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.

BRIEF OF DEFENDANTS-APPELLANTS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

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NATURE OF THE ACTION

At the time of the accident giving rise to this case, plaintiff Dominic Choate was trespassing on railroad tracks owned or operated by defendants. He was injured in the course of attempting to "flip" (*i.e.*, intentionally jump on board) a moving freight train. Choate, who was almost 13 at the time of the accident, brought suit on the theory that defendants negligently failed to prevent him from jumping onto the moving train. The circuit court initially granted summary judgment in defendants' favor, but then reversed itself on reconsideration. At trial, the jury found in favor of Choate on liability and awarded damages in the amount of $6.5 million, which were reduced to $3.9 million to account for a finding of 40% comparative fault. The trial court denied defendants' post-trial motions. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether defendants are entitled to judgment for the independent reasons that:

   (a) attempting to jump on a moving train is an "open and obvious" danger that a trespassing child such as Choate must be held to appreciate as a matter of law; and

   (b) there is no substantial dispute that Choate subjectively appreciated that jumping on a moving train was dangerous.

2. Whether defendants are entitled to a new trial because the trial court erroneously refused to give the special interrogatory tendered by defendants, which asked the jury whether Choate appreciated that jumping on a moving train was dangerous.

3. Whether defendants are entitled to judgment because Choate failed to present competent evidence of remedial measures, which defendants reasonably could have implemented, that would have eliminated the danger that trespassing children would jump on moving trains.

4. Whether defendants are entitled to a new trial because:

(a) the trial court erred in failing to give effect to Choate's binding judicial admission that he appreciated that jumping on a moving train was dangerous, while at the same time permitting Choate to suggest that his idiosyncratic vulnerabilities (*e.g.*, his allegedly below-average intelligence) prevented him from appreciating that danger;

(b) the trial court erred in excluding the testimony of Choate's companions that they recognized that jumping onto a moving train was dangerous, while at the same time allowing Choate to introduce evidence that other people—with whom he never had any contact—had attempted to jump on moving trains; and/or

(c) the trial court erred in allowing Choate's expert witness, a civil engineer, to offer conclusions that lacked a factual foundation and to opine on issues outside the scope of his expertise, such as adolescent behavior and law enforcement.

(d) the trial court erred in allowing Choate to cross-examine defendants' engineering expert using a photograph for which no foundation was ever established.

5. Whether defendants are entitled to a new trial because the verdict was against the manifest weight of the evidence.

JURISDICTION

This Court has jurisdiction under Supreme Court Rules 301 and 303. The trial court entered judgment on the jury verdict on July 14, 2009. A1. Defendants filed timely post-trial motions, which the trial court denied on December 18, 2009. A3. Defendants filed a timely notice of appeal on January 15, 2010. A34.

STATEMENT OF FACTS

Choate lost a portion of his left leg when he slipped when trying to jump aboard a moving train in order to "impress Alisa Van Witzenburg," his girlfriend at the time. Tr.

1743. Choate admitted that he "recognized . . . on the day of the accident . . . that the train [he was] grabbing onto was dangerous," but still "attempted to board [the] moving freight train [on] three different occasions," solely to "show off." Tr. 1762-63; D. Choate Dep. 127-28, 206 (A29, 32). Choate's mother had specifically and repeatedly warned him "before the accident [about] the severity of the injury that could occur if someone tried to get on a moving train." Tr. 1634, 1722.

A. The Events Of July 30, 2003.

1. The scene. Three railroad tracks run in the northwest-southeast direction behind the parking lot at 5810 West 107th Court Way in Chicago Ridge, Illinois. Tr. 716-18. Defendant CSX Transportation ("CSX") owns the tracks, while defendant Indiana Harbor Belt Railroad ("IHB") patrols the right-of-way. Tr. 1051, 1055.

Looking north from the parking lot, one sees first a fence line and then the tracks. Tr. 719, 1731; DX18A. The chain-link fence does not extend all the way across the rear of the parking lot. Tr. 819; DX18A. Near where the fence ends, there is mounted a sign reading:

DANGER
NO
TRESPASSING
NO
DUMPING

Tr. 720, 1735; DX18B.

2. The accident. July 30, 2003 was a clear summer day. Tr. 723. That afternoon, Choate and five of his acquaintances (Alisa Van Witzenburg, Brittany Edgar, Jessica Gunderson, Charlie Spindler, and Steven Weyer) had gathered in the parking lot of the apartment building behind 5810 W. 107th Court Way to "walk[] around talking for a

little while." Tr. 723-24, 1678-79.

Choate was "scooting" his bicycle around the parking lot, about 50 feet from the tracks, when an eastbound freight train appeared on the middle of the three tracks. Tr. 725-26, 1681-82, 1733. Defendants did not operate the train. Tr. 73. The operator, Burlington Northern Santa Fe Railroad ("BNSF"), separately settled with Choate for $25,000. A3.

According to Choate, the train's speed was "9, 10 miles an hour" (Tr. 1766), and the train "kept going at a steady speed" and "never stopped" (Tr. 1734). Although some of Choate's companions testified that they thought that the train might have been "stopped" part of the time (Tr. 785, 856, 935) or was moving "very slow[ly]" (Tr. 878), they agreed that "at the time the accident happened, [Choate] got onto a moving train" (Tr. 883).[1]

After several minutes of the train passing by—it was a long train, and the engine was therefore no longer visible—the boys left the parking lot and began walking towards it. Tr. 726, 1681, 1733. Under Illinois law, no unauthorized person is permitted to "walk, ride, drive or be upon or along the right of way . . . of a rail carrier within the State, at a place other than a public crossing." 625 ILCS 5/18c-7503(1)(a)(i). Thus, Choate was a trespasser as soon as he stepped onto the railroad's right-of-way. Tr. 1591.

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[1] *See also* Tr. 856, 936-37, 943-44, 949; D. Choate Dep. 124 (Choate agreed that the train was "moving continuously" and "never stopped"), 194 ("steady speed"), 207 (train was going faster than a walking pace) (A28, 31-32); Weyer Dep. 76; Van Witzenburg Dep. 50-51; Gunderson Dep. 31-32; Edgar Dep. 64. Dr. William Berg, Choate's expert witness, recognized that "there's no question [the train] was moving." Tr. 1268. And this was confirmed by the train's black-box event recorder, which "indicate[d] that the train was moving at all times . . . during the events of the accident" (Tr. 2068) and by Austin Patton, who agreed that the "train was moving" at "about 10 miles an hour, if not more," the "entire time that [he] saw and observed what was going on that day" (Tr. 726, 748).

Although Choate and some (but not all) of his companions testified that their original reason for approaching the tracks was that they intended to wait for the train to pass and then cross the tracks to visit a friend's house on the other side (Tr. 787, 846, 874, 1681; *cf.* Tr. 827), it is undisputed that once Choate drew near the tracks, his intention was to jump on the moving train, not cross the tracks. Choate admitted that once he was next to the train, he "certainly [wasn't] thinking about crossing the tracks to get to [the] house." Tr. 1743. He recognized that his "motive" and "sole focus" at that point "was trying to jump on the train to impress [his] friends and particularly [Van Witzenburg]." *Id.*; Edgar Dep. 94-95. In fact, Choate could not name "any other reason why [he] tried to do it other than . . . trying to show off." D. Choate Dep. 206 (A32). Moments before he "went over and tried to get on the train," Choate advised Van Witzenburg that he was "going to hop the train." Tr. 847. He thought that he was "going to get on the train, ride it for a couple of feet, and then . . . get off." Tr. 1689.

Austin Patton, an unrelated adult who witnessed the accident, testified that he saw Choate "[l]ooking back" at and "obviously talking" to his companions "in the parking lot." Tr. 727. Patton shouted warnings and asked "what the hell they were doing." Tr. 730. One of children, Brittany Edgar, testified that she yelled and swore at Choate to "get off the f_____ tracks and don't go by the f'ing track." Tr. 884. She said that she, Van Witzenburg, and Gunderson told Choate to "stop playing around [and] come back down." Tr. 877. Gunderson (Tr. 945-46) and Van Witzenburg (Tr. 862) similarly recalled telling Choate, "don't do it," after he told them that he was "going to try to see if he [could] jump on" the train (Tr. 945). Spindler also told Choate "not to go on the tracks." Tr. 800. Choate seemed to "hesitate[]," but ultimately was not dissuaded. Tr. 877.

Now immediately next to the moving train, first Spindler and then Choate attempted to board it. Tr. 1687-89. Choate recalled that the train was large and very loud—so loud, in fact, that the "[o]nly thing [he] could hear was the train." Tr. 1742, 1751. As established by the testimony of Larry Howery, a mechanical superintendent employed by CSX, and photographs introduced into evidence by defendants, the lowest rung on the ladders (called the "sill step") of the passing boxcars was well off the ground. Specifically, on one randomly selected boxcar the sill step was about two feet from the rail. Tr. 1903, 1918, DX8A (photograph). Because the track was situated on an elevated railbed, a person (such as Choate) running alongside a passing train would have had to jump even higher to reach the sill step. Tr. 1919; DX28-29 (photographs).

Choate testified that Spindler "stuck his hand out" and tried to grab the train, but then "pulled it right back in" and "acted like he was afraid and backed away from the train." Tr. 1742-43. Patton saw much the same thing, testifying that another boy "tried to grab a hold of the train" and then got "knocked down" and "fell over." Tr. 728, 746-47. After Spindler started to make his way off the tracks, Choate persevered and "tried to attempt to grab onto the train." Tr. 729, 1687. On Choate's first attempt, he stood flatfooted on the ground and grabbed the ladder; it bent his fingers backwards, and he pulled his hand in. Tr. 1688. On his second attempt, he ran alongside the train, grabbed the ladder, and then released it when he started "slipping on the rocks." Tr. 1689, 1747. On the third and fateful attempt, Choate threw himself at the ladder and managed to put his right foot on it. Tr. 1689-90; Gunderson Dep. 32-33. Unfortunately, Choate lost his grip, causing his left foot to swing under the train. Tr. 728-29, 937. The train continued on, because the engine had long gone by and the crew had no way knowing of the

accident. Tr. 730, 1680, 1734.

Choate's left leg was partially severed, necessitating a below-the-knee amputation. Choate's postoperative course was generally "normal" (Tr. 1009, 1022, 1141, 1699), and in late 2003 he received a prosthetic limb (Tr. 1145).

B. The Danger Of Moving Trains.

1. Choate's knowledge of the risks. Choate was born on October 14, 1990, making him 12 years and 9 months old on July 30, 2003. Tr. 1662. Although Choate was not a standout student (*e.g.*, he received Bs and Cs), he passed all the grades that he attended in school and scored in the low average to average range on an intelligence test administered by a school psychologist, Dr. Richard Lencki. Tr. 1479-80, 1763.

Choate was well aware at the time of the accident that jumping on moving trains was dangerous. He admitted in his deposition that he recognized "on the day of the accident" that the "train that [he was] grabbing onto was dangerous," although he tried to retreat from that position at trial by asserting that he "didn't know" that it was dangerous "while [he] was doing it." Tr. 1758, 1762; D. Choate Dep. 127-28 (A29). Choate defined "dangerous" things as things that "could take a body part" or "hurt" or "kill" him (Tr. 1757; D. Choate Dep. 28-29 (A22-23))—apt descriptions for a moving train.

Choate's mother had warned Choate on many occasions that moving trains were dangerous, enlivening those warnings with an anecdote about "somebody that [she] knew from [her] childhood" who had lost both of his legs in a train accident. Tr. 1628, 1634-36. Seven months before the accident, on November 7, 2002, Choate had been caught trespassing on defendants' right-of-way by an IHB patrolman, warned that "he could get hurt on railroad property," and told never to come back. Tr. 1409-10, 1724; DX21. His mother was sent a warning letter, which prompted her to remind him that he was "going

to get hurt" if he did not stay away from trains. Tr. 1410, 1613, 1631; DX22. In early 2003, less than six months before the accident, Choate's mother again warned him that he could get hurt by moving trains. Tr. 1632-33. She was sure that she had made clear to Choate "before the accident the severity of the injury that could occur if someone tried to get on a moving train," and explained "things that could happen if . . . [Choate] got hurt by a train." Tr. 1634. That was why she was so "upset" when she first learned of the accident—she thought that Choate was "stupid" and should have "kn[own] better," because she had warned him so many times before of those risks. Tr. 1628, 1633.

Choate himself recalled his mother's "specific[]" warnings—repeated "over a dozen times while [he was] growing up before this accident"—that "railroad tracks and railroad trains" were "dangerous" and that he "should not go by them." Tr. 1722. Choate had "never seen anyone else successfully jump onto a train" or "catch[] a ride on a moving train" before the accident and had never, prior to the accident, tried doing so himself. Tr. 1683-84, 1750. In fact, just minutes before the accident, Patton and several of Choate's companions—Spindler, Edgar, Gunderson, and Van Witzenburg—warned him not to try to jump on the moving train. *See supra* pp. 5-6.

2. Defendants' efforts to promote railroad safety. Defendants have for many years tried to prevent children from coming to harm on their property. Tr. 1096. They work closely with surrounding communities with respect to safety issues. Tr. 1941. The IHB police department patrols the tracks in the Chicago Ridge area. Tr. 1051. Under the Three Strikes and You're Out program, officers who encounter trespassers on railroad property stop them, escort them off the tracks, and write up a report called a "contact" or "information" card. Tr. 1058, 1418. The first time that a child is found outside a

designated crossing, the child's parents are notified by letter. Tr. 1060. The letter informs parents that their "child was observed trespassing" and that trespassing is "not only unlawful, but extremely dangerous and could result in a permanent injury or death." DX22. If the child is caught a second time, the parents are sent another letter and are contacted by phone. *Id.* If a child is caught a third time, the municipality's police department becomes involved, and court proceedings are initiated. Tr. 1060-61, 1585-86.

These policing efforts are just one component of defendants' broader program to "blanket areas with education" and "condition[] folks to the existence of rail traffic." Tr. 1420, 1973. Defendants also "were, on an annual basis, regularly in the [Chicago Ridge] schools" to give safety presentations as part of Operation Lifesaver. Tr. 1229, 1443, 1980. These talks discussed the dangers of trespassing on tracks, throwing objects at trains, climbing on stopped trains, and similar topics. Tr. 1444, 1453, 1992, 2028. Audience members were explicitly warned against "try[ing] to ride trains" and were told to "stay off" passing trains. Tr. 2002.

C. Proceedings Below.

1. Pretrial motions. The circuit court initially granted defendants' motion for summary judgment. A11. Defendants argued that they did not owe Choate a duty under the standard set forth in *Kahn v. James Burton Co.*, 5 Ill. 2d 614 (1955), both because, as a matter of law, the danger posed by jumping on a moving freight train is "open and obvious" to trespassing adolescents and because Choate admitted that he had subjectively appreciated the danger. The circuit court agreed, noting that Choate was "on record appreciating this danger," and he was a "boy of eleven, twelve, thirteen years old who can appreciate the danger." A7. When Choate moved for reconsideration, however, the court granted the motion, holding that the jury should determine whether the risk was "so

obvious as to relieve defendants of any liability under *Kahn*." A17.

2. Trial proceedings. The circuit court made a number of decisions before and during trial concerning the admissibility of evidence, which gave Choate broad latitude to present evidence to the jury, while constricting defendants' ability to do the same.

a. At his deposition, Choate admitted that he "recognized that on the day of the accident[,]. . . that the train that [he was] grabbing onto was dangerous." Tr. 1762; D. Choate Dep. 127-28 (A29). He also repeatedly admitted that he jumped onto the train to impress his girlfriend. D. Choate Dep. 196, 205-06 (A31-32). Before trial, defendants sought to bar any attempt by Choate to qualify, deny, or explain away his admission that he recognized moving trains to be dangerous. Tr. 110. The court denied the motion based on its view that the word "dangerous" was equivocal. Moreover, it limited defendants to using Choate's deposition testimony for impeachment purposes. Thus, defendants were precluded from reading Choate's admissions into the record as substantive evidence. Tr. 116, 263, 2244.

Conversely, over defendants' objection, the court allowed Choate to elicit testimony from school psychologist Dr. Richard Lencki that Choate scored in the low average to average range on an intelligence test. Tr. 1479-80. The court believed that this testimony was relevant to "whether [Choate] could appreciate the danger" given his "intellect." Tr. 2237. Choate's opening and closing arguments played up this point and minimized his capacity for appreciating the danger, despite his admission that he in fact appreciated it. Tr. 693, 2449.

b. The court also prevented defendants from eliciting testimony from Choate's companions—who were similar in age and experience to Choate—that they understood

that jumping onto a moving train was dangerous, while allowing Choate to introduce evidence that other people had on other occasions tried to jump onto moving trains. *Compare* Tr. 60, 220 (granting Choate's motion to exclude evidence that his companions appreciated dangerousness of train flipping) *with* Tr. 110-15, 162-73, 1080 (denying defendants' motions to exclude evidence of train flipping by unrelated persons). Thus, Choate was able to argue that defendants should have known that adolescents like himself would jump onto moving trains (*see* Tr. 2435-37), while avoiding the rejoinder that all five children who were with Choate at the time of the accident were perfectly aware of the risks that were inherent in such conduct (*see* Tr. 804, 832, 865, 888, 953 (offers of proof that each of Choate's companions was aware of the risks)).

c. Finally, over defendants' objections (Tr. 153), the court allowed Dr. William Berg, Choate's civil engineering expert, broad latitude in offering his opinion about the additional measures that defendants ostensibly should have taken to address the risk that a trespassing child would try to jump on a moving train.

Dr. Berg acknowledged that defendants had "[c]learly" made efforts in terms of education and had similarly taken "enforcement actions" and deployed "railroad police officers in the area." Tr. 1251. Dr. Berg had himself been informally involved in Operation Lifesaver, which involved sending individuals into schools to remind students about the "dangers and hazards of trains." Tr. 1244. There was "no question" in Dr. Berg's mind that defendants were "devoting a lot of resources to enforcement." Tr. 1300.

Yet Dr. Berg contended that defendants also should have constructed a new public crossing—perhaps an overpass—for pedestrians and bicycles at Austin Avenue. Tr. 1255. According to Dr. Berg, although there already were at-grade crossings a little

over a mile apart at Ridgeland Avenue and Central Avenue (Tr. 1239, 1349, 1886, 2441), there also should have been one roughly half-way in between at Austin (Tr. 1274). Dr. Berg also asserted that defendants should have built chain-link fencing to "channelize" pedestrians toward the crossing points at Austin, Ridgeland, and Central. Tr. 1254. In Dr. Berg's view, this fencing was necessary to "discourage crossing at other points," although it could not "prevent it" entirely. Tr. 1254, 1257. Dr. Berg opined that these measures would have "achieve[d] higher levels of safety," although he admitted that they would not have prevented all trespassing. Tr. 1365.

In support of their contention that Dr. Berg's testimony was too unreliable to be admitted, defendants pointed out that chain-link fencing likely would be cut and, moreover, that fencing alone could never be effective, because what was required was not merely providing crossing points, but rather completely separating would-be train flippers from the tracks. Tr. 147-49. They explained that Dr. Berg's conclusions—that defendants feasibly could have constructed channeling fencing and a new crossing at Austin and that the absence of these measures caused Choate's accident—were without factual foundation. Tr. 147-49, 153. Dr. Berg had not considered a number of issues bearing on the feasibility of those projects, such as an accurate analysis of the cost, the need for approval from the Illinois Commerce Commission, coordination with adjacent municipalities and property owners, and compliance with environmental, accessibility, and zoning regulations. C3383-3464.

At trial, defendants presented expert testimony questioning whether the improvements suggested by Dr. Berg could be constructed at all, much less at a reasonable cost, given a host of factors that Dr. Berg failed to consider. *E.g.*, Tr. 1311

(necessity of conducting field survey), 1324-25 (height requirements), 1328-29 (compliance with the Americans with Disabilities Act); 2092 (cost of acquiring property). Defendants also challenged Dr. Berg to show how his proposal would have addressed the condition that gave rise to the accident—trespassers who jump on moving trains to "show off," despite "kn[owing] the train and the tracks were dangerous" (Tr. 1280, 1304). They also argued that "[t]here [was] no connection between the facts of this accident and the construction of a new crossing at Austin." Tr. 1369. Nonetheless, the court cut short defendants' cross-examination of Dr. Berg on this crucial point. Tr. 1369-70.

Finally, although Dr. Berg was never qualified as an expert on matters of child psychology or behavior, the trial court also permitted him to testify, over defendants' objection, that it was "common knowledge" that "young people and trains don't mix." Tr. 1244-47. Dr. Berg testified that moving trains were a risk to children because, in his view, young people lacked the "maturity" of adults. Tr. 1243. He provided no basis for these opinions. Similarly, although Dr. Berg was not an expert on law enforcement, he was permitted to testify, again over defendants' objection, that defendants' policing efforts were inadequate. Tr. 1377-1378, 1392. (At the same time, defendants were barred from adducing the opinion of actual police officers regarding the effectiveness of their patrols. Tr. 1589, 1648-49.)

3. Denial of defendants' request for a special jury interrogatory. Defendants submitted a special interrogatory, which would have asked the jury: "at the time and place of Dominic Choate's accident, did he appreciate that attempting to jump onto a moving freight train presented a risk of harm to him"? Tr. 1847. The court refused to give the special interrogatory, reasoning that it was "not dispositive" because, in its view, the

jury could answer the question in the affirmative, yet award damages based on comparative negligence. Tr. 2342-43.

4. The jury's verdict and entry of judgment. The trial court denied defendants' motion for a directed verdict. Tr. 1770, 2300, 2309. The jury returned a verdict in Choate's favor and found that he sustained $6.5 million in damages. Based on the jury's finding that Choate was 40 percent negligent, the award was reduced to $3.9 million. Tr. 2534. The trial court denied defendants' post-trial motions, and entered judgment in the amount of $3.875 million to allow for a setoff following Choate's separate settlement with BNSF. A3.

STANDARD OF REVIEW

The trial court's decision denying defendants' motion for judgment *n.o.v.* is reviewed *do novo. York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 178 (2006). When the defendant owes "no duty [to the plaintiff] . . . as a matter of law," the defendant is entitled to judgment. *Cope v. Doe*, 102 Ill. 2d 278, 280 (1984). Judgment *n.o.v.* also must be granted when "the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand" (*Lazenby v. Mark's Constr., Inc.*, 236 Ill. 2d 83, 100 (2010)), or when there is a "lack of evidence to prove any necessary element of the [plaintiff's] case" (*York*, 222 Ill. 2d at 178 (internal quotation marks omitted)).

A new trial must be granted when the "trial court's rulings in the course of the trial result in prejudicial error." *Lisowski v. MacNeal Mem'l Hosp. Ass'n*, 381 Ill. App. 3d 275, 283 (1st Dist. 2008). Each error asserted "is subject to its own standard of review." *Id.* at 284. The "denial of a request for a special interrogatory presents a question of law and is reviewed *de novo.*" *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 38

(1st Dist. 2008). Whether "deposition testimony constitutes a judicial admission because it is unequivocal is a question of law . . . considered *de novo*." *Elliott v. Indus. Comm'n*, 303 Ill. App.3d 185, 187 (1st Dist. 1999). The admissibility of evidence and expert testimony is reviewed for abuse of discretion. *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800-01 (1st Dist. 2009).

A new trial must also be granted "when the verdict is contrary to the manifest weight of the evidence." *York*, 222 Ill. 2d at 178. The denial of a motion for a new trial on this basis is reviewed for abuse of discretion. *Id.* at 179.

SUMMARY OF ARGUMENT

While trespassing on railroad property, Choate tried three times to jump onto a moving train in order to impress his girlfriend. His bravado ended with the loss of his lower leg. While it is always unfortunate when a child is injured, Choate is not entitled to recover from defendants.

With only narrow exceptions, landowners owe no duty of care to an undiscovered child trespasser. "As in the case of adult trespassers, an owner or occupier of land owes no duty to a trespassing child except not to willfully or wantonly injure him." *Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc.*, 169 Ill. 2d 110, 116 (1995). "If no duty exists, it is axiomatic that no recovery can occur." *Id.* One of the exceptions to this "no duty" rule is the *Kahn* doctrine, under which the plaintiff must show, *inter alia*, that the condition that injured him was not one whose danger "children generally would be expected to appreciate" (*i.e.*, it was not an *objectively* obvious danger); the plaintiff did not *subjectively* appreciate the danger of the condition; and the condition could have been remedied at an expense that was "slight." *Id.* at 117; *Corcoran v. Vill. of Libertyville*, 73 Ill. 2d 316, 326 (1978). Choate failed, as a matter of law, to satisfy *any* of these three

requirements, *all* of which must be proven to establish liability.

First, as Illinois courts have long recognized, the danger of trying to climb onto board a moving train is objectively obvious as a matter of law to the general class of children (such as Choate) who are old enough to be allowed at large without adult supervision. *See infra* pp. 19-24. As a result, recovery is precluded as a matter of law, whatever Choate's "subjective understandings and limitations" may have been. *Salinas v. Chi. Park Dist.*, 189 Ill. App. 3d 55, 61 (1st Dist. 1989); *see infra* pp. 25-26.

Second, in any event, Choate himself admitted that he understood the danger. The particular plaintiff's "appreciation of the risk, if established in fact," is independently "sufficient to free a defendant landowner of all liability for the child's injuries," even if the danger cannot be deemed objectively obvious to all children. *Colls v. City of Chicago*, 212 Ill. App. 3d 904, 933 (1st Dist. 1991). In this case, judgment should have been entered for defendants because the evidence that Choate understood that jumping onto a moving train is dangerous was so overwhelming as to permit no other reasonable interpretation. *See infra* pp. 27-32. But even had the evidence left room for a contrary finding, the trial court erred in not giving defendants' proffered special interrogatory, which would have required the jury expressly to resolve that dispositive issue of fact. *See infra* pp. 32-34.

Third, Choate's claim also fails because he did not present sufficient evidence of measures that defendants reasonably could have undertaken to prevent the accident. This was not a case of a pedestrian getting hit by a train while crossing the tracks in a moment of inattention. Choate tried to jump onto a moving train not once, but three times, to show off for his girlfriend. The only way that defendants could have prevented him from doing

so would have been by completely sealing off the right-of-way and erecting overpasses at every crossing. Dr. Berg, Choate's purported expert, offered no competent evidence supporting the feasibility of such measures. That is reason enough to reverse the decision below and order the entry of judgment. *See infra* pp. 34-42.

Finally, the proceedings below were marred by a host of evidentiary rulings that excluded plainly material evidence offered by defendants and denied Choate's admissions their proper, dispositive effect, while giving Choate broad latitude to introduce unsupported and irrelevant testimony. *See infra* pp. 42-49. A new trial is warranted on account of these errors, and also because this counterintuitive verdict was against the manifest weight of the evidence.

ARGUMENT

I. Defendants Owed No Duty To Choate Because He Reasonably Could Have Been Expected To Appreciate, And Did In Fact Appreciate, That Jumping Onto A Moving Train Is Dangerous.

Kahn provides only a narrow exception to the general rule that a landowner owes no duties to a trespassing child. Under *Kahn*, a duty of reasonable care is imposed when:

> (1) the owner or occupier of the land knew or should have known that children habitually frequent the property; (2) a defective structure or dangerous condition was present on the property; (3) the defective structure or dangerous condition was likely to injure children because they are incapable, because of age and maturity, of appreciating the risk involved; and (4) the expense and inconvenience of remedying the defective structure or dangerous condition was slight when compared to the risk to children.

Mt. Zion, 169 Ill. 2d at 117. As with any other part of the plaintiff's *prima facie* case, the child seeking recovery bears the burden of proving that each of these elements is satisfied. *Colls*, 212 Ill. App. 3d at 924; *see also Corcoran*, 73 Ill. 2d at 328.

Kahn—which "brought Illinois law into harmony with section 339 of the

Restatement (Second) of Torts"—does not "impose a duty on owners or occupiers to remedy conditions the obvious risks of which children generally would be expected to appreciate." *Corcoran*, 73 Ill. 2d at 326. Therefore, even when the landowner knows that "children frequent his premises, he is not required to protect against the ever-present possibility that children will injure themselves on obvious or common conditions." *Id.* The rationale for this rule is simple: Because "children are expected to avoid dangers which are obvious, there is no reasonably foreseeable risk of harm" from obvious dangers, and it follows that "there can be no recovery for injuries caused by a danger found to be obvious." *Cope*, 102 Ill. 2d at 286. As the Restatement explains, "[t]he duty of the possessor . . . does not extend to those conditions the existence of which is obvious even to children." Restatement (Second) of Torts § 339, cmt. i.

Choate failed to establish the third element of the *Kahn* exception for two reasons. *First*, as a matter of law, trying to hitch a ride on a moving train presents an open and obvious risk of harm to the general class of children of Choate's age and experience. *See infra* pp. 19-26. *Second*, even if a moving train is not an *objectively* obvious danger for such children, the evidence was overwhelming that Choate *subjectively* appreciated that danger, which "has consistently been recognized as sufficient to free a defendant landowner of all liability" to the plaintiff. *Colls*, 212 Ill. App. 3d at 933-34. This conclusion is mandated not "merely a matter of contributory negligence," but rather because of a "lack of duty" on the part of defendants to a child who, like Choate, appreciated the danger. *Mt. Zion*, 169 Ill. 2d at 117-18 (internal quotation marks omitted). *See infra* pp. 27-32.

A. Defendants Are Entitled To Judgment Because A Moving Train Presents An Open And Obvious Danger That Children Of Choate's

Age And Experience Can Be Expected To Appreciate.

It is established Illinois law that landowners have "no duty" with respect to conditions that "present[] *obvious* risks which children would be expected to appreciate." *Cope*, 102 Ill. 2d at 286. Under the *Kahn* doctrine, Choate bore the burden of establishing that there was a condition on defendants' property presenting risks that "children generally . . . would *not* be expected" to appreciate because of their youth. *Id.* (emphasis added). This burden was one that Choate could not satisfy, because, as a matter of law, the danger of trying to jump onto a moving train is obvious to any child old enough to be "at large" without adult supervision.

1. Illinois courts have long recognized that the danger of certain conditions is, as a matter of law, obvious to children. These "obvious dangers include"—but are not limited to—"fire, drowning in water, or falling from a height." *Mt. Zion*, 169 Ill. 2d at 118 (citing DAN B. DOBBS ET AL., PROSSER AND KEETON ON TORTS § 59, at 407 (5th ed. 1984)); *Cope*, 102 Ill. 2d at 280, 286 (citing Restatement § 339, cmt. j); *see also Booth*, 224 Ill. App. 3d at 725 ("danger associated with power lines"). Such dangers "'may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large.'" *Corcoran*, 73 Ill. 2d at 327 (quoting Restatement § 339, cmt. j).

For more than a century, Illinois courts have recognized that a moving train presents an objectively obvious danger to children. In *LeBeau v. Pittsburgh, Cincinnati Chi. & St. Louis Ry. Co.*, 69 Ill. App. 557 (1st Dist. 1897), the court held that a railroad company had no duty to prevent the plaintiff, a 10-year-old child, from being injured when he tried to "hitch" or "jump" onto a moving train. The peril in which the child placed himself was clear: "[j]umping from the ground upon a moving freight train is dangerous, [and] all men and all ordinarily intelligent boys ten years of age know it to be

so." *Id.* Along similar lines, the Illinois Supreme Court rejected imposing a duty on railroads to prevent a child of eight years and nine months in age from trying to jump on a slowly moving train. *Briney v. Ill. Cent. R.R.*, 401 Ill. 181, 183, 190 (1948). And in *Fitzgerald v. Chi., B. & Q.R. Co.*, 114 Ill. App. 118 (1st Dist. 1904), the court concluded that a 12-year-old plaintiff was "presume[d]" to "know[] that it is dangerous to attempt to get on a moving freight train. In view of the clarity of this authority, it is unsurprising that federal courts have had no difficulty in concluding that Illinois law "bars recovery as a matter of law" when a trespassing child attempts to "hop a train." *Ill. State Trust Co. v. Terminal R.R. Ass'n*, 440 F.2d 497, 501 (7th Cir. 1971).

The Illinois cases holding that moving trains are an open and obvious danger for children are in the mainstream of American jurisprudence. As one leading treatise observes, the "perils of . . . moving vehicles" are among the dangers that a trespassing "child of sufficient age to be allowed at large by his parents, and so to be at all likely to trespass," invariably is expected to understand "as a matter of law." DOBBS, *supra*, PROSSER AND KEETON ON TORTS § 59, at 407; *see also* RICHARD A. EPSTEIN, TORTS § 12.5, at 319-20 (1999) ("once the danger becomes too obvious, as when a child seeks to jump onto a moving train, . . . liability can be denied on the grounds that the [condition] . . . may be obvious even to ordinary children"). Indeed, the Reporter's Notes to comment i of Restatement § 339—the approach to premises liability with which *Kahn* brings Illinois law into "harmony" (*Corcoran*, 73 Ill. 2d at 326)—contemplate a "moving train" as a "condition[] whose danger the child can reasonably be expected to appreciate." *Id.*

Courts in other jurisdictions consistently have held that even small children can

recognize the danger of trying to jump onto a moving train.[2] As the D.C. Court of Appeals explained, the "*overwhelming weight of authority*" is that "accidents involving moving trains fall outside the scope of [Restatement §] 339 because . . . a moving train is a danger so obvious that any nine-year-old child allowed at large would readily discover it and realize the risk involved." *Holland v. Baltimore & Ohio RR.*, 431 A.2d 597, 602-03 (D.C. 1981) (emphasis added; collecting cases). Hence, the court concluded, any suggestion that "a nine-year-old child . . . did not realize the danger inherent in coming within an area made dangerous by approaching freight trains" is "deficient as a matter of law." *Id.* at 602. That has also been the uniform holding of courts that have applied the Restatement § 339 approach, or analogous ones, to liability for harm to child trespassers. All this bolsters the conclusion that under Illinois law, which is in "harmony with section 339 of the Restatement" (*Corcoran*, 73 Ill. 2d at 326), the danger of a moving train must be deemed obvious as a matter of law to the general class of children of Choate's age.

Below, Choate relied on this Court's decision in *Engel v. Chicago & North Western Transportation Co.*, 186 Ill. App. 3d 522 (1st Dist. 1989), for the proposition that it is a question of fact whether the danger is open and obvious. The *Engel* court

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[2] Illustrative cases include: *Nixon v. Norfolk S. Corp.*, 2007 WL 4190705, at *9 (W.D. Pa. Nov. 21, 2007), *aff'd*, 295 F. App'x 523, 525 (3d Cir. 2008) ("the risk of a moving train is so obvious" that "a twelve-year-old taking the initiative to grab hold" of it is "deemed to appreciate the risk as a matter of law"); *Sutton v. Wheeling & Lake Erie R.R.*, 2005 WL 3537537, at *5 (Ohio Ct. App. Dec. 28, 2005) ("eleven-year-old child . . . could fully appreciate the obvious dangers and risks that a moving train possessed"); *Wolf v. Nat'l R.R. Passenger Corp.*, 697 A.2d 1082, 1086 (R.I. 1997) ("[t]he overwhelming weight of authority in jurisdictions across the country is that the attractive nuisance exception does not apply as a matter of law in cases where child trespassers are injured by moving trains"); *Perry v. Norfolk & W. Ry.*, 865 F. Supp. 1292, 1302 (N.D. Ind. 1994); *McKinney v. Hartz & Restle Realtors, Inc.*, 510 N.E.2d 386, 389-90 (Ohio 1987); *Henderson v. Terminal R.R. Ass'n*, 659 S.W.2d 227, 230-31 (Mo. Ct. App. 1983); *Space v. Nat'l R.R. Passenger Corp.*, 555 F. Supp. 163, 166 (D. Del. 1983).

reasoned that the plaintiff before it "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." *Id.* at 528. Yet the court also recognized that "*[u]nder different facts* . . . a judge could find that the danger was obvious to a plaintiff . . . and find no duty existed *as a matter of law*." *Id.* at 531 (emphasis added).

This case presents those "different facts." Unlike the train that Engel mounted, which was moving "very slow[ly]," at only "four or five miles an hour" (186 Ill. App. 3d at 527), the train that Choate jumped onto was moving at at least *twice the speed*—"9, 10 miles an hour," according to Choate (Tr. 1766). *See also* Tr. 726 (Patton's testimony that the train was going "10 miles an hour, if not more"); *cf. Torf v. Commonwealth Edison*, 268 Ill. App. 3d 87, 91 (2d Dist. 1994) ("fast-moving water . . . could only have made the risk more, not less, obvious") (internal quotation marks omitted). Indeed, the train was moving so quickly that Choate had to run alongside it. Tr. 1689, 1747. Moreover, unlike Engel, who had seen people jump onto moving trains "without incident on seven or eight times" (186 Ill. App. 3d at 526), Choate admitted that he had "never seen anyone else successfully jump onto a train" or "catch[] a ride on a moving train" (Tr. 1684, 1750). In fact, immediately before the accident, Choate saw his friend, Charlie Spindler, try *unsuccessfully* to jump onto the train. Tr. 746, 1742-43; D. Choate. Dep. 77-79 (A26). So even on its terms, *Engel* compels the conclusion that the dangerousness of the train that ***Choate*** climbed aboard was obvious as a matter of law.[3]

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[3] Choate's suggestion to the contrary notwithstanding, *Engel* cannot fairly be read to suggest that the obviousness of the danger of a moving train to a *general class of children* can be lessened by the *particular plaintiff's* idiosyncratic experience. "A landowner owes no duty to a child if children of *similar* age and experience would be able to appreciate the dangers on the premises," and whether a given danger is "deemed obvious to children (cont'd)

Choate's reliance on *LaSalle National Bank v. City of Chicago*, 132 Ill. App. 3d 607 (1st Dist. 1985), likewise is misplaced. The plaintiff there, a nine-year-old child trespasser, suffered injuries when he jumped aboard a moving train after gaining access to the tracks by climbing through a hole in a fence constructed and maintained by the defendant, the City of Chicago. *Id.* at 609. The *LaSalle* court concluded only that the jury's assignment of 18% comparative fault to the plaintiff did not necessarily mean that he "*actually* [*i.e.*, subjectively] appreciated the danger of flipping railroad cars." *Id.* at 615 (emphasis added). The court had no occasion to decide whether the danger of a moving train is, as a matter of law, *objectively* obvious to the *general class* of children old enough to be allowed at large. In any event, the "*LaSalle* court specifically limited its holding to the narrowly drawn circumstances of the case" (*Johnston v. Ill. Bell Tel. Co.*, 195 Ill. App. 3d 501, 504 (1st Dist. 1990)), and "specifically noted [the court was] relying on the city's contractual duty to erect and maintain the fence," as well as the "significant" factors "that a fence already existed, that the city had been told several times it was in need of repair, and that the [adjacent] land consisted of a playground" (*Foreman v. Consol. Rail Corp.*, 214 Ill. App. 3d 700, 705 (1st Dist. 1991)). None of the factors considered "significant" by the *LaSalle* court in finding that the defendant owed a duty to the child trespasser is present here. In particular, defendants had no independent duty (whether contractual or imposed by Illinois law, Tr. 1306-07, 2070) to erect fencing

generally" in this sense is an issue of law. *Salinas*, 189 Ill. App. 3d at 187 (emphasis added); *see also Colls*, 212 Ill. App. 3d at 945 ("[T]here can be no recovery if children of a similar age and experience as the plaintiff are capable of understanding the danger involved."). Any contrary understanding of *Engel* would be inconsistent with the Illinois Supreme Court's admonition that when the risk is objectively obvious to children generally, there is no duty irrespective of the particular plaintiff's "subjective understanding," which is "not considered." *Mt. Zion*, 169 Ill. 2d at 126-27; *see also Booth*, 224 Ill. App. 3d at 725; *Colls*, 212 Ill. App. 3d at 945; *Salinas*, 189 Ill. App. 3d at 61; *Swearingen*, 181 Ill. App. 3d at 362.

against trespassing children.

Choate's protestations to the contrary notwithstanding, *Engel* and *LaSalle* offer no real guidance for the proper resolution of the issues before this Court. This Court should reaffirm, in accord with *LeBeau*, *Briney*, and the great weight of authority, that a moving train presents an objectively obvious danger to children old enough to be at large without adult supervision.

2. If the Court agrees that the risk of jumping onto a moving train is objectively obvious as a matter of law, then the absence of a duty to the trespassing child is conclusively established, because landowners are "free to rely" upon the "assumption that any child old enough to be allowed at large by his parents will appreciate certain obvious dangers." *Mt. Zion*, 169 Ill. 2d at 117. As the *Mt. Zion* Court forcefully "retiterat[ed], obvious dangers present no foreseeability of harm, and thus no duty." *Id.* at 125. What counts as an "obvious" danger is ultimately a matter of public policy, to be "resolved by the court," like any other legal issue embedded in the determination of whether a duty exists. *Id.* at 116-17, 122; *Cope*, 102 Ill. 2d at 286.

Once the court has concluded that the danger is obvious as a matter of law, there can be no duty to the child trespasser. Whether the particular plaintiff before the court allegedly was incapable of appreciating the risk is beside the point. As a matter of public policy, it "would place an undue burden on landowners to focus on a minor's *subjective inability* to appreciate a risk where such inability was *less* than a typical minor." *Swearingen v. Korfist*, 181 Ill. App. 3d 357, 362 (2d Dist. 1989) (emphasis added); *see also Salinas*, 189 Ill. App. 3d at 61 ("[O]ur courts do not consider the subjective understandings and *limitations* of the child when a risk is deemed obvious to children

generally.") (emphasis added). Illinois public policy reposes in parents "primary responsibility for the safety of their children." *Mt. Zion*, 169 Ill. 2d at 126. Thus, "if a child is too young chronologically or mentally to be 'at large,' the duty to supervise that child as to obvious risks" lies with the parent. *Salinas*, 189 Ill. App. 3d at 62.

Because it was not open for Choate to try to show that he "subjectively . . . [did] not actually understand [an obvious] danger" (*Booth v. Goodyear Tire & Rubber Co.*, 224 Ill. App. 3d 720, 725 (3d Dist. 1992)), this case could (and should) have been resolved as a matter of law. Any evidence bearing on Choate's subjective understanding was "not appropriate for consideration . . . in a case such as the one at hand where the danger being considered is one . . . which under ordinary circumstances may reasonably be expected to be fully understood and appreciated by" the general class of children of Choate's age. *See Old Second Nat'l Bank of Aurora v. Aurora Turnpike*, 156 Ill. App. 3d 62, 66-67 (2d Dist. 1987). Put another way, because all children "permitted to be at large, beyond the watchful eye of [their] parents" can be "*reasonably expect[ed]*"—*i.e.*, as a matter of law—to appreciate the danger posed by a moving train, any facts that the particular child might be able to adduce about his own limitations are irrelevant. *Mt. Zion*, 169 Ill. 2d at 126 (emphasis added). The particular plaintiff's "subjective understanding" is irrelevant "when [the] risk is obvious." *Id.* at 126-27.

In short, the objective obviousness of the danger of moving trains ends the inquiry and forecloses the existence of a duty to any child trespasser injured by that danger.[4]

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[4] When the plaintiff is an *invitee* or *licensee*, the existence of an open and obvious condition is not an "automatic or *per se* bar to the finding of a legal duty." *Bucheleres v. Chi. Park Dist.*, 171 Ill. 2d 435, 449 (1996); *id.* at 451 (quoting Restatement (Second) of Torts § 343A, which addresses duties to "invitees" resulting from obvious dangers). But that principle cannot avail Choate, who was a *trespasser*. Under the *Kahn* doctrine, there (cont'd)

B. Defendants Are Entitled To Judgment Because There Is Overwhelming Evidence That Choate Appreciated The Dangerousness Of Jumping Onto A Moving Train.

Choate's actual understanding becomes relevant only if the Court concludes that moving trains are *not* objectively an obvious danger to the general class children of Choate's age and experience—*i.e.*, those 12 to 13 years old who are sufficiently mature to be at large, unsupervised by their parents. In that event, defendants still are entitled to judgment, because the evidence (including Choate's admissions) permits only one reasonable conclusion—that Choate *himself* subjectively understood the danger, and nonetheless consciously embraced it. This is a case in which "the evidence, when viewed in its aspect most favorable to [Choate], so overwhelmingly favor[ed]" defendants that the verdict cannot stand. *Lazenby*, 236 Ill. 2d at 100 (internal quotation marks omitted).

Notwithstanding the "usual objective nature of the court's duty analysis, . . . consideration of the particular minor plaintiff's knowledge is appropriate where the minor has some *greater* understanding of the alleged dangerous condition." *Hagy v. McHenry County Conservation Dist.*, 190 Ill. App. 3d 833, 840 (2d Dist. 1989) (emphasis added). "[T]he 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; *see also Swearingen*, 181 Ill. App. 3d

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is *never* a "reasonabl[y] foreseeable risk of harm" when a child trespasser is injured by an obvious danger, so the trespasser cannot, as a matter of law, "recover[] for injuries caused by a danger found to be obvious." *Cope*, 102 Ill. 2d at 286; *see Mt. Zion*, 169 Ill. 2d at 117, 125. "The critical distinction between the facts in this case and the facts" in cases that have looked beyond the obviousness of the danger is that "the injured children in those cases were *invitees*, whereas the injured child in this case was a *trespasser*." *Porter v. Union Elec. Co.*, 2009 WL 3065150, at *2 n.18 (S.D. Ill. Sept. 23, 2009). In sum, even if the "general rule of no liability for open and obvious conditions" has in some respects been relaxed for individuals "*lawfully* on [the defendant's] premises," that is not the case when the "[p]laintiff . . . was a *trespasser*." *Lange v. Fisher Real Estate Dev. Corp.*, 358 Ill. App. 3d 962, 972 (1st Dist. 2005) (second emphasis added).

at 362; *Guenther ex rel. Guenther v. G. Grant Dickson & Sons, Inc.*. 170 Ill. App. 3d 538, 543 (2d Dist. 1988); *Alop v. Edgewood Valley Cmty. Ass'n*, 154 Ill. App. 3d 482, 485-87 (1st Dist. 1987). Under this principle, "the possessor is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved, but none the less chooses to encounter it out of recklessness or bravado," even if the condition cannot be deemed obvious to all children. Restatement (Second) of Torts § 339, cmt. m.[5]

Put another way, when a danger is objectively obvious as a matter of law, that sets a *floor* on the level of understanding that is deemed imputed to all children; a particular child's subjective understanding is relevant only if it *augments* this knowledge, and thus "further negates any duty" owed on the part of the defendant. *Osborne v. Claydon*, 266 Ill. App. 3d 434, 441 (4th Dist. 1994). This is "'not merely a matter of contributory negligence . . . but *of lack of duty to the child*.'" *Colls*, 212 Ill. App. 3d at 934 (emphasis in *Colls*; quoting DOBBS, *supra*, PROSSER AND KEETON ON TORTS § 59, at 409); *see also Newby ex rel. Newby v. Lake Zurich Cmty. Unit Dist. 95*, 136 Ill. App. 3d 92, 105 (2d Dist. 1985); *O'Keefe v. S. End Rowing Club*, 414 P.2d 830, 843 (Cal. 1966) ("[C]ontributory negligence is a matter of *defense*, to be litigated . . . only *after* the plaintiff has proved . . . the defendant's duty . . .. [I]n actions founded on section 339 of the Restatement it is part of the *Plaintiff's case* to prove that 'because of his youth' he did

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[5] In other jurisdictions as well, courts have been "firm in their insistence that if the child is fully aware of the condition, understands the risk which it carries, and is quite able to avoid it, he stands in no better position than an adult" trespasser. DOBBS, *supra*, PROSSER AND KEETON ON TORTS § 59, at 408; *e.g.*, *Vega ex rel. Muniz v. Piedilato*, 683 A.2d 845, 852-53 (N.J. Super. Ct. App. Div. 1996) (because "deposition testimony" showed that plaintiff "had discovered the danger," "comparative negligence is not even considered," and "defendants owed no duty"); *Long v. Manzo*, 682 A.2d 370, 376 (Pa. Super. Ct. 1996); *Merrill v. Cent. Me. Power Co.*, 628 A.2d 1062, 1063-64 (Me. 1993); *Miller v. River Hills Dev.*, 831 S.W.2d 756, 763 (Mo. Ct. App. 1992).

not 'discover the condition or realize the risk involved.'") (emphasis added).

In this case, even when all the record evidence is taken in the light most favorable to Choate, there can be no reasonable dispute that Choate understood the dangerousness of the feat he had determined to undertake.

- Choate admitted at his deposition that he appreciated "on the day of the accident" that the "train that [he was] grabbing onto was dangerous." Tr. 1762-63; D. Choate Dep. 127-28 (A29). This should, by itself, have been dispositive (*Swearingen*, 181 Ill. App. 3d at 362), but the trial court erroneously concluded otherwise. *See infra* pp. 42-46.
- Choate's mother repeatedly warned him that moving trains were dangerous. Tr. 1613, 1628-34, 1636, 1722. In particular, she had made clear to him "before the accident the severity of the injury that could occur if someone tried to get on a moving train" (Tr. 1634) and that train accidents could result in the loss of limbs (Tr. 1628, 1636). *See Laster ex rel. Laster v. Norfolk S. Ry.*, 13 So. 3d 922, 930 (Ala. 2009) ("parents had repeatedly warned him"); *Butler v. Newark Country Club, Inc.*, 909 A.2d 111, 115 (Del. 2006) ("mother's express instruction"); *Dragonjac v. McGaffin Constr. & Supply Co.*, 186 A.2d 241, 243 (Pa. 1962).
- Both Patton and several of Choate's companions exhorted him not to approach the moving train. Tr. 730 (Patton), 800 (Spindler: don't "go on the tracks"), 862 (Van Witzenburg), 884 (Edgar: "get off the f_____ tracks and don't go by the f'ing track"), 945 (Gunderson: "don't do it"). *See Bonney v. Canadian Nat'l Ry. Co.*, 800 F.2d 274, 279 (1st Cir. 1986).

("his friend . . . had warned him on the night of the accident").

- Choate had been caught trespassing on railroad property on multiple occasions and warned to stay away by railroad police officers. Tr. 1409-10, 1613, 1628-29, 1673, 1724; DX21.
- Choate's companions knew that trying to jump on a moving train was dangerous. Tr. 804 (Spindler), 831-32 (Weyer), 865 (Van Witzenburg), 888 (Edgar), 953 (Gunderson); *see infra* pp. 46-47. In fact, Choate saw Spindler try to grab the train, and then "pull[] [his hand] right back in" because he "was afraid." Tr. 1742-43.
- Choate's first two attempts to climb onto the train ended in predictable failure (Tr. 1688-89), given the patent difficulty of hoisting oneself several feet off the ground onto a moving ladder from uneven terrain in low-cut tennis shoes. Tr. 1745, 1749-50; DX8A.
- The train was large and loud. Tr. 1742, 1751. *See Herrera v. S. Pac. Ry.*, 10 Cal. Rptr. 575, 580 (1961) ("Nothing could be more pregnant with warning of danger than the noise and appearance of a huge, rumbling, string of railroad cars.").

In the face of this overwhelming evidence that he was fully aware that moving trains are dangerous, Choate largely stood on his conclusory denial at trial that he did not appreciate, "while [he] was doing it," that jumping onto a moving train was dangerous. Tr. 1758. Choate was not, however, free to "create a factual dispute by contradicting [his] previously made judicial admission" (*Hansen v. Ruby Constr. Co.*, 155 Ill. App. 3d 475, 480-81 (1st Dist. 1987)) that he appreciated "on the day of the accident" that the "train

that [he] was grabbing onto was dangerous." D. Choate Dep. 127-28 (A29). Choate's admission was binding on him, and allowing him to subsequently back away from it created a needless "temptation to commit perjury." *Hansen*, 155 Ill. App. 3d at 480. "A party deponent cannot avoid the consequences of a deposition by subsequently changing or reconstructing testimony." *Steiner Elec. Co. v. NuLine Techs., Inc.*, 364 Ill. App. 3d 876, 882 (1st Dist. 2006).

The only other evidence Choate offered on this point constituted equally forbidden attempts to nullify his "judicial admission . . . with . . . [the] contrary testimony . . . of other . . . [purported] experts," such as Dr. Berg (who opined that children lack the "maturity" of adults, Tr. 1243) and Dr. Lencki (who opined that Choate had "low average to average" intelligence, Tr. 1479-80). *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 671 (2d Dist. 1992); *see infra* pp. 42-46. Moreover, Dr. Berg was not even qualified to testify as an expert on child psychology, so his testimony on young people's ability to recognize the hazards of trains was inadmissible for this independent reason. *See infra* pp. 47-48. Finally, assuming (contrary to fact) that Dr. Berg's or Dr. Lencki's testimony were otherwise admissible and "pertinent to whether a moving train is a dangerous condition that may reasonably be expected" to be appreciated by children *generally*, their testimony is irrelevant to whether Choate *subjectively* appreciated the danger, since neither testified that Choate *himself* was "a child who does not understand the danger of moving trains." *Nixon*, 2007 WL 4190705, at *8.[6]

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[6] For similar reasons, Choate's reliance below on IHB Special Agent James Griffith's musings that "*[s]ome* kids" might not realize the risks of hopping a ride on a moving train was misplaced. Tr. 1452 (emphasis added). Griffith did not testify that children of Choate's age—*much less Choate himself*—would not understand that danger. Griffith merely thought that a "younger child[]," as distinguished from an "older child, [such as] a (cont'd)

In sum, the evidence was overwhelming that Choate was aware that moving trains are dangerous, and there is no admissible evidence that reasonably could support a contrary finding. Thus, even if the danger were not deemed objectively obvious as a matter of law to *all* children, Choate *himself* undoubtedly appreciated it. This "has consistently been recognized as sufficient to free a defendant landowner of all liability for the child's injuries," and the same result should obtain here. *Colls*, 212 Ill. App. 3d at 933. "[T]he purpose of a landowner's duty under section 339 is not to protect children from their own immature recklessness in the face of known and appreciated danger." *Bonney*, 800 F.2d at 279. Accordingly, defendants are entitled to judgment for this independent reason.

C. At A Minimum, A New Trial Is Required Because The Trial Court Refused To Give A Special Jury Interrogatory On Choate's Appreciation Of The Danger.

Even supposing that the evidence that Choate understood the danger of moving trains was not sufficient to compel judgment *n.o.v.*, the trial court erred in refusing to propound to the jury the following special interrogatory proposed by defendants:

> [A]t the time and place of Dominic Choate's accident, did he appreciate that attempting to jump onto a moving freight train presented a risk of harm to him.

Tr. 1847. It is the function of a special interrogatory to serve "as a check on the jury's general verdict" by requiring the jury to make a determination as to a specific issue of fact. *Simmons v. Garces*, 198 Ill. 2d 541, 563, 566 (2002). By statute, "[t]he jury . . . must be required on request of any party, to find specially upon any material question . . . of

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high-schooler or a junior-higher," might not as readily appreciate it. Tr. 1452. In any event, Griffith, much like Dr. Berg, was not qualified to give competent testimony on such issues, and the trial court erred in not sustaining defendants' objection to this entire line of questioning (Tr. 1447). *See Nixon*, 2007 WL 4190705, at *8.

fact." 735 ILCS 5/2-1108. The word "must" is mandatory, and leaves the trial court with "no discretion to reject a special interrogatory which is proper in form." *Morton v. City of Chi.*, 286 Ill. App. 3d 444, 451 (1st Dist. 1997).

In this case, the special interrogatory tendered by defendants was surely "proper in form" in that "(1) it relate[d] to an ultimate issue of fact . . . , and (2) an answer responsive thereto [would be] inconsistent" with a general verdict in Choate's favor. *Simmons*, 198 Ill. 2d at 563. It "focused on one element"—Choate's subjective appreciation of the dangerousness of moving trains—that was "dispositive of [his] claim." *Snyder v. Curran Twp.*, 281 Ill. App. 3d 56, 60 (4th Dist. 1996). And the jury's determination of that issue in defendants' favor would be "inconsistent with [a] general verdict" of liability (*Simmons*, 198 Ill. 2d at 563), because landowners have no liability to "a child who in fact discovers the condition and appreciates the full risk involved, but none the less chooses to encounter it out of recklessness or bravado." *Colls*, 212 Ill. App. 3d at 933 (internal quotation marks omitted).

Choate's argument below that the jury's consideration of comparative fault obviated the need for this special interrogatory was misguided. As *LaSalle* explained, comparative fault is no substitute for a "specific finding that plaintiff 'appreciated the risk' in jumping on a moving freight train" 132 Ill. App. 3d at 615. "[C]omparative negligence . . . performs a separate and distinct role from an appreciation of risk determination." *Colls*, 212 Ill. App. 3d at 948. When the plaintiff "in fact discovers the condition and appreciates the full risk involved," the landowner is freed "of all liability for the child's injuries." *Id.* at 933; *Hagy*, 190 Ill. App. 3d at 840; *Swearingen*, 181 Ill. App. 3d at 362. Thus, the resolution of this issue in defendants' favor would have

conclusively precluded liability to Choate, "not merely [as] a matter of contributory negligence . . . *but of lack of duty to the child*." *Colls*, 212 Ill. App. 3d at 934 (internal quotation marks omitted); *see also Mt. Zion*, 169 Ill. 2d at 117-18.

Indeed, the circuit court had earlier recognized that it is "relevant to this case to know what [Choate] was aware of at the time he hopped or mounted the train" (Tr. 904) and that "the individual evaluation of the youngster to appreciate the danger" was precisely why the motion for reconsideration had been granted to allow the case to "go to the jury" (Tr. 2309). The trial court's "refusal to submit" defendants' tendered interrogatory is "reversible error," and requires a new trial. *Van Hattem v. Kmart Corp.*, 308 Ill. App. 3d 121, 132 (1st Dist. 1999).

II. Defendants Are Entitled To Judgment Because Choate Presented Insufficient Evidence That Defendants Could Have Prevented Trespassing Children From Jumping Onto Moving Trains.

Quite apart from the objective obviousness of the danger of moving trains and the fact that Choate himself subjectively appreciated that danger, there was a "lack of evidence to prove [another] necessary element of the [Choate's] case" (*York*, 222 Ill. 2d at 178)—namely, the requirement that "the expense and inconvenience of remedying the . . . dangerous condition [be] slight when compared to the risk to children" (*Mt. Zion*, 169 Ill. 2d at 117; *see* Restatement (Second) of Torts §339(d)). Dr. Berg's testimony was not sufficient to establish this element of the *Kahn* test.

First, Dr. Berg assumed that it was sufficient to consider improvements only in the area between Central and Ridgeland Avenues. But this reflected a mistakenly circumscribed conception of the condition defendants ostensibly should have taken steps to address, and "fail[ed] to take into consideration [Choate's own] actions." *Damron v. Micor Distrib., Ltd.*, 276 Ill. App. 3d 901, 909 (1st Dist. 1995). Consequently, Dr. Berg's

opinion that his proposal would have been an efficacious "remedy" (*Mt. Zion*, 169 Ill. 2d at 117) was "based on mere speculation and conjecture" and did not "create a question of fact" (*Damron*, 276 Ill. App. 3d at 909).

Dr. Berg agreed that accidents such as Choate's "essentially involve[] a young boy attempting to jump onto a moving freight train" in order to "try[] to show off." Tr. 1279-80. His proposed engineering improvements (*i.e.*, the construction of channeling fencing between Ridgeland and Central and the construction of a new pedestrian overpass at Austin) might at most have reduced the risk that people would seek to *cross* the tracks at an unauthorized location between Ridgeland and Central. But they would have done nothing to abate the condition that injured Choate, which was the ever-present risk that trespassing children would try to *jump onto a moving train* wherever they could gain access to the tracks. There is a world of difference between crossing railroad tracks and attempting to board a moving train. Tr. 1282-83. As Choate's own counsel remarked during trial, merely "crossing over . . . tracks" has "nothing to do with . . . hopping a ride on the train." Tr. 1405.

Even assuming that new crossings and channeling fences conceivably could address an unmet "demand for travel" across defendants' tracks (Tr. 1239), only a comprehensive system of barriers, overpasses, and guards along every one of the countless miles of defendants' rights-of-way could prevent trespassing children from trying to jump onto a moving train. Yet Dr. Berg "completely ignored [this] factor[] in reaching his determination." *Royal Elm Nursing & Convalescent Ctr., Inc. v. N. Ill. Gas Co.*, 172 Ill. App. 3d 74, 79 (1st Dist. 1988).

The trial court's willingness to let the verdict stand notwithstanding Dr. Berg's

failure to recognize that children determined to jump onto moving trains will do so *wherever* they can get access to them is against the tide of precedent. For example, applying Illinois law, the Seventh Circuit has explained that "effectively foreclos[ing]" the "practice of hopping rides" would "require fencing or patrolling of defendant's *entire right-of-way*." *Ill. State Trust*, 440 F.2d at 501 (emphasis added). As in this case, the "practice of hopping rides" was by "no means confined to" the specific location where the accident occurred. *Id.*; Tr. 164 (citing "prior incidents that . . . weren't necessarily in the same locality"). Thus, the "only method[] of [e]nsuring that such injuries would not recur would be to fence the right-of-way . . . where there is any likelihood of children's presence" or to "place a guard at all such" locations. *Ill. State Trust*, 440 F.2d at 501. The Seventh Circuit "[did] not believe Illinois law impose[d] any such requirement" that railroads shoulder this "enormous burden" and therefore affirmed the entry of a directed verdict in favor of the defendant railroads. *Id.* The Seventh Circuit's decision in *Illinois State Trust* is both on point and plainly correct. Neither Illinois statute nor Illinois common law imposes on railroads a duty to fence against trespassing children. Tr. 1306-07, 2070. The steadfast refusal of the General Assembly and courts to impose such a duty no doubt stems from the recognition that it would be "substantially impossible for a railroad company to construct a fence which would be an effectual barrier even to young boys." *Bischof v. Ill. S. Ry.*, 232 Ill. 446, 453-54 (1908). *Bischof* and *Illinois State Trust* place Illinois in the mainstream of states whose courts have held, as a matter of law, that protective measures against train-hopping adolescents would be wholly impracticable and that their cost would not be "slight as compared to the risk to the children involved," as

required to establish a duty under Restatement § 339.[7]

Moreover, Choate adduced no evidence that the accident occurred because of the lack of a public crossing nearby. To the contrary, Choate admitted that he hopped the train to impress his girlfriend. Tr. 1743. He could have engaged in this daredevilry *anywhere*. Yet Dr. Berg admitted that he limited his analysis to people "*traversing*" the tracks "somewhere *between Ridgeland and Central*." Tr. 1289 (emphasis added). That kind of testimony is insufficient to support liability under Section 339. As one court has explained in analogous circumstances:

> [T]he burden on this defendant to protect against a particular danger must be considered on a *system-wide level, and not just with regard to a particular location or a particular city or state*. . . . It is, of course, obvious that if there were imposed upon the defendant the requirement of fencing the place where this accident occurred, *it would likewise be subject to the duty of fencing the innumerable places along its many miles of tracks frequented by trespassing children.*

Edwards v. Consol. Rail Corp., 567 F. Supp. 1087, 1111 (D.D.C. 1983) (internal quotation marks omitted and emphasis added). In other words, the particular area between Ridgeland and Central Avenues that Dr. Berg asserts should have been improved was not exceptionally dangerous to trespassing children who choose to jump on moving trains as compared with any other stretch of track. Thus, imposition of a duty on defendants under these circumstances would effectively require them to upgrade *all* of

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[7] *See* DOBBS, *supra*, PROSSER AND KEETON ON TORTS § 59, at 411; *Holland*, 431 A.2d at 603 n.11 ("railroads are generally under no duty to erect fences or maintain other safeguards" against child trespassers being injured by moving trains); *Frazee v. St. Louis-San Francisco Ry.*, 549 P.2d 561, 666 (Kan. 1976) ("For this court to impose that kind of a duty on the railroad company would place an unreasonable burden upon the railroad . . . Nothing short of the most pervasive and expensive security measure could ever prevent a person from running . . . to the side of a railroad car and jumping on."); *Kline v. New York, New Haven & Hartford R.R.*, 276 A.2d 890, 893 (Conn. 1970) ("the impracticable and burdensome task" of "prevent[ing] children from attempting to board" moving trains meant that the jury would not "have been justified in finding any breach of duty").

their rights-of-way; an improvement at any *one* location "could not adequately have prevented children from boarding the train at some *other* point." *Scibelli v. Penn. R.R.*, 108 A.2d 348, 352 (Pa. 1954) (emphasis added); *Ill. State Trust*, 440 F.2d at 501; *accord Lamkin v. Towner*, 138 Ill. 2d 510, 524-25 (1990) ("limit[ing] application of the [purported] duty" based on "location" would be "illogical"); *Butler*, 909 A.2d at 114 ("To require all [similarly located] streams . . . to be fenced . . . would in the ordinary settled community practically include all streams . . ."); *Salt River Valley Water Users' Ass'n v. Superior Court ex rel. County of Maricopa*, 870 P.2d 1166, 1172 (Ariz. Ct. App. 1993).

Dr. Berg's conclusion that the Ridgeland/Austin/Central improvements would have been an effective remedy was impermissibly "based on assumptions . . . contradicted by the evidence" (*Royal Elm Nursing*, 172 Ill. App. 3d at 79)—*i.e.*, Choate's admission that when the accident occurred, he "certainly wasn't thinking about crossing the tracks," but rather was "trying to jump on the train to impress" his girlfriend. Tr. 1743. As a result, Dr. Berg's proposed improvements could not possibly have "remed[ied] the . . . [allegedly] dangerous condition" that resulted in the accident. *Mt. Zion*, 169 Ill. 2d at 117. Because Choate "failed to offer any competent expert testimony to establish" this required element of his claim, defendants are entitled to judgment. *Garley v. Columbia LaGrange Mem'l Hosp.*, 351 Ill. App. 3d 398, 410 (1st Dist. 2004).

Second, even if it were supposed that fencing and overpass construction could *in principle* eliminate the danger of moving trains, there was no factual support for a finding that *Dr. Berg's proposed improvements* could feasibly be implemented, much less that their "expense and inconvenience" would be slight. *Mt. Zion*, 169 Ill. 2d at 117. Dr. Berg testified that a crossing at Austin should be built "in conjunction with fencing" on both

sides of the right-of-way between Ridgeland and Central Avenues to "channelize" people to the crossing point at Austin. Tr. 1256-57. Dr. Berg also posited that it might eventually be necessary to build a new crossing at the site of the accident itself. Tr. 1255. He did not consider the cost of such a crossing, however.

With regard to the crossing at Austin, Dr. Berg admitted that an overpass would be "much more effective" than an at-grade crossing. Tr. 1262. According to Dr. Berg, the key to preventing trespassers from jumping onto trains was to erect a "physical barrier" that would prevent people from walking "right up to . . . the train."[8] Tr. 1315. At an at-grade crossing, though, there would "absolutely" have to be an "opening in the fence," so trespassers could "physically come in contact with a train" and have the "opportunity to jump on the side of a moving train if they cared to." Tr. 1345-46, 1348-49.

Although Dr. Berg thus admitted in substance that an overpass would be necessary to keep trespassing children from having access to the tracks, and hence moving trains, he had never before been involved in the design or construction of one. Tr. 1321, 1325. He did not prepare a "detailed design or cost estimate" of the overpass he advocated; in fact, he could not even provide any sketches of it. Tr. 1323, 1360. He had not settled on the most basic of design parameters, such as the clearance over the tracks (Tr. 1324, 1361), the width of the overpass (Tr. 1323), and how the approaches to the overpass would function (Tr. 1254, 1359-60). Dr. Berg also brushed aside other planning

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[8] An at-grade crossing would still have given Choate an "opportunity . . . to get on the side of a train at an open place in the fence" where the crossing was, and therefore would have been ineffective in preventing the accident. Tr. 2089; *see also* D. Choate Dep. 120 (A27) (agreeing that at-grade crossing would not have prevented him from gaining access to moving trains). Because the crossings at Ridgeland and Central were also "at-grade" (Tr. 1349, 1886, 2441), it is inexplicable that Dr. Berg did not consider the cost of converting them to overpasses as well.

issues, including compliance with the Americans with Disabilities Act and other accessibility requirements (Tr. 1328, 1358, 1360); the overpass's environmental impact, given the adjacent nature preserve (Tr. 1330, 1362); its impact on traffic flow, land use, and other property owners (Tr. 1354-55); and the need to coordinate its construction with two different municipalities, Chicago Ridge and Oak Lawn (Tr. 1275-76; DX19). Dr. Berg dismissed the notion that it would be difficult for defendants to secure permission from the Illinois Commerce Commission to build the overpass (*see* 625 ILCS 5/18c-7401(3)), notwithstanding his conceded lack of familiarity with the Commission's procedures. Tr. 1327-28. Most strikingly of all, the overpass would physically project beyond the railroad's property and deposit traffic on private property, so defendants would need to negotiate with neighboring property owners in order to acquire easements or title. Tr. 1275, 1354, 2092. *Yet Dr. Berg's $150,000 estimate for a crossing entirely ignored the cost of property acquisition*. Tr. 2092. In sharp contrast to Dr. Berg's patently unrealistic cost estimates, defendants' expert, Carl Bradley, testified that the ADA-compliant bridge he reviewed cost *$7.5 million* to build. Tr. 2093-94.[9]

As for the fence, Dr. Berg admitted that no Illinois law requires rail carriers to "resort to fencing to attempt to keep trespassers off of their property." Tr. 1306-07. He acknowledged that chain-link fences could be cut and that children had, in fact, "cut down the fence on the other side of the tracks [from where the accident occurred] many

[9] Choate tried to undermine Bradley's testimony by soliciting his reaction, over defendants' objection, to an overpass in Summit, Illinois. Tr. 2095; PX102-103. The overpass in question was not ADA-compliant, and constructing ramps in place of the existing stairs would have been cost-prohibitive. Tr. 2121, 2123. Indeed, Bradley was of the view that the Summit overpass could not even be altered into an accessible design. Tr. 2126. Finally, Dr. Berg himself did not consider the Summit overpass when formulating his opinions about the feasibility of a crossing at Austin. Tr. 2125; *see infra* pp. 48-49.

times." Tr. 1303, 1312; *see also* Tr. 1727, 2081, DX18G, 18H (photographs). Thus, simply installing chain-link fences along the tracks would not be enough: Defendants would "have no choice but to continue [to] repair" them. Tr. 1312; *see infra* pp. 48-49. And because the right-of-way adjoined private property in some locations, defendants would have to "work with the property owner" or "whatever" if they wanted to build or repair those fences. Tr. 1314, 1972, 2091. Dr. Berg could not say how such maintenance would be done or how much it would cost. He had never been involved in fence construction. Tr. 1309. Furthermore, Dr. Berg's cost figures for installing fencing were dramatically understated. He supposed that 75 percent of the 6000-foot corridor between Ridgeland and Central did not already have fencing (Tr. 1259), which meant that 9000 feet of new fencing would need to be installed. Dr. Berg estimated that six-feet-tall fencing would cost $18 per foot. This works out to be $162,000 (or $216,000, if the existing fencing is ignored)—not $27,000, as Dr. Berg first calculated. Tr. 1259, 1310-11. Dr. Berg admitted that the "actual costs" would be unknown until a field survey was completed, which he had not done. Tr. 1311. Topping it all off, it is "doubt[ful] that such measures would have been capable of restraining [Choate] from 'hopping' . . . trains when he was of a mind to do so." *Alston v. Balt. & Ohio R.R.*, 433 F. Supp. 553, 557 n.17 (D.D.C. 1977). Choate enjoyed climbing trees and fences (Tr. 1728), and it "defies both logic and the evidence" to suppose that the fence proposed by Dr. Berg could have restrained him. *Id.*; *see also Butler*, 909 A.2d at 114 ("to construct a boy-proof fence at a reasonable cost would tax the inventive genius of an Edison"); *Nolley v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 183 F.2d 566, 569 (8th Cir. 1950) ("no fence, other than a wholly insurmountable one, like a castle wall, would have served to keep [the

trespassing child] off the right of way").

In sum, Dr. Berg's opinion that his proposal would be effective and could feasibly be implemented "ha[d] no basis in fact" and was based on "mere conjecture." *Damron*, 276 Ill. App. 3d at 907, 909; *see also Edwards*, 567 F. Supp. at 1110. "When there is no factual support . . . [the expert's] conclusions alone do not create a question of fact." *Gyllin v. Coll. Craft Enters., Ltd.*, 260 Ill. App. 3d 707, 715 (2d Dist. 1994). Given Choate's failure to offer any competent evidence on this essential point, defendants are entitled to judgment.

III. The Trial Court's One-sided And Patently Erroneous Evidentiary Decisions Necessitate A New Trial.

At the very least, the trial court's erroneous evidentiary rulings—both individually and especially when considered together—amounted to prejudicial error requiring a new trial. *See Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257, 260 (1st Dist. 1982).

A. Because Choate Was Bound By His Judicial Admissions That He Appreciated The Dangerousness Of Moving Trains, The Trial Court Erred In Barring Defendants From Introducing Those Admissions And In Allowing Him To Contradict Them At Trial.

At his deposition, Choate admitted that he "[r]ecognized that on the day of the accident[,] the train tracks were dangerous . . . [a]nd that the train that [he was] grabbing onto was dangerous." D. Choate Dep. 127-28 (A29). He admitted that he tried to jump onto the moving train to show off for Van Witzenburg, and for no other reason. *Id.* at 78, 194, 196, 205-06 (A26, 31-32). In the trial court's view, these statements were conclusions, not "unequivocal factual admissions." Tr. 221. The trial court's holding that these statements were not judicial admissions was erroneous, as was its holding that they could be "equivocated or challenged by" Choate. Tr. 116, 263.

Choate's deposition testimony that he recognized the danger of grabbing onto a moving train satisfies all of the criteria for a binding judicial admission. It is well-established that a "discovery deposition may be used as an admission made by a party." *Van's Material Co. v. Dep't of Dev.*, 131 Ill. 2d 196, 211 (1989); *see* Ill. Sup. Ct. R. 212(a)(2). A judicial admission is a "deliberate, clear, unequivocal statement of a party about a concrete fact within that party's peculiar knowledge." *Id.* (internal quotation marks omitted). According to the trial court, Choate's statement that he recognized the dangerousness of grabbing onto a moving train was a "conclusion," rather than an "unequivocal statement[]" of fact. Tr. 112. Not so. It was a concrete fact peculiarly within Choate's knowledge whether he did or did not appreciate that moving trains were dangerous at the time of the accident. *E.g.*, *State ex rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Ctrs., Inc.*, 377 Ill. App. 3d 990, 997-99 (1st Dist. 2007) (state of mind is a question of fact); *Peterson v. Am. Family Mut. Ins. Co.*, 160 N.W.2d 541, 545 (Minn. 1968) ("when a party testifies to facts in regard to which he has special knowledge such as his own . . . knowledge, or his reasons for acting as he did . . . he will be bound"); *Findlay v. Rubin Glass & Mirror Co.*, 213 N.E.2d 858, 861 (Mass. 1966) ("Since this testimony concerns the extent of his own knowledge, the plaintiff is bound by it."); *Bell v. Harmon*, 284 S.W.2d 812, 815 (Ky. Ct. App. 1955) ("plaintiff's state of mind was peculiarly within her knowledge," and so "constitute[s] a judicial admission").

The trial court was equally mistaken in reasoning that the word "dangerous" is ambiguous. Not only is "dangerous" a commonplace word, but Choate himself used it during the deposition on several occasions: Choate knew that "dangerous" things were things that could "hurt" him. D. Choate Dep. 28-29, 127-28 (A22-23, 29); *see Hansen*,

155 Ill. App. 3d at 481 (court must "consider the whole deposition"). Asked to distinguish between "safe" and "dangerous" times for crossing a street, Choate understood that the possibility of "get[ting] hit by a car" in the "stream of traffic" made it unsafe to cross a street when traffic is moving. D. Choate Dep. 31 (A23).

The trial court reasoned in the alternative that Choate's statement was an "ultimate fact[]," the admission of which would "supplant" the jury's function. Tr. 265-66. However, "even an ultimate fact which might give rise to a legal conclusion" is a *fact*, not a conclusion of law, and a party's judicial admission to such a fact conclusively binds him. *See Banco Popular v. Beneficial Sys., Inc.*, 335 Ill. App. 3d 196, 207-09 (1st Dist. 2002); *see also Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 345 (2007); *People v. Alvarez*, 93 Ill. App. 3d 111, 115 (1st Dist. 1981) (relying on defendant's "admission of the ultimate fact that defendant was guilty of the crime charged").

Finally, the trial court suggested that "[s]ome may say that no 12-year old can appreciate such a danger regardless of the fact that they admit it, because they are 12 years old." Tr. 1786. This reasoning is fundamentally unsound. As a matter of Illinois law, judicial admissions made in a deposition—even by a minor—are binding upon the party. *See Cent. Ill. Light Co. v. Stenzel*, 44 Ill. App. 2d 388, 393 (3d Dist. 1964). Moreover, if the trial court's reasoning were accepted, trespassing children could always evade their admissions by contending that the very fact that they took the risk means that they did not *truly* appreciate it. The unfortunate truth is that "many children tragically die or are seriously injured" from even the most obvious of risks. *Hootman v. Dixon*, 129 Ill. App. 3d 645, 649 (2d Dist. 1984); *see also Hagy*, 190 Ill. App. 3d at 845. Children often willingly embrace risks from which adults would shrink, perhaps "in a spirit of bravado

or to gratify some other childish desire." Restatement (Second) of Torts § 339, cmt. i. But what matters for purposes of liability under the *Kahn* exception is that the child can be expected to (or does in fact) appreciate the risk, "not that he will in fact *avoid* it." *Swearingen*, 181 Ill. App. 3d at 369 (emphasis added).

Choate's admission that he subjectively appreciated the danger of grabbing onto moving trains should have been admitted as direct and "substantive" evidence that was dispositive of the case. *See In re Walter B.*, 227 Ill. App. 3d 746, 753 (1st Dist. 1992). Defendants should not have been limited to using Choate's admission only for impeachment purposes. *Sec. Sav. & Loan Ass'n v. Comm'nr of Sav. & Loan Assocs.*, 77 Ill. App. 3d 606, 612 (3d Dist. 1979). Under *Kahn*, Choate's recognition of the danger vitiated any duty on the part of defendants towards him. As such, Choate's admission to that effect was plainly "at issue here." *See supra* pp. 27-34; *cf.* Tr. 2244. Thus, it was all the more indefensible for Choate to attempt to "create a factual dispute by contradicting [his] previously made judicial admission." *Hansen*, 155 Ill. App. 3d at 480. A party may not water down or explain away a judicial admission either "with his own contrary testimony" or with "that of other occurrence witnesses or experts." *Caponi*, 236 Ill. App. 3d at 671. Yet that is what the trial court gave Choate free rein to do: Over defendants' objection, Dr. Berg and Dr. Lencki offered testimony, which Choate latched upon to argue that *some* minors might not recognize the danger of jumping on a moving train. Tr. 1246-47, 1479-80.[10] This amplified the prejudicial effect of the trial court's failure to recognize Choate's statement that *he* understood that danger for what it was: a

[10] Similarly, Choate elicited testimony from some of his friends that the train might have been stopped part of the time. Tr. 785, 856, 935. Here too, Choate was not free to contradict his admission that the train was moving the entire time he was trying to jump onto it. Tr. 1638-39, 1734, 1766; D. Choate Dep. 78, 124, 194, 207 (A26, 28, 31-32).

conclusively binding judicial admission.

B. The Trial Court Erred In Excluding Testimony That Choate's Companions Recognized The Dangerous Of Jumping On Moving Trains, While Admitting Testimony About Unrelated Train-Hopping Incidents Of Which Choate Had No Awareness.

Defendants' offers of proof established that Choate's companions, who were similar in age and experience to Choate himself, all appreciated that jumping onto a moving train was dangerous. Tr. 804 (Spindler), 832 (Weyer), 865 (Van Witzenburg), 888 (Edgar), 953 (Gunderson). The trial court refused to admit this evidence, reasoning that their testimony would not be relevant to either what a child of Choate's age and experience could be expected know or Choate's own state of mind. Tr. 219, 796. That ruling was erroneous. The testimony of Choate's friends, who "fully appreciated the dangerousness of 'train hopping,'" is probative of both points. *Alston*, 433 F. Supp. at 569 n.102. Uniformly, the other "children who were [in the vicinity] when [Choate] was injured" testified that they appreciated the danger, which makes it "clear that a child of [Choate's] age would have realized the danger presented" and supports the conclusion that Choate "did in fact appreciate the risks involved." *Griffin v. Knott*, 2000 WL 15026, at *6 (Wash. Ct. App. Jan. 10, 2000); *see also Foster-Smith v. Spratt*, 2006 WL 505441, at *4 & n.8 (Mich. Ct. App. Mar. 2, 2006) (per curiam); *O'Keefe*, 414 P.2d at 839 n.8 ("circumstantial evidence" includes evidence that children "similarly endowed" to the plaintiff in terms of age and experience "would have realized the danger").

Compounding this error, the trial court allowed Choate to introduce evidence of other incidents of children jumping onto moving trains about which Choate was totally unaware. Tr. 1684. That ruling enabled Choate to argue that defendants realized that children would not find the moving trains to be an obvious danger (Tr. 2437); that they

must have known that their "education and enforcement [efforts] were not working" (Tr. 692); and that they had to do more to "provide a reasonable level of safety" to trespassing children (Tr. 1301). This evidence was, as a matter of law, irrelevant to any fact issue properly before the jury. As we explain above (at pp. 28-29), it is a commonplace that some children will expose themselves to dangers, even when they realize the risks of doing so. Evidence that other children hopped trains neither undermines the objective obviousness of the danger of moving trains nor detracts from Choate's admission that he subjectively understood that danger. The courts of this state already have rejected the notion that "one child's prior failure to avoid an obvious risk would make a later child's failure to avoid the same obvious risk foreseeable." *Hootman*, 129 Ill. App. 3d at 651. Furthermore, that evidence did not bear on the feasibility of the remedial measures that Choate argues defendants should have implemented. Defendants made "persistent efforts to keep youthful trespassers away" and "cannot be called upon to insure" their success, even if defendants "had reason to know that they were being ignored." *Howard v. Atl. Coast Line R.R.*, 231 F.2d 592, 595 (5th Cir. 1956).

C. The Trial Court Erred In Allowing Dr. Berg To Testify About Adolescent Behavior And Law Enforcement, Two Issues About Which He Had No Expertise.

Expert testimony is admissible only if the "proffered expert is qualified by knowledge, skill, experience, training, or education" and "the expert has specialized knowledge that will assist the trier of fact in understanding the evidence or in determining a fact at issue." *Todd W.*, 394 Ill. App. 3d at 800 (internal quotation marks omitted). Dr. Berg, a civil engineer, was not qualified to testify regarding child psychology (*e.g.*, the "maturity" of young people and why trains posed a danger to children, Tr. 1243) or the effectiveness of defendants' policing efforts (*e.g.*, Tr. 1377-1378, 1392). Tellingly, the

Rule 213 declarations pertaining to Dr. Berg never even claimed expertise in these areas. There was no basis for allowing Dr. Berg to offer opinion testimony about such matters, and the trial court should have sustained defendants' objections to it. Choate's assertion that Dr. Berg's testimony merely was a matter of "common sense" (Tr. 691) or "common knowledge" (Tr. 1244) was no basis for admitting it, since "[e]xpert testimony is improper when the inquiry regards an area within the common knowledge of the average juror." *Bachman v. Gen. Motors Corp.*, 332 Ill. App. 3d 760, 784 (4th Dist. 2002) (internal quotation marks omitted).

The erroneous admission of Dr. Berg's testimony was particularly prejudicial because it was a "legal opinion[] that invaded the province of the trial court" insofar as it related to what obvious dangers a child of Choate's age could reasonably be expected to appreciate (*Todd W.*, 394 Ill. App. 3d at 800), and it impermissibly sought to undermine the import of Choate's judicial admission that he subjectively appreciated the dangerousness of moving trains (*see supra* pp. 42-46).

D. The Trial Court Erred In Allowing Choate To Cross-Examine Defendants' Engineering Expert With A Photograph For Which He Never Established A Foundation.

Carl Bradley, defendants' engineering expert, explained that Dr. Berg's proposed improvements would neither be effective nor feasibly implementable. In particular, Bradley testified that it was unlikely that any channeling chain-link fence would remain intact, given the evidence that holes were routinely cut in such fences. Tr. 2090-91. During Bradley's cross-examination, and over defendants' objection, Choate exhibited a picture of a concrete barrier wall, which Bradley agreed might not be susceptible to being cut. Tr. 2095, 2115; PX78. But Choate presented *no evidence* regarding how much the concrete wall cost, where it was located, or who constructed it. Tr. 2127-28. Moreover,

Dr. Berg *never considered* such a barrier wall design: He recommended only chain-link fencing. Tr. 1309, 2127. Choate's use of the photograph was an "abuse of cross-examination" because a party is not entitled to present his theory of the case through cross-examination—particularly by relying on purported "facts" not in evidence and "never discussed or even mentioned on direct examination." *See Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35, 44 (1st Dist. 2000). The circuit court's decision to allow the introduction of this photograph despite the fact that Choate had "not provided a proper foundation" constitutes reversible error, particularly in light of its "acknowledged significance," which Choate played up in his closing argument (Tr. 2444). *See Apa v. Nat'l Bank of Commerce*, 374 Ill. App. 3d 1082, 1088 (1st Dist. 2007).

IV. A New Trial Is Warranted Because The Verdict Was Against The Manifest Weight Of The Evidence.

The jury's findings of liability against defendants and of 40 percent comparative fault were "contrary to the manifest weight of the evidence" because "the opposite conclusion is clearly evident" on the basis of the record. *York*, 222 Ill. 2d at 178-79. "[T]he evidentiary situation that would require a new trial" is not nearly as conclusive as the standard required to obtain "entry of a judgment" *n.o.v. Petre v. Cardiovascular Consultants, S.C.*, 373 Ill. App. 3d 929, 939 (1st Dist. 2007). Even if this Court concludes that defendants are not entitled to judgment, it should overturn the jury's verdict and award defendants a new trial. *Mizowek v. DeFranco*, 64 Ill. 2d 303, 310-11 (1976). The manifest weight of the evidence shows both that Choate fully appreciated the danger of moving trains (*see supra* pp. 27-32) and that defendants could not have inexpensively eliminated the possibility that he would nonetheless embrace that risk (*see supra* pp. 34-42). Moreover, the jury's comparative fault determination was so at odds with the

undisputable fact that Choate trespassed onto defendants' property and then tried three times to jump onto a moving train in order to show off to his girlfriend that a new trial is required on this basis as well. "[S]mall inequities" in allocation of fault can be tolerated, but this certainly is not such a case. *Junker v. Ziegler*, 113 Ill.2d 332, 340 (1986).

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(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages.

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Michele L. Odorizzi

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on September 15, 2010, she caused three copies of the foregoing Brief of Defendants-Appellants and the incorporated Rule 342(a) Appendix to be placed with the U.S. Postal Service, proper postage prepaid, for first class mail delivery to the following:

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