-8, 28; Tr. 1634, 1722. These warnings could not have failed to have apprised Choate of that danger. *E.g.*, *Sampson v. Zimmerman*, 151 Ill. App. 3d 396, 398-99 (2d Dist. 1986) ("plaintiff had been warned about fire"); *Prince v. Wolf*, 93 Ill. App. 3d 505, 506, 509 (1st Dist. 1981) ("[t]he boys' parents had warned them against swimming in

[7] In light of the warnings that Choate concedes receiving, it is irrelevant whether he also heard the warnings of his companions at the scene of the accident. We note, though, that it is Choate who lacks "candor" (*cf.* Pl. Br. 32) about this matter. Patton, the disinterested adult witness, saw Choate "obviously talking" to his companions at the time they said they warned him not to try to jump on the train. Tr. 727; Defts. Br. 5.

'mudholes'"). Choate asserts (at 31) that the warnings are irrelevant because they "apparently had no effect." What matters, however, is that Choate "appreciate[d] the risk, not that he … avoid[ed] it." *Swearingen*, 181 Ill. App. 3d at 363. When "the particular child, because of … *prior warning*[*s*,] in fact appreciated" the risk, there can be no duty owed to the trespasser. *Colls*, 212 Ill. App. 3d at 935 (emphasis added).

Choate attempts (at 32) to distinguish the cases cited in defendants' opening brief on the ground that they did not involve trains, but has no answer to the broader principle for which those cases stand—namely, that a child who was repeatedly warned about a certain danger cannot claim to have been unaware of it. Given the "dubious probative value" of Choate's self-serving denial, "his [prior] contrary statements," and "his inherently improbable testimony" that he did not appreciate the risks of jumping onto a moving train despite repeated warnings, defendants are entitled to judgment. *In re Marriage of Gordon*, 233 Ill. App. 3d 617, 662-63 (1st Dist. 1992).[8]

C. Dr. Berg's proposed remedial measures were neither effective nor practicable.

A plaintiff seeking to establish the existence of a duty under the *Kahn* doctrine must prove "that the cost and inconvenience of remedying the situation was minimal." *Colls*, 212 Ill. App. 3d at 940. Choate sought to do that by means of testimony by Dr. Berg that conflated *track-crossing* with *train-hopping*. It is immaterial, however,

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8 *See Nolley v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 183 F.2d 566, 568 (8th Cir. 1950) ("On the stand plaintiff attempted to claim that he did not realize prior to his accident that the yards were … dangerous …. [yet] in a deposition taken before trial, when he had been asked, 'You knew it was dangerous?' he had answered, 'Yes, sir.' … [T]here was no substantial evidence that could support a finding that plaintiff did not comprehend or appreciate the danger ...."); *Watkins v. Ill. Cent. R.R.*, 1993 WL 503464, at *2 & n.3 (5th Cir. 1993) (plaintiff's "deposition[,] [which] provides: Q. You knew it was kind of dangerous to be around that moving train, didn't you? [¶] A. Yes," foreclosed argument that he "did not appreciate the dangers of playing near a moving train").

whether Dr. Berg's proposals would promote safer track-crossing in the community, because the "situation" ostensibly to be remedied here involves trespassing children jumping onto moving trains, which could occur anywhere trains are accessible.

1. Choate and ITLA insist that Dr. Berg properly limited his analysis to engineering improvements near the accident scene. Pl. Br. 13, 35-38; ITLA Br. 11-12. According to Dr. Berg, this would have reduced the risk that people seeking to *cross* the tracks near that location would be hit by trains. Tr. 1239. But Dr. Berg offered no reason to believe that these discrete improvements would prevent a trespassing child from *jumping onto a moving train* "[o]ut of the blue" (Pl. Br. 38) whenever and wherever he is motivated, as Choate was here, to "show off" and "impress [his] friends" (Tr. 1743; A32; Defts. Br. 34-35). There was evidence that trespassing children tried to jump on moving trains throughout defendants' system. *Cf.* Pl. Br. 37. Indeed, Choate *himself* introduced evidence of "prior [train-hopping] incidents ... [that] weren't … in the same locality," on the theory that some "children have the propensity to try and catch a ride on the train," wherever on the system they might encounter one (Tr. 164, 168, 1443; C1336). As Choate himself acknowledges, his was an "accident of opportunity," and he "could have engaged in [his] daredevilry anywhere." Pl. Br. 38.

In short, Choate and ITLA have only Dr. Berg's *ipse dixit* for the assertion that sealing off defendants' entire rights-of-way is unnecessary to prevent opportunistic train-hopping. Yet they nowhere dispute that imposing upon defendants a duty to upgrade the right-of-way where *this* accident happened necessarily would require them to fence and build overpass crossings *everywhere*. Defts. Br. 36-37. As the Illinois Supreme Court observed in the course of rejecting a duty to warn about snow and ice at a particular

location on a highway, a "decision in [plaintiffs'] favor would require the defendants to post warning signs under *comparable* weather circumstances on *every* highway subject to their jurisdiction." *Lansing v. McLean County*, 69 Ill. 2d 562, 573 (1978) (emphasis added). "The impracticability and the expense" of doing so defeated, as a matter of law, the imposition of a duty and required dismissal of the plaintiffs' case. *Id.*

Indeed, Illinois law is clear that when it comes to weighing, under the *Kahn* doctrine, the burden of remedying the condition against the risk of leaving the condition as-is, the court must consider the aggregate cost to society of imposing the duty on *all similarly situated property owners*. *E.g.*, *Hanks v. Mount Prospect Park Dist.*, 244 Ill. App. 3d 212, 218-19 (1st Dist. 1993); *Durr v. Stille*, 139 Ill. App. 3d 226, 231 (5th Dist. 1985); *Adams v. Brookwood Country Club*, 16 Ill. App. 2d 263, 272-73 (2d Dist. 1958); *Ellison v. Commonwealth Edison Co.*, 351 Ill. App. 58, 65 (1st Dist. 1953). To impose a duty "to erect fences on *all* land adjacent to railroad property would be intolerable." *Hanks*, 244 Ill. App. 3d 219 (emphasis added); *see also Adams*, 16 Ill. App. 2d at 272-73 ("To require … owners along *all* the rivers and creeks flowing in and adjacent to Illinois to construct boy-proof fences or to employ guards … would impose upon such owners no slight expense, but a most oppressive and unbearable burden.").

The duty that Choate seeks to impose would be similarly burdensome and intolerable. Only system-wide engineering improvements—cordoning off every railroad track throughout the state with impenetrable "boy-proof fences" and dotting the landscape with overpasses—conceivably could address the risk that trespassing children would jump onto moving trains. Defts. Br. 33-38; ATRA Br. 13-16; AAR Br. 13-18. Dr. Berg did not even attempt to evaluate the cost or feasibility of this enormous undertaking.

Thus, Choate failed to satisfy his burden of "establish[ing] that the cost and inconvenience of remedying the situation was minimal." *Colls*, 212 Ill. App. 3d at 940.

2. Even supposing that Dr. Berg's specific proposals would "remedy[] the situation," his testimony was not sufficient to establish that their expense and inconvenience would be slight in comparison to the risk. Choate's position is something of a moving target. He argued at trial (over defendants' objection) that either a crossing of some kind *or* fencing would have been enough to prevent the accident. Tr. 1825, 1827, 2502. On appeal, Choate now apparently accepts that both are necessary—a crossing to separate trespassing children from moving trains as well as fencing to prevent them from gaining access to such trains between crossings. Pl. Br. 12-13, 28, 38.

Although Dr. Berg mused that an at-grade crossing would suffice (Tr. 1253, 1259), defendants showed (and Choate does not now seriously contest) that a pedestrian overpass would have been necessary because trespassing children otherwise could gain access to moving trains via the at-grade crossing itself. Defts. Br. 38 & n.8. Yet Dr. Berg provided no basis for his testimony that an overpass could be built for $150,000 other than "mere conjecture." *Damron v. Micor Distrib., Ltd.*, 276 Ill. App. 3d 901, 907, 909 (1st Dist. 1995). Among other things, Dr. Berg never "attempt[ed] to do any cost estimate" (Tr. 1259); could not describe its dimensions (*id.* at 1323); gave short shrift to the need for defendants to secure advance permission from the Illinois Commerce Commission; and failed to take account of the cost of acquiring land to construct the overpass and its access ramps. Defts. Br. 38-39. These holes in Dr. Berg's testimony, which no reasonable jury could overlook, stand unplugged.

As for fencing, Choate does not dispute that a chain-link fence—the *only* type of

fence for which Dr. Berg supplied cost estimates—would have been susceptible to being cut, as the existing fences near the site of the accident had been.[9] Defts. Br. 39-40. Thus, the fencing proposed by Dr. Berg would have been insufficient. It was no "boy-proof fence[]" (*Adams*, 16 Ill. App. 2d at 272), unlike the concrete barrier wall that the court erroneously allowed Choate to exhibit for the jury without foundational testimony (Defts. Br. 47-48). Doubtless the cost of such a wall would be immense; Dr. Berg's testimony is silent on that topic—itself a fatal flaw, which Choate fails to address.

"When there is no factual support for an expert's conclusions, their conclusions alone do not create a question of fact." *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 875-76 (1st Dist. 1991). That is the case here.

II. At The Very Least, A New Trial Is Required.

A. The trial court erroneously refused defendants' tendered special jury interrogatory on Choate's appreciation of the risk.

Assuming *arguendo* that the case was properly submitted to a jury, the circuit court erred in refusing to give defendants' proposed special interrogatory on the dispositive issue of whether, at the time of the accident, Choate appreciated that jumping onto a moving train presented a risk of harm. Defts. Br. 31-33. Choate does not dispute that a jury finding that he appreciated that risk would preclude liability. Rather, he quibbles with the wording of the proposed interrogatory and asserts that defendants instead should have asked whether he "fully" appreciated the risk. Pl. Br. 34.

As an initial matter, Choate's argument is waived, because he did not object on

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[9] Choate incorrectly contends that this argument is waived because there was no contemporaneous objection to Dr. Berg's mention of chain-link fencing. Pl. Br. 39. This "misstates the issue," which is that Dr. Berg's testimony was so conclusory and devoid of "factual support" that it was insufficient to establish an essential element of the *Kahn* doctrine—namely, feasibility of remedies. *See Damron*, 276 Ill. App. 3d at 906-07.

this specific ground below. *Payne v. Nicholas*, 156 Ill. App. 3d 768, 776 (1st Dist. 1987). Instead, he argued only that his appreciation of the risk was subsumed by the jury's consideration of comparative fault, which is not so. Tr. 2338; *supra* pp. 5-6; Defts. Br. 32-33. Because Choate failed to "raise[] in the trial court" the objection he now presses, defendants were deprived of the "opportunity to address and," if necessary, "cure it." *Hills of Palos Condo. Ass'n v. I-Del, Inc.*, 255 Ill. App. 3d 448, 469 (1st Dist. 1993).

In any event, in *LaSalle* and again in *Colls*, this Court agreed that an instruction virtually identical to that proposed by defendants—*i.e.*, with nary a "fully" in sight—would, if answered in the affirmative by the jury, override a general verdict of negligence. Defts. Br. 32-33. In *LaSalle*, this Court accepted that a jury "finding that plaintiff 'appreciated the risk' in jumping on a moving freight train" would have made liability under *Kahn* "inappropriate." 132 Ill. App. 3d at 615. And in *Colls*, this Court held that it was a "valid legal principle[] that there can be no liability to a minor who, in fact, appreciated the risk," and that "language focusing the jury's attention squarely on the minor's appreciation of risk" should "appear in the instruction." 212 Ill. App. 3d at 950; *see Cope v. Doe*, 102 Ill. 2d 278, 289 (1984) (holding that "the defendants owed no duty" because the condition did not "present[] perils that were not appreciated by plaintiff's decedent"). There is nothing to Choate's contention that the addition of the adverb "fully" was necessary to accurately reflect the law, much less that the absence of that one word is enough to justify the court's refusal to give the interrogatory.

B. Testimony that Choate's companions appreciated the danger of jumping onto moving trains was relevant and erroneously excluded.

Choate asserts that defendants were "able to convey to the jury that [his] friends understood the dangers," while simultaneously insisting that the circuit court was correct

to bar defendants from "eliciting testimony from [his] friends as to their knowledge of the dangers of train hopping." Pl. Br. 17, 44. He belabors the testimony that defendants elicited, but then fails to defend the exclusion of the testimony at the heart of the matter—the fact that Choate's companions all appreciated that jumping onto a moving train is dangerous. Defts. Br. 45. Choate unconvincingly attempts to distinguish the authorities cited in defendants' opening brief, dismissing as "irrelevant" *O'Keefe v. S. End Rowing Club*, 414 P.2d 830 (Cal. 1966), because its facts involved an older child and a swimming accident. But he ignores its reasoning, which is that "circumstantial evidence," such as the fact that "anyone similarly endowed would have realized the danger," is relevant to whether "the injured child did not in fact 'realize the risk'" at issue. *Id.* at 839 & n.8.

C. Testimony of unrelated train-hopping incidents was irrelevant and erroneously admitted.

Choate has no meaningful response to defendants' argument that other train-hopping incidents are irrelevant. Pl. Br. 44; Defts. Br. 45-46. "[W]here a situation speaks for itself evidence of other accidents is unnecessary and inadmissible." *In re Estate of Dickens*, 161 Ill. App. 3d 565, 570 (1st Dist. 1987). Whether a danger is obvious is a question of law—the resolution of which is unaffected by the fact that others may have "fail[ed] to avoid [that] risk" (*Hootman*, 129 Ill. App. 3d at 651)—so by failing to "exclud[e] any reference to prior … accidents involving" children jumping onto moving trains, the court allowed "irrelevant and highly prejudicial" information to reach the jury. *Dickens*, 161 Ill. App. 3d at 569-70. The regrettable fact that other children also might expose themselves to obvious dangers notwithstanding their appreciation of the risk presents no basis for the imposition of a duty. Defts. Br. 43-44, 46.

D. The jury's finding of liability and assessment of comparative fault was against the manifest weight of the evidence.

It is plain that Choate appreciated the risk of jumping onto a moving train at the time of the accident. Defts. Br. 27-32; *see supra* pp. 7-10. Indeed, "there is no evidence except [Choate's] own self-serving statement [at trial] which tends to support" his contention that he did not, and his testimony in this regard was "thoroughly impeached by … previous inconsistent statements." *Coleman v. Williams*, 42 Ill. App. 3d 612, 618 (2d Dist. 1976). Thus, the jury's finding of liability is against the "manifest weight of the evidence," and a new trial is required. *See id.*

Choate erroneously states that defendants' opening brief does not challenge the jury's apportionment of comparative fault. Pl. Br. 2, 18, 49. That brief speaks for itself. Defts. Br. 48-49. The notion that Choate—who trespassed onto defendants' property and then tried *three times* to jump onto a moving train in order to show off—was only 40% at fault defies common sense and is manifestly against the weight of the evidence. *Id.* at 49.

III. Neither The Frequent-Trespass Doctrine Nor Invitee Cases Are Relevant.

Finally, two red herrings merit a brief response.

A. The frequent-trespass doctrine is irrelevant.

The sole theory of liability before the jury was the *Kahn* doctrine. Choate and ITLA try to defend the judgment by invoking the frequent-trespass doctrine, even though it was rejected by the circuit court and the jury was never instructed on it. Pl. Br. 24-25; ITLA Br. 12-14. This argument is both procedurally improper and fails on the merits.

1. As a threshold matter, Choate should not be permitted to "bootstrap a frequent trespass theory into [his] case on appeal." *Vega v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 371 Ill. App. 3d 572, 576 (1st Dist. 2007). "[T]he 'frequent trespass' doctrine … is

separate and distinct from the *Kahn* doctrine." *Nelson v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 364 Ill. App. 3d 181, 186 (1st Dist. 2006). Briefly, when a landowner habitually tolerates trespassers in a limited area, this "continued toleration" may constitute implied permission to use the land for a limited purpose. *Rodriguez v. Norfolk & W. Ry. Co.*, 228 Ill. App. 3d 1024, 1040 (1st Dist. 1992).

Here, the court repeatedly rejected Choate's contention that he was entitled to invoke the frequent-trespass theory. It granted defendants' motion for summary judgment on this point (A8-9), denied Choate's motion for reconsideration (A13-14, 20), and then barred Choate from relying on the theory at trial (Tr. 177, 235, 2332). Moreover, at trial, Choate expressly confirmed that he was "not contending [he] had a license" to jump onto moving trains under the frequent-trespass theory. Tr. 2332. Consequently, the jury never was instructed on the frequent-trespass theory.

Choate does not challenge any of these rulings. This Court has "often stated parties cannot try a case on one theory in the trial court and adopt a different theory in a court of review." *Libbra v. Mt. Olive & Staunton Coal Co.*, 29 Ill. App. 2d 396, 402 (4th Dist. 1961); *see Hagy*, 190 Ill. App. 3d at 847. Thus, the Court should strike or disregard Choate's arguments based on the frequent-trespass theory. *Keener*, 235 Ill. 2d at 346.

2. Even if the frequent-trespass theory were properly before this Court—which it is not—it would provide no basis for affirmance. The uncontradicted evidence demonstrates that Choate approached the tracks from the *south*—where there was no path—to jump onto the moving train. Tr. 1239-40, 1284; A30; DX18A. Because Choate cannot establish "the existence of a 'beaten' or 'well-worn' path" leading to the accident location, he cannot "invoke the frequent trespass doctrine." *Vega*, 371 Ill. App. 3d at

581. Although there was a path *north* of the tracks, Choate admitted that he himself had made use of it on only one occasion, months before. Tr. 1727-28; A29; *Rodriguez*, 228 Ill. App. 3d at 1042 ("use of the path by other members of the public is immaterial"). The frequent-trespass doctrine "does not impose a duty" when the plaintiff only "'sometimes' took a shortcut … across the tracks." *Vega*, 371 Ill. App. 3d at 581.

Furthermore, even assuming *arguendo* that the other requirements of the doctrine were met, Choate exceeded the scope of any implied license, which at most "would have been an invitation … to *cross the tracks*." *Rodriguez*, 228 Ill. App. 3d at 1044; A8. Yet, as the circuit court put it, this was a "'jump on the train because I want to show off to my girlfriend' case." A8-9. Thus, Choate's conduct—*i.e.*, jumping on a moving train, not just trying to cross the tracks—was not an impliedly "permitted use," and the frequent-trespass doctrine accordingly could not apply. A8, 14 (citing *Rodriguez*, 228 Ill. App. 3d at 1040, and *Gaul v. Consol. Rail Corp.*, 556 A.2d 892, 897 (Pa. Super. 1989)); *accord Lowery v. Ill. Cent. Gulf R.R.*, 891 F.2d 1187, 1192-93 (5th Cir. 1990).

B. The invitee-liability cases are irrelevant.

Choate was a *trespasser*. 625 ILCS 5/18-c7501(1)(a)(i); Defts. Br. 4. Yet throughout their briefs, Choate and ITLA rely on cases involving *invitees*, suggesting that the obviousness of the danger of jumping onto moving trains—both to children generally and to Choate in particular—is not dispositive of this case because (in their view) it should have been "reasonably foreseeable" that some children would be injured thereby. *E.g.*, Pl. Br. 19-20, 27 (citing *Quereshi v. Ahmed*, 394 Ill. App. 3d 883 (1st Dist. 2009)); ITLA Br. 4.

That argument is foreclosed by this Court's decision in *Lange v. Fisher Real Estate Development Corp.*, 358 Ill. App. 3d 962 (1st Dist. 2005). That case established

that the "rule of no liability for open and obvious conditions" applies with absolute force to trespassers. *Id*. at 972; Defts. Br. 25-26 & n.4. Moreover, *Cope* and *Mt. Zion* specifically "reiterate[d]" that, as a matter of law, "obvious dangers present *no foreseeability of harm*, and thus *no duty*" to child trespassers injured by them. *Mt. Zion*, 169 Ill. 2d at 125 (emphasis added); *see also* Defts. Br. 18, 24; ICJL Br. 15-20. In sum, the "element of foreseeability of risk to the child[]" trespasser (which is a prerequisite to the existence of a duty) cannot, as a matter of law, be established when the "dangerousness of the condition is obvious" or when the particular child "did, in fact, appreciate the risk." *Colls*, 212 Ill. App. 3d at 929, 940-41.

CONCLUSION

The Court should reverse the judgment below and render judgment in favor of defendants. At minimum, the Court should order a new trial.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

The undersigned, an attorney, certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on February 23, 2011, she caused three copies of the foregoing Reply Brief of Defendants-Appellants to be placed with the U.S. Postal Service, proper postage prepaid, for first class mail delivery to the following:

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