No. 1-10-0209

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.

DEFENDANTS-APPELLANTS' PETITION FOR REHEARING

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Pursuant to Supreme Court Rule 367, defendants-appellants CSX Transportation, Inc. (CSXT); Indiana Harbor Belt Railroad Company; and the Baltimore and Ohio Chicago Terminal Railroad Company respectfully petition for rehearing of the Court's decision issued on June 27, 2011, which upheld the jury verdict in favor of plaintiff-appellee Dominic Choate.

INTRODUCTION

It is undisputed that while trespassing on defendants' right-of-way, and despite having been warned over a dozen times that trains are dangerous, Choate attempted to jump on a moving train three times in order to impress his girlfriend. When he got injured, he sued the defendants claiming that they had a duty under the *Kahn* doctrine to protect him from his own impetuousness. In its June 27 Opinion, the Court rejected all of defendants' arguments and affirmed the jury's verdict of liability. Defendants respectfully submit that rehearing is warranted for two reasons.

First, the Court's opinion contains significant errors relating to the testimony of Dr. William Berg, Choate's civil engineering expert. Those errors undermine the Court's conclusion that the evidence supported the jury's implicit finding that defendants could feasibly have remedied the dangerous condition—*i.e.*¸ the risk of trespassing children jumping on moving trains—at a merely "slight" expense.

Second, the opinion interprets Choate's deposition testimony as conceding only that Choate was aware at the time of the deposition that it was dangerous to jump on trains on the day of the accident. When the deposition questions and answers are read in context, it is plain that Choate was addressing his appreciation of the risk ***at the time of the accident***. The case was litigated in the trial court on that premise, and Choate himself has never contended otherwise. The Court should correct this misunderstanding, hold

that Choate's testimony was a judicial admission, and enter judgment for defendants because a child trespasser who has actual knowledge of the risk is barred from recovery under *Kahn*.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. Rehearing Is Warranted Because Dr. Berg's Own Testimony Proved That His Proposed Remedial Measures Would Be Neither Effective Nor Feasible.

Under the *Kahn* doctrine, a child trespasser (such as Choate) is owed a duty only if he can show, *inter alia*, that the condition that injured him could have been remedied at an expense that was "slight." *Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc.*, 169 Ill. 2d 110, 117 (1995). The opinion concludes, on the basis of Dr. Berg's testimony, that there was sufficient evidence that defendants could have prevented Choate from jumping on a moving train if they had both (1) completely fenced both sides of the 6,000-foot corridor between Central Avenue and Ridgeland Avenue ***and*** (2) built an overpass at Austin Avenue, which is midway between Central and Ridgeland. Op. 8-10, 25. The opinion also concludes that Dr. Berg provided "adequate factual support for his conclusions that the construction of fencing and an overpass at Austin Avenue feasibly could be implemented at a relatively low cost." Op. 27. These conclusions rest upon factual premises that are refuted by Dr. Berg's own testimony.

A. Dr. Berg admitted that he had made an arithmetic error in estimating the cost of fencing.

The opinion states that "Dr. Berg testified that the cost of constructing a six-foot chain-link fence along both sides of the corridor between Central Avenue and Ridgeland Avenue would be approximately $27,000. The cost of constructing an eight-foot chain-link fence would be approximately $37,500." Op. 10; *id.* at 27 (same).

The opinion overlooks, however, that Dr. Berg acknowledged during cross-

examination that these figures were incorrect because he had made elementary errors in arithmetic. Dr. Berg assumed that defendants should have "construct[ed] a 6- to 8-foot high chain link fence along both sides of the corridor in the areas that did not have any fencing," which he "assume[d] . . . would constitute, [he] would say, 75 percent of the corridor." Tr. 1259. This works out to at least 9,000 feet of new fencing—*i.e.*, 75 percent of a 6,000-foot corridor times 2 sides.[1] Dr. Berg also assumed that the cost for installing new chain-link fencing was "$18 per foot for six-foot installed" and "$24 to $26 per foot for eight-foot installed." Tr. 1310. When Dr. Berg's own numbers are multiplied out, the total costs for his proposed fencing are ***$162,000*** (*i.e.*, $18 per foot times 9,000 feet) for a six-foot fence and between ***$216,000*** (*i.e.*, $24 per foot times 9,000 feet) and ***$234,000*** (*i.e.*, $26 per foot times 9,000 feet) for an eight-foot fence. Dr. Berg admitted that "if [the] math is correct, then that's what it would be." Tr. 1311.[2]

The opinion should be amended (at pages 10 and 27) to incorporate these mathematically corrected figures. Moreover, a conforming change should be made to the "total cost of the remedial measures" figure at page 37 of the opinion to reflect that the total cost of "chain-link fence plus overpass," based on Dr. Berg's assumption that the

[1] Dr. Berg offered no support for his assertion that defendants would be entitled to rely on the fencing of unrelated landowners to satisfy any duty defendants had to keep trespassers off their right of way. It is a matter of common sense that once told it has a duty to fence, the prudent right-of-way owner would construct a single fence throughout the relevant area so as not to have to trust its legal fate to the maintenance efforts of a myriad of unrelated landowners.

[2] Dr. Berg tried to shift assumptions once these mathematical errors were pointed out to him. Instead of ***75*** percent, he arbitrarily posited that perhaps only "***25*** percent of the corridor would require new fencing." Tr. 1311 (emphasis added). He conceded, though, that it would be impossible to determine "what the actual costs would be" without performing a "survey in the field," which he had not done. *Id.* Yet even accepting his utterly speculative 25 percent assumption—which would call for 3,000 feet of new fencing—the correct total cost figures should have been $54,000 for a six-foot fence and between $72,000 and $78,000 for an eight-foot fence.

overpass would cost $150,000, is between $312,000 and $384,000. These changes take the cost of remediation out of the "slight" category, even accepting the many other unsupported and counterfactual assumptions that underlie Dr. Berg's testimony.

B. Dr. Berg admitted that he did not know how much maintaining a fence would cost.

The opinion states that Dr. Berg testified that "he expected the maintenance of the fence to cost very little." Op. 28. He actually testified as follows:

> Q. You've shared some numbers with the jury. How much would the maintenance of the fence, 6,000 feet on both sides, how much would that cost?
>
> A. Very little I would expect.
>
> ***Q. But you don't know.***
>
> ***A. No.***

Tr. 1309 (emphasis added). Thus, the opinion should be amended to reflect that Dr. Berg did not know how much maintaining the fence he proposed would cost and was merely speculating when he testified that maintenance costs would be minimal.

C. Dr. Berg's testimony that a pedestrian overpass at Austin Avenue could be constructed for $150,000 was based on mere conjecture and so does not create a question of fact.

Dr. Berg testified that an overpass at Austin could have been constructed for $150,000. As the opinion notes, that figure is based on (among other things) Dr. Berg's assumption that "the costs of compliance with the ADA, other federal laws, and the ICC [Illinois Commerce Commission]" "would not be significant." Op. 27. In reality, Dr. Berg had no factual basis for concluding that a new pedestrian overpass could be constructed at all, let alone for only $150,000. He testified that he had never been involved in a bridge construction or design project (Tr. 1320-21); that he had not "done

any design studies" or sketches (Tr. 1323); that he had not prepared a "detailed design or cost estimate" (Tr. 1360); that he had not even settled on the proposed overpass's width (Tr. 1323); that he had not "attempt[ed] to do a detailed design" about how the overpass's access ramps could be made ADA-compliant (Tr. 1360); that he had not researched the applicable height-clearance requirements imposed by the ICC (Tr. 1323-24, 1361); and that he had "not reviewed" the ICC's rules (Tr. 1328). Dr. Berg's nonchalant assessment that securing approval from the ICC to construct a new overpass on the property of third parties (and complying with the requirements imposed by other governmental entities) would be no more involved than "get[ting] a building permit" to remodel one's kitchen was patently without foundation. *Cf.* Tr. 1327.

In fact, the ICC has the exclusive authority to determine whether a new overpass should be approved. By statute, it has the "right to refuse its permission or to grant it upon such terms and conditions as it may prescribe." 625 ILCS 5/18c-7401(3). As illustrated by, *inter alia*, the unrebutted testimony of Thomas Livingston, a Vice President for State Relations at CSXT, the process is an involved one.[3] Livingston explained that, far from being "routine" (Tr. 1950), securing approval from the ICC would require extensive coordination with the affected municipalities, as well as consideration of land-use, environmental, safety, and traffic issues (Tr. 1948-50). *See also* 92 Ill. Admin Code §§ 1535.202 (requiring "general plan or plat showing with

[3] The Court was thus mistaken in concluding that the feasibility issue boiled down to nothing more than a run-of-the-mill credibility contest between Dr. Berg and defendants' expert, Carl Bradley (*see* Op. 28). In any event, Berg's testimony was so inherently incredible as to not rise to the level necessary to create a credibility contest with Bradley. *See Gyllin v. Coll. Craft Enters.*, 260 Ill. App. 3d 707, 715 (2d Dist. 1994) ("When there is no factual support . . . [the expert's] conclusions alone do not create a question of fact.").

reasonable certainty the nature, location and construction of the proposed crossing"); 1535.203 (Construction and Maintenance of Grade Crossing), 1536.40 (Criteria for Crossing Opening). The requisite level of planning and detail was confirmed by the ICC's Pedestrian Bridge Project Application form, which Choate exhibited while cross-examining Livingston. Tr. 1965-66; PX56; *see* Ill. Commerce Comm'n, *Pedestrian Bridge Project Application*, http://www.icc.illinois.gov/downloads/public/rr/PedBridge.pdf. The form reflects that, besides general project information, the applicant also must include a "project location map," "narrative of the proposed project," "copy of a feasibility or preliminary design report," evidence of "[c]ommunity [e]ffort and [s]upport," and "approximate timeline listing key milestones concerning the design and/or construction phases." *Id.*

Given Dr. Berg's acknowledged lack of familiarity with the ICC's procedures and requirements (Tr. 1324, 1328), his conclusion that defendants could have constructed the overpass he describes—much less for only $150,000—lacked any factual basis. The opinion should be amended to reflect that Dr. Berg's testimony about the feasibility of designing and constructing a new overpass in compliance with all of these requirements was not "[b]ased on his experience" (Op. 27), but rather on mere conjecture, which is not sufficient to support the jury's implicit finding that the condition that injured Choate could have been remedied at a cost that was "slight." *See Damron v. Micor Distrib., Ltd.*, 276 Ill. App. 3d 901, 907 (1st Dist. 1995) (an expert's conclusions "based on mere conjecture and guess" do not "create a question of fact"); *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 875-76 (1st Dist. 1991) ("When there is no factual support for an expert's conclusions, their conclusions alone do not create a question of fact."); *Gariti v.*

Karlin, 127 Ill. App. 2d 166, 173 (1st Dist. 1970) ("Mere surmise, guess or conjecture by an expert witness is never regarded as proof of a fact, and a jury will not be allowed to base a verdict thereon.").

D. Under Dr. Berg's own theory, at least *three* new overpasses would have to be built, so constructing an overpass at Austin alone could not have remedied the condition.

The opinion states that "Dr. Berg opined that an overpass at the midway point of the 6,000-foot corridor at Austin Avenue, coupled with fencing along the corridor channeling pedestrians to that crossing, would be sufficient to remedy the danger." Op. 26. This characterization of Dr. Berg's testimony is incomplete in two crucial respects.

First, it overlooks the need to convert the existing crossings at Ridgeland and Central (*i.e.*, at both ends of the "corridor") from at-grade crossings to overpasses. Dr. Berg suggested that an overpass would be required to prevent train-flipping incidents, because only an overpass could physically separate trespassers from moving trains. Tr. 1262, 1315. At an at-grade crossing, however, there still would be an "opening in the fence" through which trespassers could "physically come in contact with a train" and have the "opportunity to jump on the side of a moving train." Tr. 1345-46, 1348-49. Yet the existing crossings at Ridgeland and Central were at-grade. Tr. 961, 1886, 2441. And as Dr. Berg himself recognized, "[t]here were certainly some [trespassing citations issued] probably at Ridgeland and at Central." Tr. 1289; *see also id.* at 1290 ("Q. Did you notice there are a number of citations at Ridgeland? A. Yes."), 1587-88. Thus, under Dr. Berg's own theory, constructing just one overpass at Austin could not possibly be an efficacious remedial measure, as it would not prevent trespassers from jumping on moving trains at Ridgeland and Central.

Second, Dr. Berg himself expressly qualified his opinions on the sufficiency of constructing an overpass at Austin Avenue alone. He testified that "at some point . . . you might want another crossing point in the area where the subject incident occurred." Tr. 1255; *see also* Tr. 1316 ("[Y]ou would have to consider whether [defendants] need to provide another facility at the location . . . where this incident occurred."). In particular, an "additional pedestrian bridge" at the site of the accident might be required. Tr. 1318. He acknowledged that "no one would know" how "much of the problem remain[ed]" after constructing an overpass only at Austin Avenue. Tr. 1319. And he admitted that he could not "speculate nor can . . . anyone else as to what you might find." *Id.*

Accordingly, the opinion should be amended to reflect that Dr. Berg's *ipse dixit* that a single pedestrian overpass at Austin likely would suffice is irreconcilable with his admissions that the very condition he was claiming to remedy (*i.e.*, trespassers having access to moving trains) already existed at each end of the 6000-foot corridor (*i.e.*, at Central and Ridgeland) and that no one knows whether an additional overpass would be needed at the accident site as well. Defendants are aware of no case that has ever imposed a duty on a landowner to build even ***one*** overpass, much less ***three*** (or perhaps even ***four***) of them. The Court should hold that Dr. Berg's testimony was predicated on pure result-oriented conjecture, which is insufficient to support the judgment. *See Damron*, 276 Ill. App. 3d at 907; *Wilson*, 214 Ill. App. 3d at 875-76; *Gariti*, 127 Ill. App. 2d at 173.

* * *

Rehearing is warranted to correct the foregoing errors in the opinion relating to the feasibility and efficacy of Dr. Berg's proposed remedial measures. When those errors are corrected it becomes clear that Choate did not adduce sufficient evidence to satisfy

his burden of "establish[ing] that the cost and inconvenience of remedying the situation was minimal" (*Colls v. City of Chi.*, 212 Ill. App. 3d 904, 490 (1st Dist. 1991)) and that defendants accordingly are entitled to judgment.

II. Rehearing Is Warranted Because Choate's Deposition Testimony Was A Binding Judicial Admission That He Appreciated The Risk At The Time Of The Accident.

The opinion correctly recognizes that under *Kahn* a landowner owes no duty to a child trespasser who subjectively appreciated the danger at the time of the accident. Op. 15, 22. The opinion concludes, however, that there was a jury question as to whether, on the day of the accident, Choate appreciated the danger associated with jumping on a moving train. It reaches this conclusion by adopting the never-before contemplated interpretation of Choate's deposition testimony as acknowledging only "his recognition, ***at the time of the deposition questions***, that the train tracks and train posed a danger to him." Op. 29 (emphasis added). The opinion erroneously overlooks the context, which makes it clear beyond serious question that the lawyers, the trial court, and Choate himself all understood Choate to be acknowledging that, at the time of the accident, he was aware that jumping on moving trains was dangerous.

The following exchange transpired at Choate's deposition:

> Q. So you recognize train tracks as being dangerous; correct?
>
> A. Yes.
>
> ***Q. And you recognize that on the day of the accident the train tracks were dangerous; correct?***
>
> ***A. Yes.***
>
> Q. And that the train that you were grabbing onto was dangerous?

A. Yes.

A29 (emphasis added).

The context reflects that the italicized question was targeted at eliciting Choate's appreciation of the danger at the time he was injured. In the immediately preceding question, defense counsel had confirmed the obvious—that, at the time of the deposition, Choate understood that jumping on a moving train is dangerous. Having established that, he turned to the legally relevant question—and the one that everyone involved understood him to have asked—which is whether Choate understood this at the time of the accident. The Court's interpretation deprives the phrase "on the day of the accident" of any meaning and requires indulgence of the assumption that defense counsel asked the same—legally irrelevant—question twice, while failing to ask the legally critical question even once.

Indeed, until the issue was raised for the first time by the Court at oral argument, the consistent understanding upon which this case had been litigated is that defense counsel's questions and Choate's answers related to Choate's appreciation of the danger at the time he jumped onto the moving train. In the trial court, Choate argued that his statements should not be deemed judicial admissions because "dangerous" is an "ambiguous" word and because his state of mind was a "conclusion, not a fact." Tr. 112. Choate's counsel accepted that "[o]bviously [Choate] ***was*** cognizant, as anybody would be, that a moving train would be dangerous" and disputed only "exactly what was the hazard that he appreciated at that time." *Id.* (emphasis added).

The trial court's conclusion that the statements did not constitute judicial admissions was predicated on its erroneous adoption of Choate's arguments, not on the

verb tense used in the deposition questions. *See* Tr. 115-16, 221, 263-64. Furthermore, before trial, the court had repeatedly construed Choate's deposition testimony as meaning that he appreciated at the time of the accident that the train he was grabbing onto was dangerous. *E.g.*, A7 (oral decision on defendants' motion for summary judgment) ("Choate is on record appreciating this danger"); A17 (oral decision on Choate's motion for reconsideration) ("plaintiff has acknowledged that he appreciated his risk").

At trial, defendants impeached Choate with his deposition testimony. After reading him the questions and answers about his knowledge of the dangers, defendants asked: "And despite all of that, you attempted to board this moving freight train three different occasions; is that correct?" He responded: "That is correct." Tr. 1763. That response confirms that he, like everyone else, understood his deposition testimony to relate to his knowledge at the time of the accident. If Choate had understood differently, he clearly would have said so—*i.e.*, he would have disputed the very premise of the question (which was that he jumped on the train "despite" understanding at the time of the accident that doing so was dangerous), and asserted instead that his deposition testimony meant only that he appreciated the risk once he had lost his leg.

Not surprisingly, given the common understanding of everyone involved, Choate reiterated in this Court the arguments he made below and never contended that his testimony at the deposition was limited to his knowledge on the day of the deposition. To the contrary, his brief in this Court specifically acknowledged that his deposition testimony spoke to his ***past*** appreciation of the danger. He asserted that defendants were able to "impeach[] Dominic with his deposition testimony where he said that he recognized ***on the day of the accident*** that train tracks were dangerous and that the train

he was grabbing onto was dangerous." Pl. Br. 43 (emphasis added).

The Opinion affirms the judgment below based on an interpretation of Choate's deposition testimony that was never raised below and that was not argued on appeal by Choate. Although an appellee may raise any argument for affirmance supported by the record, even if he did not advance that argument below (*In re Veronica C.*, 239 Ill. 2d 134, 151 (2010)), the adversary system is undermined when courts reach out to affirm on the basis of an argument that that appellee has never raised at *any* time.[4] "[T]he appellate court's *sua sponte* consideration of issues not considered by the trial court and never argued by the parties constitute[s] error . . . ." *People v. Hunt*, 234 Ill. 2d 49, 61 (2009); *id.* at 66 ("[W]e reject the appellate court's *sua sponte*" basis for affirming the trial court's order.); *see also In re Estate of Kline*, 245 Ill. App. 3d 413, 434 (3d Dist. 1993) ("A reviewing court is not a depository in which a litigant may leave the burden of argument and research.").

For all of these reasons, the Court should grant rehearing and revise the opinion to accept the understanding of the parties and the court below that Choate's deposition testimony involved his appreciation of the danger at the time of the accident. Having done that, the Court then should hold that defendants are entitled to judgment because Choate's admission during his deposition (combined with all of the other evidence at trial that he was fully aware of the danger of jumping on a moving train) precluded him from

[4] We note, for example, that although the panel raised this interpretation of Choate's deposition testimony with counsel for defendants at the very outset of his argument, counsel for Choate carefully avoided the point during his part of the argument, and no member of the panel asked him whether he agreed with defendants that everyone involved understood the questions and answers to relate to Choate's knowledge at the time of the accident. Had he been asked, his duty of candor to the Court might well have required him to disavow the Court's reading.

establishing that defendants owed him a duty under *Kahn*.

CONCLUSION

The Court should grant defendants' petition for rehearing, correct the factual errors identified above, and enter a new opinion reversing the judgment below with directions that judgment be entered in favor of defendants.

Dated: July 15, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH SUPREME COURT RULES 341 AND 367

The undersigned, an attorney, certifies that this brief conforms to the requirements of Rules 341 and 367. The length of this brief, excluding the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 13 pages.

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Michele L. Odorizzi

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 15, 2011, she caused three copies of the foregoing **DEFENDANTS-APPELLANTS' PETITION FOR REHEARING** to be placed with the U.S. Postal Service, proper postage prepaid, for first class mail delivery to the following:

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