No. _____

IN THE
SUPREME COURT OF ILLINOIS

DOMINIC CHOATE, Plaintiff-Respondent, 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-Petitioners.	On Petition For Leave To Appeal From The Illinois Appellate Court, First District, No. 1-10-0209 There Heard On Appeal From The Circuit Court, Cook County, Illinois County Department, Law Division, No. 03-L-12237 The Hon. William J. Haddad, *Judge Presiding*

PETITION FOR LEAVE TO APPEAL

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Dated: September 2, 2011

PRAYER FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rule 315, defendants-petitioners CSX Transportation, Inc. (CSXT), Indiana Harbor Belt Railroad Company, and the Baltimore and Ohio Chicago Terminal Railroad Company respectfully petition this Court for leave to appeal from the Appellate Court's decision attached hereto.

JURISDICTION

The Appellate Court issued its opinion on June 27, 2011. A1.[1] Petitioners filed a timely petition for rehearing on July 15, 2011. A29-44. The Appellate Court issued a modified opinion upon denial of rehearing on August 1, 2011. A1.

POINTS RELIED UPON FOR REVERSAL

This case involves recurring issues relating to whether, and if so when, owners of railroad rights of way owe a duty to prevent trespassing children from trying to jump onto moving trains under *Kahn v. James Burton Co.*, 5 Ill. 2d 614 (1955). This Court has expressly recognized that questions regarding applicability of the *Kahn* doctrine in the train-jumping context are "important" (*Dickeson v. Balt. & Ohio Chi. Terminal R.R.*, 42 Ill. 2d 103, 109 (1969)), but has twice failed to reach the issue after concluding that the cases before it could be resolved on narrower grounds (*id.*; *Am. Nat'l Bank & Trust Co. v. Pa. R.R.*, 35 Ill. 2d 145, 153-54 (1966)). Since then, confusion has reigned. The decision below—which held that defendants owed a duty to Dominic Choate, a nearly thirteen-year-old boy, to prevent him from jumping onto a moving train—and the two Appellate Court decisions it followed are impossible to reconcile with *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110 (1995), this Court's latest and most comprehensive articulation of the *Kahn* doctrine's contours. The present case

[1] Citations to A__ are to the appendix. Citations to Tr. __ are to the trial transcript.

affords this Court an ideal opportunity to resolve the confusion and bring the law back into line with its precedents. The Appellate Court's opinion frames the issues perfectly; the case already has attracted the involvement of multiple *amici*—five that filed a total of three briefs in support of defendants, and one that filed a brief in support of Choate; and, unlike the overwhelming majority of lower court decisions, the opinion below has prompted a scathing critique by a legal commentator, who opined that it "[f]launt[s] common sense" and fails "the 'straight face' test." Pat Murphy, *Boy Loses Foot in Rail Yard, Wins $3.9M in Courtroom*, Lawyers Weekly USA (July 21, 2011).[2]

Under *Kahn*, a landowner owes a trespassing child a duty of care only if the plaintiff can show, *inter alia*, that the danger of the condition that injured him is not obvious to children generally; the child trespasser himself did not appreciate the danger; and the condition could have been remedied at an expense that was slight. *Mt. Zion*, 169 Ill. 2d at 117. In upholding the verdict in favor of Choate, the Appellate Court eviscerated each of these three elements, transformed the *Kahn* doctrine from a narrow exception to the rule that landowners owe no duty to trespassing children into an open-ended means for imposing liability on property owners, and did grievous damage to the statutory requirement relating to special interrogatories for good measure.

The petition raises three issues, each warranting the Court's review.

First, the Appellate Court held that the danger of moving trains is not so objectively obvious to trespassing children as to preclude recognition of a duty as a matter of law. As noted above, this Court has twice before granted review and heard argument on this "important" issue but then failed to reach it. Now is the time to reach

[2] *See* http://lawyersusaonline.com/benchmarks/2011/07/21/boy-loses-foot-in-rail-yard-wins-3-9m-in-courtroom/ (last visited September 1, 2011).

the issue and reverse the decision below, which is irreconcilable with the Court's reasoning in *Mt. Zion*, conflicts with the Restatement (Second) of Torts and the decisions of the vast majority of courts around the country that have addressed the same issue, and compounds the Appellate Court's ongoing confusion about the *Kahn* doctrine.

Second, the decision below threatens to dramatically expand the liability of landowners to trespassing children, in conflict with this Court's repeated admonition that the exception recognized in *Kahn* is a narrow one. Even taking the *ipse dixit* of Choate's expert witness at face value, preventing children from jumping onto moving trains just in this 6,000-foot rail corridor would require defendants to build and maintain thousands of feet of fencing and erect a minimum of one pedestrian overpass. And that, of course, would not be enough. Because trespassing children can jump on moving trains *anywhere* they can get access to them, the First District's recognition of a duty *here* effectively imposes a duty on *all* Illinois railroads over their *entire* rights-of-way—all 7,000 miles of them. The decision below conflicts with Illinois decisions holding that the court must consider the *aggregate cost* to society of imposing a duty on *all similarly situated landowners* and that there is no duty to fence tracks to prevent children from trespassing. The Court should grant review to resolve the conflict in the case law and restore the commonsense limitations on the duty of landowners to protect trespassing children.

Third, in the course of rejecting defendants' proposed special interrogatory, which would have asked the jury whether Choate in fact appreciated that attempting to jump onto a moving train presented a risk of harm, the Appellate Court held that liability is precluded under this aspect of *Kahn* only if the child trespasser appreciated the "full" risk of harm. That understanding of *Kahn* conflicts with several prior Appellate Court

decisions. To make matters worse, in upholding the refusal to give a special interrogatory on the ground that it was missing an adjective—even though that supposed failing was never raised below—the Appellate Court watered down the protections of the special-interrogatory statute and created a square conflict with a prior Appellate Court decision. The Court should grant review to resolve the various conflicts created by the decision below and correct the lower court's substantive and procedural errors.

STATEMENT OF FACTS

A. The accident

Defendants own three railroad tracks that run through Chicago Ridge, Illinois. A4 ¶ 4. On July 30, 2003, Choate and five friends gathered in the parking lot of an apartment building south of the tracks. A3-4 ¶¶ 4-6. Moving steadily at about 9 or 10 miles per hour, a freight train appeared on the middle track. A4 ¶ 6. After several minutes, Choate and two other boys left the parking lot and headed onto the tracks. A4 ¶ 7.

Because no unauthorized person is permitted to "walk … or be upon" a railroad's right-of-way, Choate was unquestionably a trespasser. 625 ILCS 5/18c-7503(1)(a)(i); A4 ¶ 7. Although there was some disagreement as to why Choate initially approached the tracks, it is undisputed that once he drew near the passing train, his intent was to jump aboard it. A4-5 ¶¶ 7-9. Choate's "motivation … was to impress Alisa [Van Witzenburg], whom he was dating at that time" (A5 ¶ 9) and to "show off" (Tr. 1280).

Choate's companions, as well as an unrelated adult who witnessed the accident, testified that they shouted warnings to him. A5 ¶¶ 10, 14. But Choate "testified he never heard [them] because the train was so loud that it was hard to hear." A5 ¶ 10.

Immediately before his accident, Choate saw one of his friends try unsuccessfully to jump onto the moving train. A4 ¶ 9. Choate then made three attempts to climb aboard

it. On his first attempt, he "stood flat-footed on the ground" and grabbed a passing ladder, which bent his fingers backwards causing him to pull his hand in. A5 ¶ 10.[3] On his second attempt, he ran alongside the train, grabbed a ladder, and then released it when his low-cut tennis shoes started "slipping on the rocks." A5 ¶ 11; Tr. 1689, 1747-48. On his third attempt, he threw himself at a ladder with both hands and managed to put his right foot on a rung. A5 ¶ 12. Choate lost his grip, causing his left foot to swing under the moving train. A5 ¶¶ 12, 14. His left foot was partially severed.

B. The plaintiff

Choate was 12 years and 9 months old at the time of the accident. A3 ¶ 3. Before the accident, Choate had been warned repeatedly that moving trains were dangerous. Seven months prior, Choate was caught trespassing on defendants' right-of-way by a patrolman, warned "that he could get hurt on railroad property," and told never to come back. A6 ¶ 16. Choate admitted that his mother had warned him "over a dozen times" before the accident that "railroad trains and tracks" were "dangerous" and that he should stay away from them. A6 ¶¶ 16-17. Choate's mother was sure that 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" and was "upset" when she first learned of his accident because she thought that Choate should have "kn[own] better." Tr. 1628, 1633-34.

Indeed, asked during his deposition, "[a]nd you recognize that on the day of the accident the train tracks were dangerous," Choate replied "[y]es." A22 ¶ 87.[4]

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[3] The lowest rung of the passing boxcars was about two feet above the rail; because the track was situated on an elevated railbed, Choate would have had to reach even higher to grab the ladder. Tr. 1903, 1918-19; DX8A, 28-29 (photographs).

[4] The First District *sua sponte* interpreted Choate's deposition testimony as conceding only that he was aware *at the time of the deposition* that it was dangerous to jump on trains. A22-23 ¶ 89. When the exchange is read in context, however, it is plain (cont'd)

C. Proceedings below

The circuit court initially granted defendants' motion for summary judgment, concluding that defendants did not owe Choate a duty under the *Kahn* doctrine based on, among other things, Choate's "deposition testimony that he had subjectively appreciated the danger of jumping aboard the moving freight train." A3 ¶ 2. The court granted Choate's motion for reconsideration, however, and the case went to trial.

Over objection, Choate's expert, Dr. William Berg, testified that defendants could have prevented Choate from jumping on a moving train by doing both of two things: (1) fencing both sides of the 6,000-foot corridor between Central Avenue and Ridgeland Avenue ***and*** (2) building a new pedestrian overpass at its midpoint. A8 ¶¶ 29-30. Dr. Berg did not consider the feasibility of implementing similar measures everywhere else that trespassing children could gain access to moving trains. A19 ¶ 76; Tr. 164, 1289.

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. A2 ¶ 1. Defendants appealed.

The First District affirmed. According to the court, the "danger of jumping aboard a slow-moving, 9 to 10 mile per hour freight train that the not-yet 13-year-old plaintiff could outrun and which had caused neither him nor his friend harm in their previous attempts to board" was not such an "obvious danger that children of plaintiff's general age and experience can be expected to appreciate [it] as a matter of law." A16 ¶ 59.

that Choate was addressing his appreciation of the risk at the time of the accident. The case was litigated on that premise, and Choate himself has never said otherwise. To the contrary, in his appellate brief he affirmatively contended that defendants were able to "impeach[] Dominic with his deposition testimony *where he said that he recognized on the day of the accident* … that the train he was grabbing onto was dangerous." Pl. Br. 43 (emphasis added). Although defendants pointed this out at both oral argument and in their petition for rehearing (A40-41), the Appellate Court ignored it.

The court upheld the jury's implicit finding that Dr. Berg's proposals would be efficacious and could be implemented at a cost that was "slight." A21-22 ¶¶ 81, 84. In the court's view, the nearly $200,000 dollars—a gross underestimate (*see* Tr. 1300-11, 1321-31)—that Dr. Berg asserted his proposed remedial measures would cost counted as "slight." A21-22, 28 ¶¶ 81, 84, 114. Relying on Dr. Berg's *ipse dixit* that "remedial measures" were required "only along the 6,000-foot corridor" where Choate himself had been injured, the court denied that its holding would impose on railroads a duty to fence off their rights-of-way across their entire systems. A19-20, 27 ¶¶ 76, 113.

The First District also affirmed the circuit court's refusal to give defendants' proposed 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?" A23 ¶ 91. It posited that there was a difference between Choate's "appreciation of the *full* risk of harm (*i.e.*, death or dismemberment) from jumping aboard the moving freight train[, which] would have negated defendants' duty toward him" and his merely appreciating "some lesser risk of harm (*e.g.*, falling and spraining his ankle)," which, it believed, "would not have similarly negated defendant[s'] duty." A23-24 ¶ 95. The First District recognized that Choate had "failed to object below to" the ostensibly "improper wording of the proposed special interrogatory" but deemed this failure to be of no import. A24 ¶ 96.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Court Should Grant Review And Hold That The Danger Of Jumping Onto A Moving Train Is, As A Matter Of Law, Obvious To The General Class Of Children Of Choate's Age And Experience.

Under the *Kahn* doctrine, the child trespasser is owed no duty when the danger of the condition that injured him is obvious as a matter of law to the general class of

children of the same age and experience. *Mt. Zion*, 169 Ill. 2d at 117-18, 127. On two prior occasions, this Court heard argument on what it called the "important" question of whether a child trespasser injured by a moving train may recover under the "principles set forth in *Kahn*." *Dickeson*, 42 Ill. 2d at 109; *see Am. Nat'l Bank*, 35 Ill. 2d at 153-54. Yet because the defendants' liability in those cases could be sustained on other grounds, the Court left the issue for another day. *This* case is the perfect vehicle for resolving that issue once and for all, since the sole basis for liability was that defendants breached their purported duty under *Kahn* to prevent Choate from jumping onto a moving train.

A. The decision below is irreconcilable with *Mt. Zion*.

This Court's decision in *Mt. Zion* provides the most detailed articulation of the circumstances under which a child trespasser is owed no duty because the danger is an objectively obvious one. After making clear that the issue is a question of law for the court to decide, this Court explained that "[t]he responsibility for a child's safety lies primarily with his or her parents, whose duty it is to see that the child is not placed in danger." 169 Ill. 2d at 116. Thus, a "possessor of land is free to rely upon the assumption that any child old enough to be allowed at large by his parents will appreciate certain obvious dangers." *Id.* at 117. This legal "assumption" that it is "*reasonable to expect*" children to "appreciate certain particular dangers" necessarily entails the legal conclusion that "there is no reasonable foreseeable risk of harm" as to obvious dangers and thus "no duty" as a matter of law to trespassing children injured by them. *Id.* at 118, 126-27.

Applying these principles, this Court in *Mt. Zion* found no duty to a six-year-old who nearly drowned in a pool. *Id.* at 113, 120. Surely, if a six-year-old should be expected to recognize the danger of a calm, clear, blue pool, so too should children (such as Choate) who are nearly 13 and are routinely "permitted to be at large, beyond the

watchful eye of [their] parent[s]" (*see id.* at 126) be expected to recognize the danger of a large, loud, moving train. It is a matter of "common knowledge" (*Allen ex rel. Linder v. Martinez*, 348 Ill. App. 3d 310, 315 (2d Dist. 2004)) that, as a critic of the decision below put it, "no 12-year-old kid needs to be told that life and limb is at stake when he attempts to take on a moving freight train" (Murphy, *supra*).

B. The decision below cannot be squared with other Illinois decisions involving conditions that are no more obviously dangerous than a large, loud, moving train.

"There are *many* dangers" that "may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large." *Corcoran v. Vill. of Libertyville*, 73 Ill. 2d 316, 327 (1978) (internal quotation marks omitted; emphasis added). Thus, Illinois courts have determined that, in addition to the paradigmatic dangers of fire, water, or falling from a height, a broad range of other risks are "open and obvious" to children as a matter of law. These include "electric power lines" (*Booth v. Goodyear Tire & Rubber Co.*, 224 Ill. App. 3d 720, 726 (3d Dist. 1992)), standing on a log (*Fuller v. Justice*, 117 Ill. App. 3d 933, 941 (2d Dist. 1983)), playground slides (*Alop by Alop v. Edgewood Valley Cmty.*, 154 Ill. App. 3d 482, 485 (1st Dist. 1987)), trampolines (*Allen*, 348 Ill. App. 3d at 314), rope swings (*Bier v. Leanna Lakeside Prop. Ass'n*, 305 Ill. App. 3d 45, 52 (2d Dist. 1999)), a tennis match (*Chareas v. Twp. High Sch. Dist.*, 195 Ill. App. 3d 540, 544 (1st Dist. 1990)), and playing floor hockey (*Keller by Keller v. Mols*, 129 Ill. App. 3d 208, 211 (1st Dist. 1984)).

Given that Illinois courts have recognized that the silent, invisible dangers of electricity and the risks of ordinary children's games are obvious ones that children can reasonably expected to appreciate, the First District's holding that a loud, massive, moving train is not an obvious danger defies common sense.

C. The decision below is out-of-step with decisions nationwide.

This Court's decision in *Kahn* "brought Illinois law into harmony with section 339 of the Restatement (Second) of Torts," under which landowners have no duty to remedy dangers that are obvious to children old enough to be at large. *Corcoran*, 73 Ill. 2d at 326. The First District's decision (and the decisions it purports to follow) disrupt that harmony by authorizing juries to hold right-of-way owners liable on an *ad hoc* basis for injuries incurred from the most self-evidently obvious of dangers—jumping onto a large, loud, moving train.

Even before this Court adopted Section 339, the courts of this State had recognized that "[j]umping from the ground upon a moving freight train is dangerous, . . . and all ordinarily intelligent boys ten years of age know it to be so." *LeBeau v. Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co.*, 69 Ill. App. 557, 560 (1st Dist. 1897); *see also Fitzgerald v. Chi., Burlington & Quincy R.R. Co.*, 114 Ill. App. 118, 121 (1st Dist. 1904) (12-year-old plaintiff was "presume[d]" to "know[] that it is dangerous to attempt to get on a moving freight train"). Although these cases are not precedential, the decision below offers no reason why the observation that moving trains represent an obvious danger is any less valid today than it was over a century ago.

Indeed, the Reporter's Notes to comment i of Restatement § 339 squarely state that a "moving train" is one of the conditions "whose danger the child can reasonably be expected to appreciate." Moreover, courts in other jurisdictions applying Restatement § 339 consistently have held that even small children can recognize the danger of trying to jump onto a moving train. As one court put it, "[n]othing could be more pregnant with warning of danger than the noise and appearance of a huge, rumbling, string of railroad cars." *Herrera v. S. Pac. Ry. Co.*, 188 Cal. App. 2d 441, 449 (1961). Thus, the

"*overwhelming weight of authority*" is that "a moving train is a danger so obvious that any … child allowed at large would readily … realize the risk involved." *Holland v. Baltimore & Ohio R.R.*, 431 A.2d 597, 602-03 (D.C. 1981) (emphasis added).[5]

The leading treatises are in accord, explaining that the "perils of … moving vehicles" are among the dangers that a trespassing "child of sufficient age to be allowed at large by his parents" invariably is expected to understand "as a matter of law." DAN B. DOBBS ET AL., PROSSER AND KEETON ON TORTS § 59, at 407 (5th ed. 1984); 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").

The First District acknowledged all of this authority, but dismissed the need to "look to other states for guidance" because it believed (erroneously, we submit) that two prior First District decisions— *LaSalle National Bank v. City of Chicago*, 132 Ill. App. 3d 607 (1st Dist. 1985), and *Engel v. Chicago & North Western Transportation Co.*, 186 Ill. App. 3d 522 (1st Dist. 1989)—were "dispositive." A16 ¶ 51. In *LaSalle*, the First District held that there was a "jury question" whether the landowner had breached a duty under *Kahn* by not preventing the plaintiff from "gain[ing] access to the railroad tracks," from which he jumped onto a moving train. 132 Ill. App. 3d at 615. And in *Engel*, the First District again held that "the 'obviousness' of the danger [of a moving train] is not such

[5] *See, e.g.*, *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"); *McKinney v. Hartz & Restle Realtors, Inc.*, 510 N.E.2d 386, 389 (Ohio 1987); *Wolf v. Nat'l R.R. Passenger Corp.*, 697 A.2d 1082, 1086 (R.I. 1997); *Perry v. Norfolk & W. Ry.*, 865 F. Supp. 1292, 1302 (N.D. Ind. 1994); *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); *see also* Association of American Railroads ("AAR") Br. 5-13 (citing cases).

that no minds could reasonably differ" and therefore could not be "determined as a matter of law." 186 Ill. App. 3d at 530-31. In neither case did that court provide any reasoned basis for departing from the consensus view that moving trains present a self-evidently obvious danger to all children old enough to be at large. Moreover, as this Court subsequently made clear in *Mt. Zion*, the existence of a duty under *Kahn* "is a question of law, the determination of which must be resolved by the court." 169 Ill. 2d at 116. To make matters worse, *Engel* also held that whether the *particular child* had seen others successfully jump on the train bears on the obviousness of the danger. 186 Ill. App. 3d at 528. But as this Court held in *Mt. Zion*, the appropriate focus of *Kahn*'s objective prong is on whether the danger is obvious as matter of law to the *general class of children* old enough to be "permitted at large." 169 Ill. 2d at 117-18, 126.

Though *LaSalle* and *Engel* pre-dated *Mt. Zion*, the Appellate Court made precisely the same doctrinal errors in this post-*Mt. Zion* case. A15-16 ¶ 59 (obviousness "issue [was] one of fact for the jury," because Choate's "two unsuccessful attempts to jump on the train prior to his injuries" had not hurt him). This Court's intervention is thus clearly needed in order to bring the Appellate Court into conformity with *Mt. Zion*.

II. The Court Should Grant Review Because The Decision Below Threatens To Impose A Crushing Burden On Landowners Throughout The State.

To recover under the *Kahn* doctrine, Choate also had to show that defendants could have remedied the condition that injured him—*i.e.*, the temptation to jump onto a moving trains—at a cost that is "slight." *Mt. Zion*, 169 Ill. 2d at 117. Choate sought to meet this burden through the testimony of Dr. Berg, who opined that defendants should have fenced the 6,000-foot rail corridor between Central and Ridgeland and built a pedestrian overpass at its mid point. A18 ¶ 71. Under Dr. Berg's assumptions, these

remedial measures would have cost between $204,000 and $228,000. *See* A21, 28 ¶¶ 84, 114; *but see* note 6, *infra*. According to the First District, the jury could have found that "the fencing and overpass would be limited to the 6,000-foot corridor and would not have to be replicated elsewhere" and that the cost of such improvements was "slight" for purposes of the *Kahn* doctrine. A19-22 ¶¶ 76, 81, 84. Review is warranted because that interpretation of the *Kahn* doctrine is both wrong and profoundly troubling.

A. The decision below, in conflict with decisions of this Court, the Appellate Court, and courts in other jurisdictions, ignores the system-wide costs of the duty recognized.

The First District brushed aside the total burden of sealing off the entirety of defendants' rights-of-way—over 7,000 miles in this State alone—based solely on Dr. Berg's say-so "that defendants were required to take remedial measures *only*" in the immediate area of Choate's accident. A28 ¶ 114 (emphasis added). But this makes no sense. The "dangerous condition" ostensibly to be remedied was trespassing children jumping on moving trains, which *could occur anywhere trains are accessible to children*. Children had tried to jump on moving trains in other parts of defendants' system (A7 ¶ 22) and, indeed, Choate himself introduced evidence of "prior [train-hopping] incidents that … weren't … in the same locality" (Tr. 164, 168, 1443).

The First District's narrow focus on the cost of remedying the "condition" at the specific location of Choate's accident is directly contrary to *Lansing v. McLean County*, 69 Ill. 2d 562 (1978). There, in the course of rejecting a duty to warn about snow at one particular location on a highway, the Court explained that a "decision in [plaintiffs'] favor would require the defendants to post warning signs under *comparable* weather circumstances on *every* highway." *Id.* at 573 (emphasis added). Under *Lansing*, a decision imposing upon *these* defendants a duty to seal off the right-of-way where *this*

accident happened necessarily would impose upon *all railroads* a duty to erect fencing and build overpasses *everywhere*. In blessing Dr. Berg's result-oriented *ipse dixit* that system-wide changes would not need to be made, the decision below conflicts with *Lansing*. It also conflicts with a heretofore uniform line of Illinois authority holding that courts must consider the *total cost to society* of imposing the duty on everyone, not just the specific defendant before the court. *E.g.*, *Hanks v. Mt. Prospect Park Dist.*, 244 Ill. App. 3d 212, 218-19 (1st Dist. 1993); *Durr v. Stille*, 139 Ill. App. 3d 226, 231 (5th Dist. 1985); *Adams v. Brookwood Country Club*, 16 Ill. App. 2d 263, 272-73 (2d Dist. 1958); *Ellison v. Commonwealth Edison Co.*, 351 Ill. App. 58, 65 (1st Dist. 1953).

In this respect, too, the decision below departs from the majority approach. Recognizing that only system-wide changes (*e.g.*, cordoning off every railroad track with impenetrable fences and dotting the landscape with overpasses) conceivably could prevent trespassing children from jumping on moving trains, these courts have held, as a matter of law, that the intolerably "impracticable and burdensome task" of doing so precludes "finding any breach of duty" under Restatement § 339. *Kline v. N.Y., New Haven & Hartford R.R.*, 276 A.2d 890, 893 (Conn. 1970); *e.g.*, *Frazee v. St. Louis-San Francisco Ry.*, 549 P.2d 561, 666 (Kan. 1976) ("[n]othing short of the most pervasive and expensive security measure could ever prevent" such incidents); *Edwards v. Consol. Rail Corp.*, 567 F. Supp. 1087, 1111 (D.D.C. 1983); *Norfolk & Portsmouth Belt Line R.R. v. Barker*, 275 S.E.2d 613, 616 (Va. 1981); *see* AAR Br. 13-18 (collecting cases).

B. The decision below, in conflict with decisions of this Court and the Appellate Court, abrogates the principle that railroads are not obliged to seal off their entire rights-of-way.

It long has been the law of this State that neither statute nor the common law requires railroads to fence against trespassing children. *Bischof v. Ill. S. Ry.*, 232 Ill. 446,

453-54 (1908) ("It may well be that the Legislature made no provision that railroad[s] … should fence against persons … [since] it would be substantially impossible for a railroad company to construct a fence which would be an effectual barrier even to young boys."); *Briney v. Ill. Cent. R.R.*, 324 Ill. App. 375, 381 (1st Dist. 1944) ("The fencing statute of this state imposes no duty to fence against children. … There is no common law duty to do so."). Because only an unrealistically comprehensive system of barriers could prevent trespassing children from trying to jump onto a moving train, the decision below imposes a duty that the General Assembly and the courts of this State heretofore have declined to recognize. Unless the Court grants review, the principle that railroads need not cordon off their entire rights-of-way could become a dead letter.

C. The decision below imposes an unprecedentedly burdensome duty, even as to the 6,000-foot corridor where the accident occurred.

Even if the concerns expressed by this Court in prior cases could be dispensed with simply on the basis of a paid expert's say-so, this case still raises the question whether *Kahn* imposes duties on landowners to undertake whatever expenditures a jury deems to be "slight." Accepting for present purposes Dr. Berg's understated and unfounded estimates,[6] the cost of preventing children from jumping onto moving trains in just this single 6,000-foot portion of track would run into the hundreds of thousands of

[6] It is undisputed that the construction of any overpass would have to be approved by the Illinois Commerce Commission. Tr. 1327. Yet Dr. Berg admitted that he had not "reviewed" the ICC's rules (Tr. 1328), which provide for an extensive application and hearing process (*see* 625 ILCS 5/18c-7401(3); Tr. 1948-50). Dr. Berg also made elementary errors in arithmetic when estimating the cost of building his proposed fence, which the First District brushed aside (Tr. 1310-11; A21-22 ¶¶ 82-84; A32-33); had no idea how much maintaining that fence would cost (Tr. 1309); and had no factual basis for concluding that a new overpass could be constructed at all, let alone for only $150,000. Dr. Berg admitted that he had never designed or built a bridge (Tr. 1320-21); that he had not "done any design studies," sketches, or "cost estimate[s]" (Tr. 1323, 1360); and that he had not even determined the overpass's width or how high it would have to be to comply with the ICC's height-clearance requirements (Tr. 1323-24, 1361).

dollars. Here alone, the remedial measures that he said were necessary—*i.e.*, the construction and maintenance of thousands of feet of new fencing and a new pedestrian overpass—are unprecedentedly burdensome. Moreover, under Dr. Berg's own logic, constructing a single overpass midway through the 6,000-foot corridor could not possibly be an effective remedy, as it would not prevent trespassers from jumping onto moving trains at the at-grade crossings at both ends of the corridor. Tr. 961, 1262, 1315, 1345-46, 1886, 2441. So those existing crossings would have to be converted to overpasses as well. Indeed, Dr. Berg confessed that "at some point … you might want" still *another* "crossing point … where [Choate's] incident occurred," since "no one would know" whether his proposed overpass would do the trick. Tr. 1255, 1318-19.

Defendants are aware of no case that has ever imposed a duty on a landowner to build even *one* overpass. The First District affirmed a jury verdict implicitly finding that defendants were negligent for not having built at least *three* (or possibly *four*) new overpasses prior to the accident. If the requirement that the cost of the remedy must be "slight" means anything at all, the duty imposed by the First District here cannot stand. To hold otherwise would eviscerate the *Kahn* doctrine.

III. The Court Should Grant Review To Determine Whether Asserted Defects In A Special Interrogatory That Were Not Raised Below May Be The Basis For Affirming The Trial Court's Refusal To Give The Interrogatory.

Under the *Kahn* doctrine, even if the danger is not deemed to be obvious to children generally, the particular plaintiff's "appreciation of the risk" has "consistently been recognized as sufficient to free a defendant landowner" of any duty to that plaintiff. *Colls v. City of Chi.*, 212 Ill. App. 3d 904, 933 (1st Dist. 1991).[7] Defendants proposed a

[7] *See, e.g.*, *Hagy v. McHenry County Conservation Dist.*, 190 Ill. App. 3d 833, 840 (2d Dist. 1989) ("consideration of the particular minor plaintiff's knowledge is (cont'd)

special interrogatory that would have asked the jury: "At the time and place of [plaintiff's] accident, did he appreciate that attempting to jump onto a moving freight train presented a risk of harm to him?" A23 ¶ 91.

It is clear Illinois law that "[t]he jury … *must* be required on request … to find specially upon any material question … of fact," the answer to which might be inconsistent with a general verdict. 735 ILCS 5/2-1108 (emphasis added). Nevertheless, the circuit court refused to give the special interrogatory, accepting Choate's contention that the plaintiff's appreciation of the risk is subsumed by the jury's consideration of comparative negligence. Tr. 2342-43. Because Choate did not even try to defend that manifestly erroneous ground on appeal,[8] the First District had to look elsewhere for a basis to affirm. It held that the proposed special interrogatory "was not in proper form" because the interrogatory omitted the adjective "full" before "risk of harm." A23 ¶ 95. According to the court, "the relevant inquiry is whether plaintiff appreciated the '*full* risk' of harm involved in jumping aboard the moving freight train" and not simply whether Choate appreciated that the freight train presented "*a* risk of harm to him." *Id.* In the First District's view, the "plaintiff's appreciation of some lesser risk of harm … would not have … negated defendant[s'] duty toward him." *Id.*

Review is warranted because the legal premise of the First District's ruling conflicts with prior Appellate Court decisions. In *Shull v. Harristown Township*, 223 Ill. App. 3d 819 (4th Dist. 1992), for example, an 8-year-old child was injured while

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appropriate where the minor has some greater understanding of the alleged dangerous condition"); *Alop*, 154 Ill. App. 3d at 485-87.

[8] As this Court has explained, "[t]he [*Kahn*] exception … is not merely a matter of contributory negligence … , but of lack of duty to the child" (*Mt. Zion*, 169 Ill. 2d at 117-18), and "[t]he existence of a defendant's legal duty is separate … from … the parties' comparative fault" (*Bucheleres v. Chi. Park Dist.*, 171 Ill. 2d 435, 447 (1996)).

swinging on a sliding gate. The Fourth District concluded that the plaintiff could not recover under the *Kahn* doctrine because he had admitted that, "while he was swinging on the gate, he knew he could injure his hand if it became lodged under the roller." *Id.* at 826. Rejecting the plaintiff's argument that this testimony did not mean that he "*fully* understood the consequences," the *Shull* court explained that even when the plaintiff "may not have known the *extent*" of his injuries, the property owner is not "responsible for injuries suffered by the child" so long as the plaintiff knew that the condition was dangerous. *Id.* at 826-27 (emphasis added). In other words, it is immaterial under the *Kahn* doctrine whether the "child knows the *full* extent of injuries to which he might be exposed by ignoring risks associated with a known danger." *Id.* (emphasis added).

Several other cases likewise do not require that the plaintiff have "full" knowledge of the risk in order for liability to be precluded. *See, e.g.*, *Colls*, 212 Ill. App. 3d at 950 ("there can be no liability to a minor who, in fact, appreciated the risk"); *Hagy*, 190 Ill. App. 3d at 840 ("the defendant owed no duty to this plaintiff where the plaintiff in fact … was able to appreciate the risk involved"). Indeed, in *LaSalle National Bank v. City of Chicago*, 132 Ill. App. 3d 607 (1st Dist. 1985), the First District all but invited the special interrogatory that defendants proposed by stating that there can be no liability under *Kahn* if the jury makes a "specific finding that plaintiff 'appreciated the risk' in jumping on a moving freight train" (*id.* at 615)—with nary a "full" in sight.

Besides being wrong on the merits—and in conflict with four prior Appellate Court decisions—the decision below severely undermines the salutary purposes of the statutory requirement that courts give a special interrogatory whenever the factual question covered by the interrogatory would be dispositive of liability. Choate did not

object to the wording of the proposed interrogatory in the trial court. A24 ¶ 96. That should have ended the matter. As defendants explained in their reply brief and reiterated repeatedly during oral argument, the First District had previously held that when a party fails to "raise[] in the trial court" the objection that the proposed "special interrogatory was improper in form," that rationale may not serve as a basis for affirming the refusal to give the interrogatory. *Hills of Palos Condo. Ass'n v. I-Del, Inc.*, 255 Ill. App. 3d 448, 469 (1st Dist. 1993). Nevertheless, in conflict with *Hills of Palos*, the First District held that it was entitled to affirm "on any basis appearing in the record." A24 ¶ 96.

For the Appellate Court to embrace Choate's belated semantic quibble—especially when it is clear that the circuit court would not have given the interrogatory with or without the adjective "full"—fundamentally undermines the special-interrogatory mechanism. This is not simply a matter of waiver. Rather, when an "objection as to form" is not "raised in the trial court," the party proposing the interrogatory is denied the "opportunity to address and cure it." *Hills of Palos*, 255 Ill. App. 3d at 469. Indeed, the special interrogatory would cease to carry out its function "as guardian of the integrity of a general verdict" (*Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002)) if the bait-and-switch approach employed here is allowed to take hold.

This case perfectly illustrates the "important check upon the accuracy of the general verdict" that special interrogatories are meant to serve. *Snyder v. Curran Twp.*, 281 Ill. App. 3d 56, 64 (4th Dist. 1996). There was a wealth of evidence from which the jury could have found that Choate did in fact appreciate the risk of jumping on a moving train: *e.g.*, Choate admitted that his mother had repeatedly warned him of the dangers of moving trains; Choate admitted that he had been caught trespassing on railroad property

by railroad police officers before and had been warned to stay away; Choate testified that the roaring noise of the train made it impossible for him to hear his friends' shouted warnings; and it was undisputed that Choate's first two attempts to jump on the train (as well as that of an older companion) ended in failure. A16-17 ¶ 64. An affirmative answer to the proposed special interrogatory would have conclusively foreclosed the existence of a duty to Choate under the *Kahn* doctrine (*Colls*, 212 Ill. App. 3d at 934) and thus served as a valuable "test" of the jury's general verdict (*Snyder*, 281 Ill. App. 3d at 64). The Court should grant review to resolve the square conflict between the decision below and *Hills of Palos* and to forestall the erosion of the special-interrogatory safeguard.

CONCLUSION

For the foregoing reasons, the Petition for Leave to Appeal should be granted.

Dated: September 2, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that this petition conforms to the requirements of Rules 315 and 341. The length of this petition, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificates of service and mailing, and those matters to be appended to the petition under Rule 315, is 20 pages.

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Michele L. Odorizzi

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is one of the attorneys for defendants-petitioners and that she served three copies of the foregoing **Petition for Leave to Appeal** on all counsel of record by causing the same to be delivered, delivery charges prepaid, to a third-party commercial carrier at 71 South Wacker Drive, Chicago, Illinois, before the hour of 5:00 p.m. on September 2, 2011 for overnight delivery to the following addresses:

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CERTIFICATE OF MAILING

The undersigned hereby certifies that she is one of the attorneys for defendants-petitioners and that she filed the foregoing **Petition for Leave to Appeal** by causing the original of the Notice of Filing and 20 copies of the Petition to be delivered to a third-party commercial carrier at 71 South Wacker Drive, Chicago, Illinois, before the hour of 5:00 p.m. on September 2, 2011 for overnight delivery to the Clerk of the Court. Delivery charges were prepaid and the package was addressed to:

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