No. 112948

IN THE
SUPREME COURT OF ILLINOIS

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 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*

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ORAL ARGUMENT REQUESTED

INTRODUCTION

The central issue here is *duty*—specifically, whether defendants owed a duty to Choate, a trespassing adolescent who tried three times to jump on a moving train in order to show off for his girlfriend. When "no duty exists, it is axiomatic that no recovery can occur." *Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc.*, 169 Ill.2d 110, 116 (1995). Ignoring contrary precedent, Choate insists that whether the danger of jumping on a moving train is obvious to trespassing children generally is a question of fact for the jury, when it actually is a question of law for this Court—one that the Court should answer in the affirmative. Moreover, Choate concedes that he himself "recognized on the day of the accident" that trains and train tracks are dangerous, an admission that is independently dispositive. Pl. Br. 14. Finally, Choate has no meaningful response to our argument that recognition of liability *here* necessarily would impose inordinate and extraordinary *state-wide* burdens—the duty to seal off rights-of-way and build overpasses anywhere trespassing children might try to jump on moving trains.

ARGUMENT

The most salient fact in this case is not disputed—Choate, a trespassing adolescent, was injured while trying to jump onto a moving train. Nevertheless, we feel obliged to correct some of the more misleading statements in Choate's brief before refuting his arguments on the important legal issues in this case.

The train was moving all three times he tried to jump on it. Although Choate now asserts that the train was stopped when he initially approached it (Pl. Br. 1, 4, 45), Choate admitted at trial that the train was "going at a steady speed"—"[s]ay, 9, 10 miles an hour"—and "never stopped" the entire time it was in sight (Tr. 1734, 1766; Opening Br. 5 & n.3, 22 n.8). Indeed, Choate testified that the force of the moving train "bent [his]

two fingers backwards" during his first attempt to board it. Tr. 1688.

Choate was not mentally retarded. Contrary to Choate's repeated insinuations (Pl. Br. 3, 37, 41), he scored in the "low average to average" range on an intelligence test and was capable of handling age-appropriate coursework (*i.e.*, sixth grade). Tr. 1479-80, 1483 (mental retardation "eliminated from consideration"), 1763-64 (working on his GED).

The "park" is irrelevant. The "park" that Choate continually references (Pl. Br. 5, 25, 45) has no connection to this accident. Choate was hanging out with friends in an apartment-building parking lot adjacent to the tracks. Tr. 723-24, 1678-79.

There was a warning sign. Choate misleadingly omits the word "DANGER" in describing the sign posted by the end of the fence behind the parking lot. *Compare* Pl. Br. 5, 10 *with* Tr. 720, 1735; DX18B ("DANGER / NO TRESPASSING / NO DUMPING").

I. Defendants Owed No Duty To Choate Under *Kahn*.

A. Defendants Are Entitled To Judgment Under The *Kahn* Doctrine's Objective Element.

Illinois courts have held, as a matter of law, that trespassing children can reasonably be expected to appreciate a variety of risks that are far *less* obviously dangerous than a large, loud, moving freight train—*e.g.*, the silent, invisible dangers of electricity, drowning in a still pool of water, or falling from stationary objects. Opening Br. 20-24. Choate's efforts to evade the force of this body of law fall far short.

1. The obviousness of a danger is an issue of law when, as here, the nature of the condition is not disputed.

Choate and proposed *amicus* Illinois Trial Lawyers Association ("ITLA") assert that juries must decide the obviousness of a danger on a case-by-case basis. Pl. Br. 22; ITLA Br. 11. In so doing, they ignore this Court's holding in *Mt. Zion* that whether a "duty exists [under *Kahn*] is a question of law, the determination of which must be

resolved by the court." 169 Ill.2d at 116. That legal question includes within it the question whether a particular condition presents an obvious danger to children old enough to be at large. Opening Br. 19-20, 22 & n.8. Here, the material facts about the "condition" are undisputed: Choate admits that he was injured while trying to jump onto a train moving at 9 or 10 miles per hour. Pl. Br. 4, 25-26; Opening Br. 5 n.3, 22 n.8. There is no factual dispute to be resolved before this Court may decide that this danger is, as a matter of law, obvious to children of Choate's general age and experience.

2. As a matter of law, the danger of jumping onto a moving train is objectively obvious.

Illinois courts have held that a broad range of dangers are so obvious that landowners may expect trespassing children to appreciate them. In *Mt. Zion*, for example, this Court held that the defendant owed no duty to a six-year-old who nearly drowned because a "pool . . . is an obvious danger" that landowners "could reasonably expect" trespassing children to appreciate. 169 Ill.2d at 120. This Court similarly has held that the "risk of falling" is an obvious one. *Logan v. Old Enter. Farms, Ltd.*, 139 Ill.2d 229, 241 (1990). And Illinois courts have held that many other dangers—including those posed by climbing a ladder on a parked freight car and electric power lines—also are obvious as a matter of law. Opening Br. 20-24. To affirm the ruling below would require overruling numerous Illinois cases holding that dangers far *less* obvious than that of a moving train nonetheless should be deemed to be obvious to children as a matter of law.

a. Choate's attempt to distinguish these cases is largely devoid of reasoning. For example, he asserts that *Mt. Zion* "involved the danger of water" and that *Logan* involved "heights," which "have been deemed open and obvious . . . for decades" without saying how that distinguishes moving trains. Pl. Br. 26-27. While Choate asserts that the

power-line cases somehow are "different" because "children are told from a very early age . . . to stay away from electric outlets" (*id.* at 27), he gives no basis for supposing that children who live near train tracks aren't also told to stay away from moving trains. Quite the contrary: Choate admitted that he repeatedly had been warned about those dangers. Opening Br. 3-4, 36-37. And so were other neighborhood children. Pl. Br. 7-8.

Choate implicitly assumes (as did the decision below) that fire, water, and heights are the *only* conditions whose danger is obvious as a matter of law. ITLA describes these conditions as forming a "circumscribed list."[1] ITLA Br. 4. However, this Court has held that "obvious dangers include"—and thus are not limited to—"fire, drowning in water, or falling." *See* Opening Br. 18-19 & n.5 (quoting *Mt. Zion*, 169 Ill. 2d at 118). Having no rejoinder to this point, Choate ignores it.

b. Like the First District, Choate and ITLA rely principally on *Engel v. Chicago & North Western Transportation Co.*, 186 Ill.App.3d 522 (1st Dist. 1989), and *LaSalle National Bank v. City of Chicago*, 132 Ill.App.3d 607 (1st Dist. 1985), for the proposition that the obviousness of the danger of moving trains is a question of fact. Pl. Br. 22-24; ITLA Br. 11-12. But those cases have been implicitly overruled by *Mt. Zion*, which held that the duty issue is one of law. *See* Opening Br. 21-22. Choate barely acknowledges *Mt. Zion*, much less comes to grips with it.

Furthermore, Choate does not rebut our explanation for why these cases are unpersuasive and distinguishable even on their own terms. *See* Opening Br. 21 n.7. For example, in departing from the consensus view that moving trains are an obvious danger

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[1] ITLA asserts that moving trains do not present an obvious danger because that would mean that "any moving motor vehicle present[s] obvious dangers such that no duty is owed to pedestrians." ITLA Br. 4. ITLA ignores that Choate's claim asserts *premises liability* against an absent landowner, not *active negligence* by, for example, a driver.

as a matter of law, *Engel* relies solely on *ipse dixit*. Choate brushes aside the manifold factual distinctions (for example, that the train in *Engel* was travelling half as fast; Engel saw others jump on trains; the conductor had waved to Engel; and the defendant park district voluntarily assumed a duty to fence[2]) as "insignificant." Pl. Br. 26. But he offers no explanation for what else the *Engel* court could have meant when it said that "Engel could not be presumed to have realized the dangers . . . *because he had seen others . . . successfully mount*" trains and that "[u]nder *different facts than are present* in this case . . . a judge could find that the danger was obvious . . . and find no duty existed as a matter of law." 186 Ill.App.3d at 528, 531 (emphasis added).

Choate's other cases similarly are inapposite, readily distinguishable, or both. We addressed *LaSalle* in our opening brief (at 21 n.7). In *American National Bank & Trust Co. v. Elgin, Joliet & Eastern Railway*, 133 Ill.App.2d 450 (1st Dist. 1971), the First District held that the railroad could be found liable in what it called "a most unusual situation" for failing to carry out its contractual obligation to erect a fence along its own right-of-way. *Id.* at 453, 455. As in *LaSalle*, the court did not address whether the danger of jumping onto a moving train is objectively obvious.[3]

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[2] Choate asserts that defendants voluntarily assumed a duty to protect him through their educational and enforcement initiatives. Pl. Br. 26. That contention is forfeited because it was never raised below. It also is meritless. There is no evidence that defendants undertook to keep Choate from jumping onto trains or that their initiatives "'increase[d] [Choate's] risk of . . . harm'" or "'induced [Choate] to forgo other . . . precautions.'" *Rowe v. State Bank*, 125 Ill.2d 203, 217-18 (1988). Moreover, even assuming *arguendo* that defendants undertook "to perform such services, [their] duty was limited by the extent of the undertaking" (*id.* at 218-19)—*i.e.*, education and patrolling—and there is no evidence that they failed to use reasonable care in *those* respects. Indeed, Choate's expert admitted that defendants were "regularly in the schools" to educate youth and had devoted "a lot of resources to enforcement." Tr. 1299-1300.

[3] Choate cites a number of additional cases in a footnote. *See* Pl. Br. 22 n.3. Neither *Pellegrini v. Chicago, Rock Island & Pacific Railroad*, 91 Ill.App.3d 1091 (1st Dist. (cont'd)

c. Our opening brief also explained that the decision below is out of step with the decisions of other courts that have adopted the Restatement's approach to premises liability. Opening Br. 25-28. This is no surprise, given that the Reporter's Notes to Section 339 of the Restatement cite a "moving train" as an example of an obvious danger. *Id*. at 25. Tellingly, Choate neither acknowledges the Reporter's Notes nor identifies any cases in which courts applying the Restatement § 339 approach have held that a moving train is *not* an obvious danger.

In any event, Choate's attempted distinctions of the cases that we cited fall flat. As our opening brief explained (at 24-25) and as we discuss further below (at 8-9), defendants' knowledge that trespassing children may try to jump onto moving trains has no bearing on whether that danger is obvious as a matter of law. It thus is immaterial that *Holland v. Baltimore & Ohio Railroad*, 431 A.2d 597 (D.C. 1981), and *Nixon v. Norfolk Southern Corp.*, 295 F. App'x 523 (3d Cir. 2008), did not discuss the frequency of trespassing. *Cf.* Pl. Br. 30-31. *Holland* squarely held that liability under Section 339 of the Restatement is precluded because, "*as a matter of law*, . . . a moving train is a danger so obvious that any nine-year-old child allowed at large" is held to appreciate it. 431 A.2d at 599, 603 (emphasis added). So did *Nixon*. *See* 295 F. App'x at 524-25.

Contrary to Choate's submission (Pl. Br. 31), *Herrera v. Southern Pacific*

1980), nor *Dickeson v. Baltimore & Ohio Chicago Terminal Railroad*, 73 Ill.App.2d 5 (1st Dist. 1965), addressed whether the danger of jumping onto a moving train is objectively obvious. Moreover, those cases were decided "before the adoption of comparative negligence," which has eroded "[w]hatever validity [their] rationale" may once have had. *Colls v. City of Chicago*, 212 Ill.App.3d 904, 932, 949 (1st Dist. 1991). *American National Bank & Trust Co. v. Pennsylvania Railroad*, 52 Ill.App.2d 406 (1st Dist. 1964), merely rejects the contention that children injured by "objects in motion" (as opposed to "stationary objects") can never recover under *Kahn*. *Id.* at 421. And like *LaSalle*, *American National Bank* also involved a "special ordinance" imposing upon the railroad "the duty to fence the area." *Id.* at 431.

Railway, 10 Cal.Rptr. 575 (Ct. App. 1961), did not turn on contributory negligence. It held that "the basic requirements" under Section 339 of the Restatement could not be met because, *inter alia*, the trespassing child could be held to "understand[] and appreciate[] the danger of hopping . . . a moving railroad car." *Id.* at 579-81. Choate ignores the other California decision we cited—*Joslin v. S. Pac. Co.*, 11 Cal.Rptr. 267 (Ct. App. 1963).

In *Henderson v. Terminal Railroad Association*, 736 S.W.2d 594 (Mo. Ct. App. 1987), the Missouri court adhered to its holding in *Henderson v. Terminal Railroad Association*, 659 S.W.2d 227 (Mo. Ct. App. 1983), that a moving train is an open and obvious danger and that a trespassing child cannot establish the existence of a duty under Section 339 as a matter of law. *See* 736 S.W.2d at 600 (prior opinion established "law of the case"). The Missouri court sustained the jury's verdict in favor of the plaintiff on an *entirely different* theory of liability, which applies only when a train crew is *actively* negligent to an observed trespasser in immediate peril. *Id.* at 599-600.

Space v. National Railroad Passenger Corp., 555 F. Supp. 163, 168 (D. Del. 1983), stated that a plaintiff shocked by a live transformer wire might be able to establish a duty under Section 339. But in so holding, the court first embraced the "nearly universally accepted view that a moving train [does] *not*" trigger liability under the Restatement. *Id.* at 166 (emphasis added).

Finally, Choate asserts that older cases are irrelevant because what was obvious in the past "may not be obvious today." Pl Br. 26. But train tracks and grade crossings continue to be a ubiquitous feature of the State's landscape, as the official statistics cited by *amici* the Association of American Railroads ("AAR"), the Chicago Transit Authority, and Metra confirm. AAR et al. Br. 1-2, 7, 10.

3. The fact that other children have tried to jump onto moving trains does not detract from the obviousness of the risk.

Choate suggests that the fact that other children have tried to jump onto moving trains means that the risk cannot be an obvious one. Pl. Br. 18, 21, 25. We explained in our opening brief (at 24-25) why this argument misses the mark. The unfortunate fact that some children will expose themselves to obvious dangers, perhaps "in a spirit of bravado or to gratify some other childish desire," presents no basis to impose a duty. Restatement (Second) of Torts § 339, cmt. i. Whether a danger is obvious is a question of law, the resolution of which is unaffected by the fact that children may have "fail[ed] to avoid [the] risk." *Hootman v. Dixon*, 129 Ill.App.3d 645, 651 (2d Dist. 1984).

Choate also asserts that defendants realized that their education and enforcement initiatives were "not enough" to keep trespassers away from moving trains and that they "knew that children ignored the dangers" of trains. Pl. Br. 21, 25. These are red herrings.[4] The very same thing could be said of the landowners relieved of liability under the objective element of the *Kahn* doctrine when trespassers dove into shallow bodies of water or fell out of trees. *E.g., Logan*, 139 Ill.2d at 240. Efforts to "keep youthful trespassers away"—even assuming that there was "reason to know that they were" not fully effective—have no bearing on the obviousness of a danger. *See Howard v. Atl. Coast Line R.R.*, 231 F.2d 592, 595 (5th Cir. 1956). For example, parents and schools regularly educate children about very obvious dangers—such as playing with matches or

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[4] Choate falsely states that one of defendants' employees, IHB Special Agent James Griffith, "admitted that children of [Choate's] age don't appreciate the dangers posed by the trains." Pl. Br. 18, 47. To the contrary, Griffith mused that "*[s]ome* kids," perhaps a "younger child" (such as a "kindergartner or a preschooler"), as distinguished from an "older child" (such as a "high-schooler or a junior-higher"), might not as readily appreciate it. Tr. 1452 (emphasis added).

going into the pool alone—but this has never been thought to diminish their obviousness. Indeed, Choate cannot possibly be right that efforts to educate children about the dangers of trains prove that the danger is not obvious. That would have the perverse result of discouraging defendants from warning children about dangers and making public safety announcements.

4. Under *Kahn*'s objective element, the obviousness of the danger precludes recognition of a duty.

Choate was undisputedly a *trespasser*. Opening Br. 5; A4. Yet he relies on cases involving *invitees* and asserts that the obviousness of the danger of jumping onto moving trains is not dispositive because (in his view) defendants still should have expected that some children would attempt that foolhardy feat and be injured. Pl. Br. 20-22, 25 (citing *Quereshi v. Ahmed*, 394 Ill.App.3d 883 (1st Dist. 2009)). We addressed this argument (*see* Opening. Br. 18, 29 n.11), and Choate does not acknowledge, let alone try to rebut, the authority we cited.

As we explained, when the plaintiff is an *invitee*, the obviousness of the danger is not always a bar to liability because other factors may enter into the duty analysis.[5] But the "rule of no liability for open and obvious conditions" applies with absolute force to *trespassers*. *Lange v. Fisher Real Estate Dev. Corp.*, 358 Ill.App.3d 962, 972 (1st Dist. 2005). In *Mt. Zion*, this Court specifically "reiterate[d]" that, as a matter of law, "obvious dangers present *no foreseeability of harm*, and thus *no duty*" to trespassing children injured by them. 169 Ill.2d at 125 (emphasis added). In other words:

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[5] We note, though, that even if Choate had been an invitee, he could not satisfy either the "distraction" or the "deliberate encounter" exceptions to the rule that there is no duty to protect against obvious dangers. *Sollami v. Eaton*, 201 Ill.2d 1, 16-17 (2002). A massive, moving freight train is not the sort of danger that an individual might "momentarily forget" about or feel an "economic compulsion" to try to jump abroad. *Id.*

> [S]ince children are expected to avoid dangers which are obvious, there is no reasonably foreseeable risk of harm. The law then is that foreseeability of harm to the child is the test for assessing liability; but there can be no recovery for injuries caused by a danger found to be obvious.

Cope v. Doe, 102 Ill.2d 278, 286 (1984).

B. Defendants Are Entitled To Judgment Under The *Kahn* Doctrine's Subjective Element.

The *Kahn* doctrine's subjective element affords an independent basis for reversal.

1. The *Kahn* doctrine's subjective element does not require "full" awareness of the risk.

Illinois courts have never required the plaintiff's awareness of the "full" extent of the danger in order for liability to be precluded under *Kahn*'s subjective prong. *See* Opening Br. 31-32. Choate tries to brush aside the cases we cited for this proposition (*see* Pl. Br. 37-38), but he cannot dispute that in one of them the court squarely held that an "obvious risk is not limited to circumstances where the child knows the full extent of injuries to which he might be exposed by ignoring risks associated with a known danger." *Shull v. Harristown Twp.*, 223 Ill.App.3d 819, 825-27 (4th Dist. 1992); *cf. Sollami*, 201 Ill.2d at 14, 25 (rejecting imposition of duty notwithstanding *dissent's* contention that the "specific risk of harm . . . is not so apparent"). Meanwhile, he does not even attempt to deal with the out-of-state authority we cited. Opening Br. 32-33.

Changing the topic, Choate argues that defendants had to show that he knew more about the risk of moving trains than did his companions. Pl. Br. 34-35. But his reliance on *Swearingen* and *Colls* is misplaced because he fails to appreciate that *Kahn*'s subjective element is reached only if the risk is not an objectively obvious one. *Mt. Zion*, 169 Ill.2d at 126. Thus, in asking whether the plaintiff has a greater understanding of the risk than the "typical child" or "typical minor," *Swearingen* and *Colls* were merely restating the

background premise that the condition was not obvious to children of the plaintiff's general age and experience. The dispositive question under *Kahn*'s subjective element remains whether the plaintiff "was aware of the dangerous character of the" condition (*Swearingen*, 181 Ill.App.3d at 363) and "in fact did appreciate" that danger (*Colls*, 212 Ill.App.3d at 945-46). Knowledge of the "full" risk of harm is unnecessary.

2. The evidence overwhelmingly shows that Choate cannot satisfy the *Kahn* doctrine's subjective element.

If ever there were a case in which the *Pedrick* standard required overturning a verdict, this would be it. The only basis for Choate's contention that he was unaware of the risk is his self-serving testimony at trial that he thought "everything would be fine" and that he did not appreciate the danger "while [he] was doing it." Pl. Br. 36 (citing Tr. 1689, 1763). But on the other side of the ledger is Choate's admission at his deposition that he appreciated at the time of the accident that the "train . . . [he was] grabbing onto was dangerous" (Tr. 1762-63), as well as his admission that he was repeatedly warned about the danger of moving trains (*see* Opening Br. 3-4, 36-37).

a. It is telling that Choate does not defend the First District's *sua sponte* recharacterization of his deposition testimony as speaking only to his knowledge of the risk at the time of his deposition. Indeed, he concedes—as he has done throughout the case (*see* Opening Br. 35-36)—that he stated at his deposition 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. 14; *id.* at 12, 35. This is a binding judicial admission that Choate was not free to contradict at trial. Choate's contentions to the contrary lack merit.

Choate contends that he did not understand all of the questions at the deposition. Pl. Br. 35, 41. But he does not seriously dispute that he understood the crucial question

about the dangerousness of trains.[6] Choate agreed that something is "dangerous" if it "could *take a body part*" or "hurt" or "kill" him. A53-54 (emphasis added). Furthermore, Choate admitted that, on the day of the accident, he would have understood the "DANGER / NO TRESPASSING / NO DUMPING" sign to mean that it was "harmful" to go on the trains. Tr. 1735-36; A54. Choate—who was not mentally retarded and scored "above the level of expectancy" on a test of "reading and spelling" (Tr. 1483)—plainly understood the meaning of "dangerous," an ordinary and commonplace word.

Choate also argues that his statement could not be a judicial admission because it was merely a conclusion. Pl. Br. 36. But it was a concrete fact peculiarly within Choate's knowledge whether he did or did not appreciate that moving trains are dangerous. Whether a person did or did not have "knowledge" of something is a "question of fact," not a conclusion, and therefore a fit subject for a judicial admission. *Steiner Elec. Co. v. NuLine Techs., Inc.*, 364 Ill.App.3d 876, 882 (1st Dist. 2006); *People v. West*, 102 Ill.App.3d 50, 56 (2d Dist. 1981) (explaining that a party's "state of mind, his knowledge and intent" can be established from his "own testimony").

Finally, Choate asserts that any failure to give effect to his judicial admission was not prejudicial because defendants were able to use his deposition testimony for "impeachment." Pl. Br. 41. That misses the point. Because of the circuit court's error, Choate was able to change stories on the stand and claim that he did not know "while . . . doing it" that jumping onto a moving train was dangerous. Tr. 1758. The defining characteristic of a judicial admission is that a party is *conclusively bound*; it cannot be contradicted or qualified. Therefore, the prejudice is plain. Correctly recognized as a

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[6] That question did not come "at the end of a lengthy deposition." *Cf.* Pl. Br. 35. It came about halfway through and had been preceded by a short break. A57, 59, C379.

judicial admission, Choate's statement that he appreciated the risk of moving trains *by itself* entitled defendants to judgment under *Kahn*'s subjective element.

b. In any event, Choate's statement is at least an *evidentiary* admission, which, when coupled with the other evidence, compels the conclusion that Choate appreciated the risk. Choate concedes (Pl. Br. 36) that he heard warnings—*over a dozen of them*—from his mother and from the railroad police about the danger of moving trains.[7] *See* Opening Br. 35-36. These warnings could not have failed to apprise him of that very danger. *E.g., Sampson v. Zimmerman*, 151 Ill.App.3d 396, 398-99 (2d Dist. 1986) ("plaintiff had been warned"); *Prince v. Wolf*, 93 Ill.App.3d 505, 506 (1st Dist. 1981) ("[t]he boys' parents had warned them"). Choate asserts that the warnings are irrelevant because they "apparently had no effect" on him. Pl. Br. 36. What matters under *Kahn*'s subjective element, though, is that Choate "appreciate[d] the risk, not that he . . . avoid[ed] it." *Swearingen*, 181 Ill.App.3d at 363. When "the particular child, because of . . . prior warning[s,] in fact appreciated" the risk, no duty is owed. *Colls*, 212 Ill.App.3d at 935. The verdict cannot stand under the *Pedrick* standard. *See* Opening Br. 37-38.

3. At minimum, defendants are entitled to a new trial.

A new trial would be warranted even assuming *arguendo* that *Kahn*'s subjective element requires appreciation of the "full" risk. *See* Opening Br. 38-40. Choate's arguments to the contrary are unpersuasive.

Resurrecting the sole argument he made to the trial court (but which he abandoned before the First District), Choate suggests that defendants' interrogatory

[7] In light of the prior warnings that Choate admitted receiving, it is irrelevant whether he also heard the warnings at the scene of the accident. We note, though, that contrary to Choate's accusation (Pl. Br. 37), we acknowledged that he testified that he could not hear the shouted warnings of his companions. *See* Opening Br. 6, 37.

regarding his awareness of the danger was subsumed by the jury's consideration of comparative fault. *Compare* Pl. Br. 17, 40 *with* 1st Dist. Pl. Br. 33-34.[8] This Court has repeatedly and squarely rejected the conflation of duty and comparative negligence. *E.g.*, *Bucheleres v. Chi. Park Dist.*, 171 Ill.2d 435, 447 (1996); *Mt. Zion*, 169 Ill.2d at 113, 117-18; *Deibert v. Bauer Bros. Constr. Co.*, 141 Ill.2d 430, 448 (1990). As this Court has explained, "[t]he existence of a defendant's legal duty is separate and distinct from . . . the parties' comparative fault" (*Bucheleres*, 171 Ill.2d at 447), and "[t]he [*Kahn*] exception for obvious dangers is 'not merely a matter of contributory negligence . . . , but of *lack of duty to the child*'" (*Mt. Zion*, 169 Ill.2d at 117-18; *Colls*, 212 Ill.App.3d at 934). When, as here, there is no duty on account of the plaintiff's appreciation of the danger, the issue of comparative fault never arises. *See* Opening Br. 30 & n.12.

Choate concedes that he "did not argue to the trial court that the special interrogatory required the word 'full[].'" Pl. Br. 42. But he asserts that the First District nonetheless was entitled to affirm on this ground because he objected to the interrogatory on a different ground. This misses the point: An objection to an interrogatory on *one* basis does not preserve an objection on *another* basis when, as here, the supposed defect easily could have been "address[ed] and cure[d]" had it been raised below. *Hills of Palos Condo. Ass'n v. I-Del, Inc.*, 255 Ill.App.3d 448, 469 (1st Dist. 1993).

C. Defendants Are Entitled To Judgment Under The *Kahn* Doctrine's Remedial Element

In attempting to respond to our argument that there is no duty because defendants could not have remedied the "condition"—*i.e.*, trespassing children trying to jump onto

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[8] Choate's assertion that the proposed interrogatory was "vague" and "unclear" (Pl. Br. 40) is unsupported and thus forfeited (*Brown v. Tenney*, 125 Ill.2d 348, 362 (1988)).

moving trains—at a cost that is "slight when compared to the risk" (*Mt. Zion*, 169 Ill.2d at 117), Choate and ITLA misleadingly understate the remedial measures that would have been needed. It is clear that fencing alone would not have been enough. Choate's expert, Dr. Berg, admitted that at least one overpass at Austin would be needed "in conjunction with" fencing. Tr. 1256-57. He further allowed that if, after defendants built a new overpass there, people continued to trespass at the spot where Choate was injured, defendants might well have had to build an "additional pedestrian bridge." Tr. 1254, 1316-18, 1347; Opening Br. 49. Another logical consequence of Dr. Berg's testimony is that the existing at-grade crossings at Central and Ridgeland would have to be converted into overpasses (*see* Opening Br. 48) for a total of three (or perhaps four) overpasses.[9]

1. Even if the duty recognized by the decision could logically be limited to the one-mile corridor between Central and Ridgeland as the First District insisted, that duty would remain unprecedentedly burdensome. As we explained, Dr. Berg's feasibility opinions—in particular his claim that an overpass at Austin could be built for only $150,000—lacked sufficient foundation to create a fact issue. Opening Br. 46-48.[10] This is confirmed by the judicially noticeable governmental reports cited by the AAR et al. *amici* showing that, in reality, the cost of building a pedestrian overpass ranges from $560,000 to $3.5 million. AAR et al. Br. 11-13. Dr. Berg also ignored that overpass

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[9] Choate erroneously asserts that either an at-grade crossing or an overpass would have sufficed. Pl. Br. 10. But Dr. Berg admitted that an at-grade crossing would not be enough, since trespassing children would still be able to jump onto moving trains at the gaps in the fence. Tr. 1262, 1348-49.

[10] Choate contends that this argument was waived because defendants did not object to Dr. Berg's testimony on this basis. Pl. Br. 44. The objection was made. Tr. 1368-70; C2760-62. In any event, a contemporaneous objection is unnecessary to preserve this issue, which pertains to the sufficiency of the expert's testimony, not its admissibility. *Damron v. Micor Distrib., Ltd.*, 276 Ill.App.3d 901, 906-07 (1st Dist. 1995).

construction is subject to the plenary authority of a regulatory agency, the Illinois Commerce Commission—*not* the "whim" of railroads (*cf.* ITLA Br. 6)—as explained in Thomas Livingston's unchallenged and unrebutted testimony (Opening Br. 46 & n.16). We pointed out in our opening brief (at 49), and Choate does not deny, that no decision has ever required a landowner to build even a single overpass to accommodate trespassers. That is reason enough to reverse.

2. Of course, under this Court's precedent, it is improper to consider only the burden of imposing the duty to remedy the condition at the location of *Choate's accident*. As explained by both us (*see* Opening Br. 40-44) and the railroad industry *amici* (*see* AAR et al. Br. 6-11), the duty analysis must consider the cost of preventing children from jumping onto moving trains on a *system-wide basis—i.e.*, all the thousands of miles of tracks throughout the state (*id.* at 10)—and all the fences and overpasses that would have to be constructed and maintained. Given that immense and inordinate cost, it is clear that *Kahn*'s remedial element cannot be satisfied, as a matter of law.[11]

Choate asserts that we have waived this aspect of our argument. Pl. Br. 45. But it is he who has committed the waiver by failing to argue waiver either in his First District brief or in his Answer to the Petition for Leave to Appeal. *See, e.g.*, *Razor v. Hyundai Motor Am.*, 222 Ill.2d 75, 104 n.4 (2006). In any event, this Court has often reached issues that were "decided by the appellate court but not by the trial court," as this

[11] ITLA asserts that the additional burden would be minimal given 625 ILCS 5/18c-7504's existing fencing requirement. ITLA Br. 14. But the remedial duty imposed by the decision below would require construction of new overpasses in addition to fencing. *See supra* p. 15 & n.9. Moreover, the statute requires only a fence sufficient to separate the tracks from livestock. As this Court has stated, the statute does not require railroads to "fence against persons," perhaps because 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); Opening Br. 47-49.

argument was. *In re Marriage of Rodriguez*, 131 Ill.2d 273, 279 (1989); *see also Wagner v. City of Chi.*, 166 Ill.2d 144, 147 (1995).

It is notable how little Choate has to say on the merits. Courts consistently have recognized that the burden analysis must take into account the extent to which imposing the duty would require all similarly situated actors to modify their behavior under analogous circumstances. *See* Opening Br. 41-44. Choate and ITLA identify purported factual differences between some of those cases and the situation at hand—*e.g.*, accumulations of snow versus streams versus catenary wires—but can't explain why the differences matter. They simply have no answer to the legal proposition for which the cases stand, which is that consideration of system-wide impact is required as a matter of law. If a remedial duty were imposed with respect to defendants *here*, it necessarily would apply *anywhere* that Choate's "accident of opportunity" (Pl. Br. 45) could happen—*i.e.*, anywhere trespassing children might be able to jump onto moving trains.[12]

Choate again cites Dr. Berg's *ipse dixit* that remedial measures were, in his view, necessary only in the 6,000 foot "corridor" where Choate's accident happened. Pl. Br. 44. But the underlying legal duty recognized by the decision below cannot be limited to the specific facts of a case by an expert's say-so. Opening Br. 44. Judicial decisions are not tickets good for one ride only. If the First District's ruling were allowed to stand, every right-of-way owner would have to consider building overpasses and miles of fencing lest

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[12] Choate implies that no evidence was presented that the "practice of train hopping was not confined to the area where [his] injury occurred." Pl. Br. 46. This is demonstrably false, as Choate himself admitted below (*see* Opening Br. 41), and as confirmed by statistics maintained by the Illinois Commerce Commission (*see* Illinois Commerce Commission, *Pedestrian Safety at Rail Grade Crossing in Northeastern Illinois* at i & Ex. 7 (Apr. 2005), *available at* http://1.usa.gov/IM7XND (155 rail-related incidents involving trespassers in Northeastern Illinois between 2000 and 2004)).

it be held liable to the next impetuous teenager who tries to jump onto a moving train.

II. Choate's Remaining Contentions Are Unpersuasive.

Finally, two remaining arguments call for a brief response.

A. The frequent-trespass doctrine is irrelevant

Choate tries to defend the judgment by invoking the frequent-trespass doctrine, even though it was rejected by the circuit court and the jury was never instructed on it. Pl. Br. 27-29. This argument is procedurally improper and fails on the merits.

1. As a threshold matter, Choate should not be permitted to "bootstrap a frequent trespass theory into [his] case on appeal." *Vega v. Ne. Ill. Reg'l Commuter R.R.*, 371 Ill.App.3d 572, 576 (1st Dist. 2007). "[T]he 'frequent trespass' doctrine . . . is separate and distinct from the *Kahn* doctrine." *Nelson v. Ne. Ill. Reg'l Commuter R.R.*, 364 Ill.App.3d 181, 186 (1st Dist. 2006). Briefly, when a landowner habitually tolerates trespassers in a limited area, this "continued toleration" may constitute implied permission to use the land for a limited purpose. *Rodriguez v. Norfolk & W. Ry.*, 228 Ill.App.3d 1024, 1040 (1st Dist. 1992).

Here, the circuit court granted defendants' motion for summary judgment on this point (A47-48), denied Choate's motion for reconsideration (A36, 39-40), and then barred Choate from relying on the frequent-trespass theory at trial (Tr. 177, 235, 2332). Moreover, at trial, Choate confirmed that he was "not contending [he] had a license" to jump onto moving trains. Tr. 2332. Consequently, the jury never was instructed on that theory. The First District similarly declined to reach that theory. A28. Choate does not challenge any of these rulings. "[T]he theory under which a case is tried in the trial court cannot be changed on review." *In re Marriage of Schneider*, 214 Ill.2d 152, 172 (2005).

2. In any event, the frequent-trespass theory would provide no basis for

affirmance. It is undisputed that Choate approached the tracks from the *south*—where there was no path—to jump onto the moving train. Tr. 1239-40, 1284, 1731; DX18A. Because Choate cannot establish "the existence of a 'beaten' . . . path" leading to the accident site, he cannot "invoke the frequent trespass doctrine." *Vega*, 371 Ill.App.3d at 581. Moreover, the frequent-trespass theory "does not impose a duty" when, as here, the plaintiff only "'sometimes' took a shortcut . . . across the tracks." *Vega*, 371 Ill.App.3d at 581; *Rodriguez*, 228 Ill.App.3d at 1042 ("use of the path by other members of the public is immaterial"); Tr. 1727-28 (Choate trespassed at accident site only once before).

Furthermore, any conceivable implied license would at most "have been an invitation . . . to *cross* the tracks." *Rodriguez*, 228 Ill.App.3d at 1044 (emphasis added). As the circuit court put it, this was a "'jump on the train because I want to show off to my girlfriend' case." A47-48. Thus, Choate's stunt cannot be deemed an impliedly "permitted use" under any circumstances, and the frequent-trespass doctrine thus cannot apply. A48 (citing *Rodriguez* and *Gaul v. Consol. R.R.*, 556 A.2d 892, 897 (Pa. Super. Ct. 1989)); *accord Lowery v. Ill. Cent. Gulf R.R.*, 891 F.2d 1187, 1192-93 (5th Cir. 1990).

B. Choate's "neuroscience" research is irrelevant

Choate also invokes "neurological" research that he did not present at trial.[13] Pl. Br. 29-30. Because this information is outside the record, Choate cannot rely on it to "support [his] position on appeal." *Keener v. City of Herrin*, 235 Ill.2d 338, 346 (2009). This Court should therefore "disregard the inappropriate material." *Id.*

In any event, the cited research—which defendants never had the opportunity to

[13] Indeed, before the circuit court, Choate himself objected to the argument that he "was an impulsive risk taker who would seek attention." Tr. 711. Thus, his reliance on "modern neuroscience" about impulse control is not only forfeited, but affirmatively waived. *In re Detention of Swope*, 213 Ill.2d 210, 218 (2004).

challenge at trial—shows *at most* that some adolescents are prone to impulsive behavior and mistakes of judgment because of their immaturity. Such a propensity is immaterial to whether adolescents generally are (or Choate in particular was) *capable of appreciating a given risk* and, as such, is immaterial to whether defendants owe a duty under the *Kahn* doctrine in this case. Indeed, before the First District, ITLA cited a study that confirmed that appreciation of risk and intentional risk-taking are not synonymous:

> "[A]dolescents *are able to reason and understand risks* of behaviors in which they engage . . . . [W]hen a poor decision is made in an emotional context, the *adolescent may know better*[.]"

1st Dist. ITLA Br. 16 (emphasis added; quoting B.J. Casey et al., *The Adolescent Brain*, 1124 Ann. N.Y. Acad. Sci. 111 (Mar. 2008)). Thus, Choate's belatedly-introduced "neurological" research actually supports *defendants'* position. "[W]hat is important is the fact that the minor can appreciate the risk, not that he will in fact avoid it." *Swearingen*, 181 Ill.App.3d at 363. "[A] lack of 'mature judgment' does not negate the ability to recognize or appreciate an obvious risk." *Hagy v. McHenry Cnty. Conservation Dist.*, 190 Ill.App.3d 833, 845 (2d Dist. 1989).

Finally, Choate's argument has no limiting principle and could be levied against every *other* obvious danger recognized by this Court—*e.g.*, trespassing children might impulsively dive into shallow pools of water or play with fire. Thus, its acceptance would require the wholesale abandonment of *Kahn*.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is one of the attorneys for defendants-appellants and that he served three copies of the foregoing Reply Brief of Defendants-Appellants on all counsel of record by causing the same to be delivered, delivery charges prepaid, to a third-party commercial carrier at 1999 K St. NW, Washington, DC 20006, before the hour of 8:00 p.m. on May 10, 2012, for overnight delivery to the following addresses:

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