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*

OPENING BRIEF OF DEFENDANTS-APPELLANTS

David R. Schmidt
George H. Brant
FEDOTA CHILDERS, P.C.
70 W. Madison St. – Suite 3900
Chicago, IL 60602
(312) 236-5015

Evan M. Tager (*pro hac vice*)
Brian J. Wong (*pro hac vice*)
MAYER BROWN LLP
1999 K St. NW
Washington, DC 20006
(202) 263-3000

Michele L. Odorizzi
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Defendants-Appellants

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

While trespassing on railroad tracks owned by defendants, plaintiff Dominic Choate was injured trying to jump onto a moving train in order to impress his girlfriend. Choate, who was almost 13 at the time of the accident, brought suit on the theory that defendants negligently failed to prevent him from jumping onto the moving train.

Choate alleged that defendants were liable under *Kahn v. James Burton Co.*, 5 Ill. 2d 614 (1955). Under *Kahn* and its progeny, a landowner is liable to a child trespasser who is injured by a dangerous condition on the property only if, among other things, (i) the condition that injured him is not one that children of his age generally would be expected to appreciate—*Kahn*'s objective element; (ii) he did not have actual knowledge of the danger—*Kahn*'s subjective element; *and* (iii) the cost of remedying the condition would have been slight in comparison to the risk of harm—*Kahn*'s cost element.

As to *Kahn*'s objective element, the trial court held that the question whether children of Choate's age should be expected to appreciate the danger of jumping onto a moving train was a factual one for the jury to decide. With respect to *Kahn*'s subjective element, defendants adduced testimony from multiple witnesses that Choate was aware that moving trains are dangerous. Defendants also requested a special interrogatory that would have asked: "[A]t the time and place of Dominic Choate's accident, did he appreciate that attempting to jump onto a moving freight train presented a risk of harm to him"? The trial court declined to give the interrogatory, agreeing with Choate that his appreciation of the risk was relevant only to comparative fault, not to whether defendants owed him a duty under *Kahn*. Finally, with respect to *Kahn*'s cost element, Choate's expert witness testified over objection that the accident could have been prevented at a cost of roughly $200,000 by building a pedestrian overpass about a quarter-mile from the

site of the accident and erecting fencing to channel pedestrians to the overpass. He denied that similar measures would need to be taken anywhere else.

The jury found in favor of Choate on liability and awarded damages in the amount of $6.5 million, which were reduced to $3.9 million to account for the jury's finding that Choate was 40% at fault. The trial court denied defendants' post-trial motions. The Appellate Court affirmed. No questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether, as a matter of law, nearly thirteen-year-old children can reasonably be expected to appreciate the risk of jumping onto a moving train.

2. Whether the Appellate Court erred in holding that defendants' omission of the adjective "full" before "risk of harm" in their proposed special interrogatory was a legally valid basis for the trial court's refusal to give that or any other interrogatory on the subject of Choate's appreciation of the risk.

3. Whether the Appellate Court erred in (a) refusing to consider the need to replicate the remedial measures proposed by Choate's expert on a system-wide basis and (b) holding that Choate adduced sufficient evidence to satisfy *Kahn*'s cost element.

JURISDICTION

The Appellate Court had jurisdiction under Supreme Court Rules 301 and 303 because defendants filed a timely appeal from a final judgment. Defendants filed a timely petition for leave to appeal from the Appellate Court's decision, which this Court granted on November 30, 2011.

STATEMENT OF FACTS

A. Factual background

Defendant CSX Transportation ("CSX") owns three railroad tracks that run northwest-southeast through Chicago Ridge, Illinois. Tr. 716-18, 1051.[1] Defendant Indiana Harbor Belt Railroad ("IHB") patrols the right-of-way. Tr. 1051.

For many years, defendants have tried to prevent children from coming to harm on their property. Tr. 1096. Under the Three Strikes and You're Out program, IHB police officers who encounter trespassers on railroad property stop them, escort them off the tracks, and write up a report called a "contact" card. Tr. 1058, 1418. The first time that a child is found outside a designated crossing, the child's parents are notified by letter. Tr. 1060. The letter informs parents that their "child was observed trespassing" and that trespassing is "not only unlawful, but extremely dangerous and could result in a permanent injury or death." DX22. If the child is caught a second time, the parents are sent another letter and are contacted by phone. *Id.* If a child is caught a third time, the case is referred to the municipal police for prosecution. Tr. 1060-61, 1585-86.

Choate himself had been caught trespassing on defendants' right-of-way by an IHB patrolman. When he was about 9 or 10 years old, he was stopped and "warned . . . about being on the tracks." Tr. 1673. Several years later, in November 2002—just seven months prior to the accident—Choate was again caught trespassing by an IHB patrolman. Tr. 1674, 1724. He was warned that he "could get hurt on railroad property" and told never to return. Tr. 1409-10, 1724; DX21. Both times that Choate was caught, his mother received a warning letter (Tr. 1410, 1629-31; DX22), which prompted her to remind

[1] Citations to A__ are to the appendix; to C__ are to the common-law record; to Tr. __ are to the transcript; and to DX and PX are to the parties' exhibits.

Choate that he was "going to get hurt" (Tr. 1613) and to lecture him about staying away from railroad tracks and trains (Tr. 1725).

Choate's mother had warned him many other times before the accident that moving trains are dangerous. Tr. 1628. She testified that she had made clear to Choate "before the accident the severity of the injury that could occur if someone tried to get on a moving train" and explained the "things that could happen if" Choate continued to play around trains. Tr. 1634. She even illustrated those warnings with an anecdote about "somebody that [she] knew from [her] childhood" who had "lost both of his legs" in a train accident. Tr. 1636. In early 2003, less than six months before the accident, Choate's mother again warned him that he could get hurt by moving trains. Tr. 1632-33. His mother accordingly was "upset" at Choate when she first learned of the accident, because she thought that he should have "kn[own] better." Tr. 1628, 1633. Choate himself recalled his mother's "specific[]" warnings—repeated "over a dozen times while he was growing up before this accident"—that "railroad tracks and railroad trains" were "dangerous" and that he "should not go by them." Tr. 1722. He further indicated his understanding that something is "dangerous" if it "could take a body part" or "hurt" or "kill" him. Tr. 1757-58.

When asked during his deposition, "[a]nd you recognize that on the day of the accident the train tracks were dangerous" and that the "train that [he] w[as] grabbing onto was dangerous," Choate replied "[y]es." Tr. 1762; D. Choate Dep. 127-28 (A59).[2]

[2] The Appellate Court *sua sponte* interpreted this exchange as conceding only Choate's awareness of the danger *as of the time of the deposition*. A22-23 ¶ 89. As we discuss below (at pp. 35-36, *infra*), that interpretation—which Choate himself has never advanced and indeed has affirmatively contradicted—is entirely implausible.

On the day of the accident, July 30, 2003, Choate was 12 years and 9 months old. Tr. 1662. Choate and five of his acquaintances (Alisa Van Witzenburg, Brittany Edgar, Jessica Gunderson, Charlie Spindler, and Steven Weyer) had gathered in the parking lot of an apartment building to the south of the tracks. Tr. 723-24, 1678-79. There is no railroad crossing at that location. Tr. 716-17, 1678. The nearest crossings are at Ridgeland Avenue (about three-quarters of a mile to the west) and at Central Avenue (about a quarter of a mile to the east). Tr. 1239, 1274, 1349; DX19.

Moving steadily at about 9 or 10 miles per hour, an eastbound freight train operated by a railroad that is no longer part of this case appeared on the middle track. Tr. 73, 725-26, 1681-82, 1733; C10, 584, 682, 1445.[3] After several minutes, Choate and two other boys left the parking lot to head towards the passing freight train. Tr. 726, 1681, 1733-34. They walked past a sign reading "DANGER NO TRESPASSING NO DUMPING," which Choate claimed that he did not see. Tr. 720, 1735-36; DX18B. Because no unauthorized person is permitted to "walk . . . or be upon or along the right of way . . . of a rail carrier within the State, at a place other than a public crossing," Choate was a trespasser as soon as he stepped onto defendants' right-of-way. Tr. 1591; 625 ILCS 5/18c-7503(1)(a)(i).

[3] Although one of the children thought that the train may have stopped at one point, Choate himself testified that the train's speed was "9, 10 miles an hour" and that the train "kept going at a steady speed" and "never stopped." Tr. 1734, 1751-52, 1766. Dr. William Berg, Choate's expert witness, recognized that "there's no question [the train] was moving" at the time of the accident. Tr. 1268. And this was confirmed by the train's black-box event recorder, which "indicate[d] that the train was moving at all times" (Tr. 2068) and by Austin Patton, an adult bystander, who agreed that the "train was moving" at "about 10 miles an hour" the "entire time that [he] saw and observed what was going on that day" (Tr. 726, 748).

Although there was some disagreement among the children 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. Choate admitted that he "certainly [wasn't] thinking about crossing the tracks to get" anywhere else. Tr. 1743. He stated that his "motive" and "sole focus" at that point "was trying to jump on the train to impress [his] friends and particularly [Van Witzenburg]," his then-girlfriend (*id.*)—*i.e.*, that he was trying to "show off" for her (Tr. 111, 1280). Choate had never before tried to jump onto a moving train and had "never seen anyone else successfully jump onto a train" or "catch[] a ride on a moving train." Tr. 1683-84, 1750.

Both Austin Patton, an adult who witnessed the accident, and several of Choate's companions testified that they shouted warnings to him. Patton testified that he saw Choate "[l]ooking back" at and "obviously talking" to his companions "in the parking lot." Tr. 727. Patton shouted warnings and asked "what the hell they were doing." Tr. 730. One of Choate's friends, Brittany Edgar, testified that she swore at Choate to "get off the f____ tracks and don't go by the f'ing track." Tr. 884. She said that she, Van Witzenburg, and Gunderson told Choate to "stop playing around [and] come back." Tr. 877. Van Witzenburg (Tr. 862) and Gunderson (Tr. 945-46) themselves recalled telling Choate, "don't do it," after Choate said that he was going to try to jump on the train (Tr. 945). Spindler also testified that he told Choate "not to go on the tracks." Tr. 800. Choate testified that he never heard these warnings because the train was very loud—so loud, in fact, that the "[o]nly thing [he] could hear was the train." Tr. 1742, 1751.

Having continued across the closest set of tracks, first Spindler and then Choate attempted to jump onto the train as it proceeded along the middle set of tracks. Tr. 1687-

89. Choate testified that Spindler "stuck his hand out" and tried to grab the train, but then "pulled it right back in" and "acted like he was afraid and backed away from the train." Tr. 1742-43. Patton similarly testified that the boy accompanying Choate "tried to grab a hold of the train" and then got "knocked down" and "fell over." Tr. 728-29, 746-47. After Spindler started to retreat from the tracks, Choate persevered and "tried to attempt to grab onto the train." Tr. 729, 1687. On Choate's first attempt, he stood flatfooted on the ground and grabbed the ladder; it bent his fingers backwards, and he pulled his hand in. Tr. 1688. On his second attempt, he ran alongside the train, grabbed the ladder, and then released it when he started "slipping on the rocks." Tr. 1689, 1747, 1749. On the third and fateful attempt, Choate threw himself at the ladder, which was several feet above the tracks,[4] and managed to put his right foot on it. Tr. 1689-90. Unfortunately, Choate lost his grip, causing his left foot to swing under the train. Tr. 728-29, 937.

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

B. Proceedings below

1. Pretrial proceedings. Choate sued defendants and the operator of the train, alleging, *inter alia*, liability under the *Kahn* doctrine. Following discovery, defendants moved for summary judgment, arguing that they did not owe Choate a duty both because the danger posed by jumping on a moving freight train is "open and obvious" as a matter of law to trespassing children of Choate's age and because Choate admitted that he had

[4] 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).

personally appreciated the danger. The trial court granted summary judgment, finding that Choate was "on record appreciating this danger." A46. The court subsequently granted Choate's motion for reconsideration, however, reasoning that there was a question of fact as to whether the risk was "so obvious as to relieve defendants of any liability under *Kahn*." A39.

2. Trial proceedings. Although there was much testimony about the accident and Choate's knowledge of the risks associated with moving trains, that testimony was, as described above, largely consistent and undisputed. The principal area of dispute at trial pertained to the feasibility of preventing trespassers from jumping onto moving trains.

Choate's expert witness, Dr. William Berg, was allowed to testify on this topic over defendants' objection. Tr. 153. He acknowledged the steps that defendants had already taken to prevent trespassers from being injured by trains, stating that there was "no question" in his mind that defendants were "devoting a lot of resources to enforcement" and deploying "railroad police officers." Tr. 1251, 1300. Moreover, Dr. Berg had himself been informally involved in Operation Lifesaver (Tr. 1244), which was one component of defendants' broader program to "blanket areas with education" (Tr. 1420, 1973) by giving annual safety presentations to students in area schools (Tr. 1229, 1443, 1980). These talks discussed the dangers of trespassing on tracks, throwing objects at trains, and similar topics. Tr. 1444, 1453, 1991-92, 2028. Audience members were explicitly warned against "try[ing] to ride trains" and were told to "stay off" passing trains. Tr. 2002.

Yet Dr. Berg contended that defendants should have done more. In particular, although there already were crossings a little over a mile apart at Ridgeland Avenue and

Central Avenue (Tr. 1239, 1349, 1886, 2441), Dr. Berg asserted that defendants should have constructed a new pedestrian overpass roughly half-way between, at Austin Avenue (Tr. 1255, 1274). He further asserted that defendants should have built chain-link fencing on both sides of the 6000-foot "corridor" between Ridgeland and Central to "channel[]" pedestrians toward the crossings. Tr. 1254. In Dr. Berg's view, this fencing would have made it more difficult, albeit not impossible, to access the tracks at intermediate points of the "corridor"—such as the site of the accident, midway between Austin and Central. Tr. 1254, 1257. Dr. Berg opined that implementing both of these measures would result in "higher levels of safety," although he admitted that they would not have prevented all trespassing. Tr. 1365; *see also* Tr. 1256-57. Dr. Berg testified that these measures—*i.e.*, fencing and a new overpass—would cost roughly $200,000. Tr. 1259-60, 1311; A21-22, 28 ¶¶ 84, 114. He denied that fencing would be needed along the thousands of miles of track owned by defendants and other railroads in Illinois or that defendants would have to "keep building additional bridges." Tr. 1256, 1318-19. He did, however, acknowledge that a single overpass at Austin might not be sufficient and that defendants would need to monitor the area and add another overpass near the accident site if "you were getting continuing cutting of the fence" at that point. Tr. 1255, 1316-18, 1348-49.

Defendants argued that Dr. Berg's testimony was not sufficient to create a question of fact as to the feasibility of remedial measures. They pointed out that, although Dr. Berg had asserted that fencing and overpass construction could be limited to the 6,000-foot "corridor" near the accident and that similar measures would not have to be replicated elsewhere, the "dangerous" condition to be remedied was access to moving trains by trespassing children who might want to try to jump onto them in order to "show

off." Tr. 1280, 1304. Of course, train hopping could happen *anywhere* that trains are accessible—including at the grade-level crossings at Ridgeland and Central. Thus, defendants argued, "[t]here [was] no connection between . . . this accident and the construction of the new crossing at Austin." Tr. 1369.

Defendants elicited expert testimony demonstrating that, even accepting Dr. Berg's *ipse dixit* that improvements could be limited to the 6000-foot "corridor," he had failed to account for the need to convert the existing at-grade crossings at Central and Ridgeland to overpasses, as would be necessary to prevent trespassers from jumping onto moving trains at those locations. Tr. 961, 1262, 1315, 1345-46, 1348-49, 1886, 2441. Defendants further showed that, even on their own terms, Dr. Berg's conclusions lacked a sufficient factual foundation. Tr. 147-49, 153. For example, chain-link fencing could be cut, and so defendants would have had to maintain it. Yet Dr. Berg did not know how much maintaining the fence he proposed would cost. Tr. 1309. Furthermore, Dr. Berg had failed to consider a number of issues bearing on the feasibility of his proposed remedial measures, such as the plenary authority of the Illinois Commerce Commission ("ICC") over new overpasses, coordination with adjacent municipalities, acquisition of adjoining property, and compliance with environmental, accessibility, and other regulations.

Defendants argued that there was no support for Dr. Berg's conclusion that the cost of his proposed improvements would be modest. *E.g.*, Tr. 1323 (Dr. Berg did not do any design studies or prepare any sketches); 1324-25 (height requirements), 1327-28 (ICC approval); 1328-29 (compliance with Americans with Disabilities Act ("ADA")); 2092 (cost of acquiring property); *see also* C3383-3464; 625 ILCS 5/18c-7401(3) (granting ICC exclusive authority to approve construction of overpasses).

3. Denial of defendants' request for a special interrogatory. Defendants submitted a special interrogatory, which would have asked the jury: "at the time and place of Dominic Choate's accident, did he appreciate that attempting to jump onto a moving freight train presented a risk of harm to him?" Tr. 1847. Choate opposed it on the ground that "his appreciation and acting go to the comparative negligence. And that question, even if answered in the affirmative, would not defeat a verdict in the favor of the plaintiff." *Id*. The trial court refused to give the special interrogatory, reasoning that it was "not dispositive" because, in its view, the jury could answer the question in the affirmative, yet award damages based on comparative negligence. Tr. 2342-43.

4. The jury's verdict and entry of judgment. The trial court denied defendants' motion for a directed verdict. Tr. 1770, 2300, 2309. The jury was instructed that defendants owed Choate a duty if "the Defendants knew or in the exercise of ordinary care should have known that children frequented the Defendants' property"; "there was a condition or activity on the Defendants' property that presented a risk of harm to children that they . . . would not appreciate due to their immaturity"; and "the expense or inconvenience to the Defendants in protecting children against the condition or activity would be slight in comparison to the risk of harm to them." Tr. 2501-02.

The jury returned a verdict for Choate, but found him to be 40% at fault. Tr. 2534. The trial court denied defendants' post-trial motions and reduced the amount awarded from $6.5 million to $3.875 million to account for the jury's comparative-fault finding and a separate settlement by the operator of the train. A33.

5. The appeal. The First District affirmed. As to *Kahn*'s objective element, the court followed two prior First District opinions in holding that the "'obviousness' of the

danger of jumping aboard a slow-moving, 9 to 10 mile per hour freight train" presented a question "of fact for the jury to determine." A15-16 ¶ 59. According to the court, that danger was not so obvious "that children of plaintiff's general age and experience can be expected to appreciate [it] as a matter of law." *Id.*

The First District also rejected defendants' argument that they were entitled to judgment on the subjective element of the *Kahn* test—whether the child actually appreciated the risk. The court accepted Choate's argument, made for the first time on appeal, that the plaintiff satisfies the subjective element of *Kahn* so long as he adduces any evidence that he lacked an appreciation of the "full" risk of the condition in question. The court held that there is 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" and Choate's appreciation of "some lesser risk of harm (e.g., falling and spraining his ankle)," which the court believed "would not have similarly negated" the duty. A23-24 ¶ 95.

Based on this interpretation of *Kahn*'s subjective element, the court held that the trial court did not err in refusing to give defendants' proposed interrogatory because the interrogatory did not ask whether Choate appreciated the "full" risk associated with jumping on a moving train. The court recognized that Choate "failed to object below to" the wording of the interrogatory and hence that defendants had no opportunity to rectify the supposed inaccuracy. A24 ¶ 96. But it held that it could affirm "on any basis appearing in the record, regardless of the ground relied upon by the circuit court or whether its rationale was correct." *Id.*

The Appellate Court also rejected defendants' arguments for a new trial or judgment based on *Kahn*'s cost element, upholding the jury's implicit finding that Dr. Berg's proposed remedial measures would have prevented the accident and could be implemented at a cost that was "slight" in relation to the risk. A21-22 ¶¶ 81, 84. Relying on Dr. Berg's assertion that "remedial measures" were required "only along the 6,000-foot corridor" where Choate had been injured, the court denied that its holding would impose on all railroads a duty to fence off their rights-of-way and build overpasses across their entire systems. A19-20, 27-28 ¶¶ 76, 114. Having limited the inquiry to the location where Choate was injured, the court held that the jury reasonably could find that the amount Dr. Berg asserted his proposed remedial measures would cost—roughly $200,000—was "slight" compared to the risk. A20-22, 27-28 ¶¶ 79-84, 114.

STANDARD OF REVIEW

The denial of defendants' motion for judgment *n.o.v.* is reviewed *do novo. York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 178 (2006). When the defendant owes "no duty to [the plaintiff] . . . as a matter of law," the defendant is entitled to judgment. *Cope v. Doe*, 102 Ill. 2d 278, 280 (1984). Judgment *n.o.v.* also must be granted when "the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Lazenby v. Mark's Constr., Inc.*, 236 Ill. 2d 83, 100 (2010). When "weak evidence has so faded in the strong light of all of the proof that only one verdict is possible," judgment must be granted. *People v. Rosochacki*, 41 Ill. 2d 483, 490 (1969) (citing *Pedrick v. Peoria & E. R.R.*, 37 Ill. 2d 494, 505, 510 (1967)).

A new trial must be granted when the "trial court's rulings in the course of the trial result in prejudicial error." *Lisowski v. MacNeal Mem'l Hosp. Ass'n*, 381 Ill. App. 3d

275, 283 (1st Dist. 2008). The "denial of a request for a special interrogatory presents a question of law and is reviewed *de novo.*" *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 38 (1st Dist. 2008); 735 ILCS 5/2-1108.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the kind of case that makes people scratch their heads in bewilderment. A nearly-thirteen-year old boy, who had been warned over a dozen times to stay away from moving trains and who had just witnessed his friend get knocked back while trying unsuccessfully to jump on one, attempted the same feat precisely because he knew it was dangerous and wanted to show off for his girlfriend. He was injured, sued, and won a multi-million-dollar verdict. Under established tort principles, his effort to hold the companies that own and police the railroad tracks liable for his own impetuousness should have failed—and the judgment below therefore should be reversed—for three independent reasons.

First, *Kahn* and its progeny make clear that the dangers of some conditions are so obvious to children old enough to be at large that there is no duty to protect children from such conditions, *as a matter of law*. It is a matter of common sense and experience that large, loud freight trains moving faster than most people can run on a treadmill constitute one such objectively obviously dangerous condition. That conclusion is supported by (i) century-old Illinois cases involving precisely this fact pattern; (ii) Illinois cases holding that there could be no liability as a matter of law for a wide range of conditions that are manifestly *less* obviously dangerous than a moving train; (iii) the Restatement (Second) of Torts, which squarely states that moving trains are among the conditions the danger of which children old enough to be at large can reasonably be expected to appreciate; and (iv) dozens of on-point decisions from other states. The courts below committed

reversible error by treating this quintessentially legal issue as a question of fact for jury resolution on a case-by-case basis.

Second, the law is equally well established under *Kahn* and its progeny that there can be no liability if the child trespasser was actually aware of the danger of the condition—whether or not children of his age generally reasonably could be expected to appreciate that danger. And it is hard to imagine any case in which there was more compelling evidence of such actual awareness than this one. Choate was warned about the dangers of moving trains more than a dozen times before the accident; he watched his friend get knocked back after trying unsuccessfully to jump onto the train; all five of Choate's friends testified that *they* knew that it was dangerous to try to jump onto a moving train; and Choate admitted during his deposition that he recognized that railroad tracks and trains are dangerous.

The Appellate Court, however, held that the relevant inquiry for this aspect of the *Kahn* doctrine is whether the child trespasser was aware of the "full" danger of the condition. It accordingly held that the special interrogatory that defendants tendered was not in the proper form, and therefore the trial court did not err in refusing to give it, because it omitted the adjective "full." And the Appellate Court similarly held that there was sufficient evidence to support the verdict, because Choate testified that, though he was warned many times that trains are dangerous, he did not recall his mother telling him that he could lose a leg. Both the Appellate Court's premise and its conclusions are wrong. The case law does not provide that a child trespasser may avoid the consequences of his decision to encounter a known risk merely by testifying that he didn't know the "full" danger, and adopting such a standard would be poor policy, as it would encourage

both risk taking and dissembling. Accordingly, the trial court's refusal to give the special interrogatory constituted reversible error. Moreover, because the evidence that Choate was aware that jumping on trains is dangerous was so overwhelming, the proper result is to order judgment in favor of defendants.

Third, as a matter of law, the cost of preventing trespassing children from jumping onto moving trains is not "slight" compared to the risk. To begin with, no court ever has held that the cost of building at least one pedestrian overpass and fencing thousands of feet of right-of-way is "slight." Moreover, the courts of this state have made clear repeatedly that in situations like this it is improper to consider only the cost of remedying the condition at the location of the accident; instead, if the accident could have happened elsewhere on the property of the defendant and similarly situated property owners, the cost of remedying the condition in those locations must be considered as well. And it goes without saying that fencing thousands of *miles* of right-of-way and building untold numbers of new ADA-compliant pedestrian overpasses would be massive, not slight. Indeed, even if it were permissible to consider solely the cost of remedying the condition at the site of the accident, Dr. Berg's cost estimates were so patently speculative and unsubstantiated as to be insufficient to support the jury's verdict.

ARGUMENT

Generally speaking, "[a]s in the case of adult trespassers, an owner or occupier of land owes no duty to a trespassing child except not to willfully or wantonly injure him." *Mt. Zion State Bank & Trust Co. v. Consol. Commc'ns, Inc.*, 169 Ill. 2d 110, 116 (1995). *Kahn* sets forth a narrow exception to that general rule. Under *Kahn*, a duty is imposed only when:

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

Id. at 117. As *Kahn* and subsequent cases have made clear, the plaintiff must show, *inter alia*, that the condition that injured him was not one whose danger "children generally would be expected to comprehend" (*i.e.*, it was not an objectively obvious danger); the plaintiff himself did not subjectively appreciate the danger; and the burden of remedying the condition was "slight" in comparison to the risk. *Id.* at 117, 120; *Cope*, 102 Ill. 2d at 289; *Colls v. City of Chicago*, 212 Ill. App. 3d 904, 939 (1st Dist. 1991) (recognizing "both an objective test as to whether the danger was one which a child of the age and mentality involved should have perceived" and a "subjective test as to whether the danger was in fact perceived by the particular child").

In upholding the verdict in favor of Choate, the Appellate Court erroneously transformed the *Kahn* doctrine from an exception to the rule that landowners owe no duty to trespassing children into an open-ended means for imposing liability on property owners.

I. Defendants Are Entitled To Judgment Because 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.

Kahn, which "brought Illinois law into harmony with section 339 of the Restatement (Second) of Torts," does not impose a duty on landowners to remedy "conditions the obvious risks of which children generally would be expected to appreciate." *Corcoran v. Vill. of Libertyville*, 73 Ill. 2d 316, 326 (1978). In particular,

even when the landowner knows that "children frequent his premises, he is not required to protect against the ever-present possibility that children will injure themselves on obvious or common conditions." *Id.* That is because society reposes in parents "primary responsibility for the safety of their children." *Mt. Zion*, 169 Ill. 2d at 126. The law thus entitles landowners to "rely upon the assumption that any child old enough to be allowed at large . . . 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 117-18, 126-27; *Cope*, 102 Ill. 2d at 286. In short, "[t]he duty of the possessor . . . does not extend to those conditions the existence of which is obvious even to children." Restatement (Second) of Torts § 339, cmt. i.

The First District's holding that the question whether the danger of jumping onto a moving train should be obvious to "children of plaintiff's age and experience" is one of fact for a jury to decide is irreconcilable with this Court's precedents.

A. The decision below is irreconcilable with *Mt. Zion* and other Illinois decisions.

Illinois courts have long recognized that "'*many* dangers . . . may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large.'" *Corcoran*, 73 Ill. 2d at 327 (emphasis added; quoting Restatement § 339, cmt. j). These "obvious dangers include"—but are not limited to—"fire, drowning in water, or falling from a height." *Mt. Zion*, 169 Ill. 2d at 118 (citing DAN B. DOBBS ET AL., PROSSER AND KEETON ON TORTS § 59, at 407 (5th ed. 1984)); *Cope*, 102 Ill. 2d at 280, 286 (citing Restatement § 339, cmt. j); *see also infra* at pp. 22-24 (cataloguing other dangers deemed

to be obvious by Illinois courts, including electric power lines, standing on a log, and playground equipment).[5]

Indeed, 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.*, 69 Ill. App. 557, 560 (1st Dist. 1897); *see also Fitzgerald v. Chi., Burlington & Quincy R.R.*, 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"). Subsequent case law confirms that the observation that moving trains represent an obvious danger to children who are old enough to be at large is as valid today as it was over a century ago.

1. 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. The Court began by making clear that this determination is a *legal* question for the court to resolve—not a question for the jury as the courts below believed. *Mt. Zion*, 169 Ill. 2d at 116; *see also Allen ex rel. Linder v. Martinez*, 348 Ill. App. 3d 310, 314-15 (2d Dist. 2004) (whether a danger is "open and obvious" is "neither

[5] There is no merit to the Appellate Court's apparent belief that fire, water, and heights are the *only* conditions that may be deemed to be obviously dangerous as a matter of law. *See* A15 ¶ 56. Such a view was squarely rejected in *Hagy v. McHenry County Conservation District*, 190 Ill. App. 3d 833 (2d Dist. 1989), where the plaintiff argued that it "would *per se* be error" for a court to "expan[d]" the set of dangers recognized to be obvious as a matter of law. *Id.* at 840. As the *Hagy* court explained, this argument is "unsupported by any authority and, in fact, is contrary to the clear language of section 339 [of the Restatement (Second) of Torts], which recognizes there are '*many dangers*'" that children may reasonably be expected to appreciate. *Id.*; *accord Bier v. Leanna Lakeside Props. Ass'n*, 305 Ill. App. 3d 45, 52 (2d Dist. 1999).

a factual question nor a scientific one," but rather "a question of law" committed to judicial "common knowledge").

In *Mt. Zion*, the Court held that the defendant landowner owed no duty to a six-year-old who nearly drowned in a pool. 169 Ill. 2d at 113, 120. It concluded that a "swimming pool . . . is an obvious danger" and that the defendant "could reasonably expect" trespassing children to "appreciate[] the risk associated with" it. *Id.* at 120. It would seem evident that if six-year-olds 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]" (*id.* at 126) be expected to recognize the danger of a massive, thunderingly loud, freight train moving at the speed of a very fast treadmill. That is a matter of "common knowledge"—and common sense. *See Allen*, 348 Ill. App. 3d at 315.

That the danger posed by leaping onto the ladder of a *moving* train is obvious as a matter of law is confirmed by the fact that Illinois courts have uniformly recognized that any child allowed at large may reasonably be expected to appreciate the risk of climbing even a *stationary* object. Thus, in *Logan v. Old Enterprise Farms, Ltd.*, 139 Ill. 2d 229 (1990), this Court held that the "risk of falling out of the tree was an obvious danger" that children are "reasonably expected to understand and appreciate." *Id.* at 241.[6] And in *Sydenstricker v. Chicago & North Western Railway Co.*, 107 Ill. App. 2d 427 (1st Dist. 1969), the court held that the "risk in climbing" a ladder on a "*parked* railroad tank car"

[6] *Logan*'s result was, as this Court observed, consistent with the "overwhelming majority" of decisions denying recovery to children injured by the "obvious risk" of falls from a height. 139 Ill. 2d at 239-40 (citing half a dozen Appellate Court decisions).

"is simple and obvious to a child of plaintiff's age and experience"—there, a nine-year-old. *Id.* at 433 (emphasis added).

Just as "fast-moving floodwater" is even more obviously dangerous than a "static . . . bod[y] of water" (*Old Second Nat'l Bank v. Aurora Twp.*, 156 Ill. App. 3d 62, 68-69 (2d Dist. 1987); *accord Torf v. Commonwealth Edison*, 268 Ill. App. 3d 87, 91 (2d Dist. 1994)), trying to jump onto a train moving at 9 to 10 miles an hour self-evidently presents a *more obvious* danger than climbing on or jumping from a stationary object or train. This, again, is just common sense.

Disregarding all of this case law, the First District held that the question whether the danger of moving trains should be obvious to children of Choate's age was "one of fact for the jury" under two prior First District decisions—*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)—that the court believed to be "dispositive." A13, 16 ¶¶ 51, 60.[7] That conclusion was wrong as a matter of law.

[7] At any rate, *Engel* and *LaSalle* are unpersuasive and readily distinguishable on their own terms. *Engel* did not provide any reasoned basis for departing from the consensus view that, for purposes of Section 339 of the Restatement, the danger of moving trains is obvious to children old enough to be at large—as a matter of law. Moreover, *Engel* did not hold that the danger of jumping on a moving train is *never* obvious as a matter of law. To the contrary, the court specifically stated that "[u]nder different facts than are present . . . a judge could find that the danger was obvious . . . and find no duty existed as a matter of law." 186 Ill. App. 3d at 531. This case presents those "different facts" because (i) the train in *Engel* was moving at four or five miles per hour—*i.e.*, walking speed—after having been stopped, and (ii) unlike in the present case, the conductor in *Engel* exchanged waves with Engel before the accident, thereby creating the impression that there was nothing wrong with being near the train. *Id.* at 526-27. Here, in contrast, the train, which had never stopped, was moving at nine to ten miles per hour—*i.e.*, a speed that constitutes a sprint for many people—and its crew was long out of sight by the time Choate approached it. *See* Tr. 1684, 1733, 1750, 1766. *LaSalle* addressed only the subjective element of the *Kahn* doctrine, and thus had no occasion to decide whether the danger of a moving train is, as a matter of law, objectively obvious. *See* 132 Ill. App. 3d at 615. Furthermore, both *Engel* and *LaSalle* involved voluntarily (cont'd)

Mt. Zion, which post-dates both *Engel* and *LaSalle*, squarely holds that the existence of a duty—which necessarily includes the embedded question of whether the danger of a particular condition should be obvious to children of the plaintiff's age—"is a question of *law*, the determination of which must be resolved by the court." 169 Ill. 2d at 116 (emphasis added); *Cope*, 102 Ill. 2d at 286; *Allen*, 348 Ill. App. 3d at 314-15.[8] Accordingly, to the extent *LaSalle* and *Engel* stand for the proposition for which the court below invoked them—that juries must decide on a case-by-case basis whether children old enough to be at large should recognize the dangers of moving trains—they have been implicitly overruled by *Mt. Zion*. The issue is one of law for the courts, and it should be resolved by holding once and for all that children who are old enough to be at large should reasonably be expected to appreciate the dangers of moving trains—*i.e.*, that moving trains present an objectively obvious danger *as a matter of law*.

2. Indeed, to hold that the danger of moving trains is not objectively obvious to nearly-thirteen-year olds would require overruling a multitude of Illinois decisions holding that conditions far *less* obviously dangerous than a large, loud, moving train are

assumed duties—in *Engel*, a voluntary undertaking to maintain a fence around a park and in *LaSalle*, a contractual duty to fence off a playground. *Calhoun v. Belt Ry.*, 314 Ill. App. 3d 513, 526-27 (1st Dist. 2000); *Foreman v. Consol. Rail Corp.*, 214 Ill. App. 3d 700, 705 (1st Dist. 1991); *Colls*, 212 Ill. App. 3d at 959-60.

[8] To be sure, it sometimes will be necessary for a jury to resolve disputed facts before the court can resolve a legal question that turns on those facts. But here, the relevant facts are undisputed: Choate admits that he tried three times to jump on board a train moving at 9 or 10 miles per hour. *E.g.*, Tr. 1734, 1751-52, 1766; *see also* Tr. 726, 748 (Patton); Tr. 1268 (Dr. Berg); Tr. 2068 (train's event recorder). Thus, there is no antecedent factual dispute to be resolved before the court may decide whether the danger of jumping on a train moving at this speed should be obvious to children of Choate's age. *Belluomini v. Stratford Green Condo. Ass'n*, 346 Ill. App. 3d 687, 693 (2d Dist. 2004); *accord Wilfong v. L.J. Dodd Constr.*, 401 Ill. App. 3d 1044, 1053 (2d Dist. 2010) ("[W]hether a condition is open and obvious is also a question of law where there is no dispute about the physical nature of the condition."); *Jakubowski v. Alden-Bennett Constr. Co.*, 327 Ill. App. 3d 627, 635 (1st Dist. 2002).

"open and obvious" to children as a matter of law. Those conditions include "electric power lines" (*Booth v. Goodyear Tire & Rubber Co.*, 224 Ill. App. 3d 720, 726 (3d Dist. 1992)); a log (*Fuller v. Justice*, 117 Ill. App. 3d 933, 941 (2d Dist. 1983));[9] monkey bars and playground slides (*Young v. Chi. Housing Auth.*, 162 Ill. App. 3d 53, 56-57 (1st Dist. 1987); *Alop v. Edgewood Valley Cmty. Ass'n*, 154 Ill. App. 3d 482, 485 (1st Dist. 1987)); nunchucks (*Mealey v. Pittman*, 202 Ill. App. 3d 771, 777-78 (3d Dist. 1990)); watching a tennis match (*Chareas v. Twp. High Sch. Dist.*, 195 Ill. App. 3d 540, 544 (1st Dist. 1990)); playing floor hockey (*Keller v. Mols*, 129 Ill. App. 3d 208, 211 (1st Dist. 1984)); a hammer and nails (*Page v. Blank*, 262 Ill. App. 3d 580, 583 (4th Dist. 1994)); a stick left in a pile of debris (*Niemann v. Vermilion Cnty. Housing Auth.*, 101 Ill. App. 3d 735, 739 (4th Dist. 1981)); a loop of a rope (*Smith v. Holmes*, 239 Ill. App. 3d 184, 198 (5th Dist. 1992)); and knocking out bricks from the walls of a building (*Hootman v. Dixon*, 129 Ill. App. 3d 645, 649 (2d Dist. 1984)).

The cases holding that the danger of electricity is obvious to children as a matter of law are particularly instructive. *See, e.g.*, *Booth*, 224 Ill. App. 3d at 726; *Hansen v. Goodyear Tire & Rubber Co.*, 194 Ill. App. 3d 351, 355-56 (3d Dist. 1990); *Bonder v. Commonwealth Edison Co.*, 168 Ill. App. 3d 80, 83 (1st Dist. 1988). In *Bonder*, the court held that "defendants owed no duty to warn the plaintiff, then 14 years old, of the open and obvious danger posed by power lines." 168 Ill. App. 3d at 81. The court rested this conclusion on its determination that "boys of plaintiff's age and experience are as a matter of law deemed to be capable of understanding the dangers involved in contacting

[9] In his answer to our petition for leave to appeal, Choate puzzlingly asserts that *Fuller* is inapposite because a "tree stump does not present a dangerous condition, like a train does." Ans. to PLA 15. *Of course* a moving train is more dangerous than a tree stump—that is precisely our point.

power lines." *Id.* at 83. In *Hansen*, the Appellate Court extended its prior decisions, holding that even when "darkness concealed the power lines," children are deemed capable of appreciating the risk. 194 Ill. App. 3d at 356. And *Booth* reaffirmed that, as a matter of law, "[a] child trespasser of plaintiff's age and experience [*i.e.*, nearly 14-years-old] . . . shall be deemed to have appreciated those dangers associated with electric power lines." 224 Ill. App. 3d at 726.

It should go without saying that the dangers of a loud, massive, moving train are far more obvious than the silent, invisible dangers of electricity and the risks of ordinary children's games. Affirmance of the decision below accordingly would require overruling with one stroke a staggering array of cases dating back over 30 years. That is reason enough to conclude that it is the decision below that is wrong and must be reversed.

3. Choate has asserted in previous briefing that the risk of a moving train cannot be obvious because he and other children exposed themselves to it. But this reasoning is circular. "[M]any children tragically die or are seriously injured" from even obvious risks. *Hootman*, 129 Ill. App. 3d at 649. "[I]f the standard for determining the obviousness of risks to children was measured by the frequency of cases involving them," then even the "obvious risks of water, fire and falling from a height would have to be eliminated." *Hagy*, 190 Ill. App. 3d at 845. Indeed, there would not be *any* obvious dangers, since the very fact that a child trespasser was injured and brought a claim in the first place means that the danger was encountered and not avoided. Thus, "one child's prior failure to avoid an obvious risk" does not make the "failure to avoid the same obvious risk foreseeable." *Hootman*, 129 Ill. App. 3d at 651. Some children (and, for that matter, some adults) unfortunately do things even when they know of the dangers—*e.g.*,

jaywalking or text messaging while driving. Like Choate, they no doubt believe that they would not come to harm despite the danger. But what matters for purposes of the *Kahn* doctrine is that the danger is one that the child can be expected to appreciate—"not that he will in fact avoid it." *Swearingen v. Korfist*, 181 Ill. App. 3d 357, 363, 369 (2d Dist. 1989).

B. The decision below is out of step with decisions nationwide applying Restatement (Second) of Torts § 339 in this context.

In addition to being irreconcilable with Illinois case law, the decision below is far out of step with the mainstream of American jurisprudence. This Court's decision in *Kahn* "brought Illinois law into harmony with section 339 of the Restatement (Second) of Torts." *Corcoran*, 73 Ill. 2d at 326. The Reporter's Notes to comment i of Restatement § 339 squarely state that a "moving train"—like other kinds of moving vehicles—is a paradigmatic example of a condition "whose danger the child can reasonably be expected to appreciate." *Id.*; *see Holland v. Baltimore & Ohio R.R.*, 431 A.2d 597, 603 n.9 (D.C. 1981) ("The Restatement (Second) of Torts . . . cites . . . moving train cases as examples of obvious dangers.").

In view of this unambiguous statement, it is unsurprising that courts in other jurisdictions that have adopted Restatement Section 339 consistently have held that even small children can be expected to recognize the danger of moving trains. As the D.C. Court of Appeal explained, the "*overwhelming weight of authority*" is that "accidents involving moving trains fall outside the scope of § 339 because . . . a moving train is a danger so obvious that *any* nine-year-old child allowed at large would readily discover it and realize the risk involved." *Holland*, 431 A.2d at 602-03 (emphasis added; collecting cases). Hence, the court concluded, any suggestion that "a nine-year-old child . . . did not

realize the danger inherent in coming within an area made dangerous by approaching freight trains" is "*deficient as a matter of law*." *Id.* at 602 (emphasis added).

The obviousness of the danger was not even a close question to these courts. As one California 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.*, 10 Cal. Rptr. 575, 580 (Cal. Ct. App. 1961). Trains—including the freight train that Choate tried to jump onto (*see* Tr. 726, 1680-81, 1733-34)—are massive objects. And they are loud; Choate, for example, testified that the one that he tried to jump onto was so loud that the "[o]nly thing [he] could hear was the train" itself. Tr. 1742, 1751. It thus is "difficult to conceive" of a child old enough to be at large "not understanding and appreciating the danger of hopping and riding a moving railroad car." *Herrera*, 10 Cal. Rptr. at 579-80; *see also Joslin v. S. Pac. Co.*, 11 Cal. Rptr. 267, 269 (Cal. Ct. App. 1961) ("The dangers of being near a moving train, let alone attempting to board it, are so patent that we shall not burden this opinion with a discussion of them."), *overruled on other grounds and rule reinstated by statute, Silva v. Union Pac. R.R.*, 102 Cal. Rptr. 2d 668, 670 & n.1 (Cal. Ct. App. 2000). The *Herrera* court even pointedly observed that the danger of a moving train is far *more* obvious than the "silent, deadly danger of high-power electricity" or "the still, inviting depths of a swimming pool." 10 Cal. Rptr. at 580. And of course, Illinois courts have held that those dangers *are* ones that trespassing children are as a matter of law reasonably expected to appreciate. *See supra* pp. 20-24 (citing, *inter alia*, *Booth* and *Mt. Zion*).

The D.C. and California courts are by no means outliers. For example, the Missouri Court of Appeals has agreed that "a child hopping on and off the train is

expected to realize that danger exists therein," holding that a trespassing 11-year-old child could not make a "submissible case of negligence under § 339 as a matter of law." *Henderson v. Terminal R.R. Ass'n,* 659 S.W.2d 227, 230-31 (Mo. Ct. App. 1983). Similarly, applying Pennsylvania law (which incorporates Section 339 of the Restatement), the U.S. Court of Appeals for the Third Circuit concluded that a trespassing child whose "foot was severed after he grabbed hold of a passing . . . railcar" could not recover because the "'risk of a moving train is so obvious'" that 12-year-old children are "deemed to appreciate [it] as a matter of law." *Nixon v. Norfolk S. Corp.*, 295 F. App'x 523, 524-25 (3d Cir. 2008). Federal courts applying Delaware and Minnesota law likewise have held that "a moving train is not, as a matter of law," a condition that supports liability "under the Restatement." *Space v. Nat'l R.R. Passenger Corp.*, 555 F. Supp. 163, 166 (D. Del. 1983); *see also Nolley v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 183 F.2d 566, 566-67 (8th Cir. 1950) (Minnesota law). As the Eighth Circuit explained in *Nolley*, it "must be apparent to *anyone* who has seen railroad trains moving" that trying to board a moving train puts one in a "a position of great danger." 183 F.3d at 568 (emphasis added).

That has been the uniform holding of other courts that have applied the Restatement § 339 approach, or the "attractive nuisance" doctrine, which it supplanted.[10]

[10] Illustrative cases include *Seiferth v. St. Louis Sw. Ry.*, 368 F.2d 153, 156 (7th Cir. 1966) (no liability where 16-year-old child fell from boxcar in which he had hitched a ride) (Missouri law); *Jones v. United States*, 241 F.2d 26, 28-29 (4th Cir. 1957) (denying recovery to 23-month-old plaintiff because "danger here" of being "struck by a train" was "open, obvious, natural, and common to all") (Maryland law); *Hughes v. Union Pac. Ry.*, 757 P.2d 1185, 1188-90 (Idaho 1988) (holding that "children can understand the risk involved in intermeddling with trains" and that this danger is apparent "as a matter of law"); *Perry v. Norfolk & W. Ry.*, 865 F. Supp. 1292, 1302 (N.D. Ind. 1994) (Indiana law); *McKinney v. Hartz & Restle Realtors, Inc.*, 510 N.E.2d 386, 389-90 (Ohio 1987) (a "moving train is not a subtle or hidden danger and its potential for causing serious bodily (cont'd)

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." DOBBS, *supra*, PROSSER AND KEETON ON TORTS § 59, at 407; *see also* J.D. LEE & BARRY LINDAHL, 4 MODERN TORT LAW: LIABILITY & LITIGATION § 30:10 (2d ed. 2003) ("where child trespassers are injured by moving trains[,] . . . under the Restatement formulation[,] . . . the risk is regarded as one that a child should appreciate"); 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").

In short, if allowed to stand, the decision below would turn Illinois into an outlier, whose law on this issue would be contrary to that of every other jurisdiction that applies the Restatement Section 339 approach.

C. The obviousness of the danger of moving trains precludes the existence of a duty under *Kahn*.

If the Court agrees that the danger of moving trains should be obvious to children who are old enough to be at large, that would settle the duty issue as a matter of law, because "obvious dangers present no foreseeability of harm, and thus no duty." *Mt. Zion*, 169 Ill. 2d at 125. In other words, a determination that the danger of moving trains should be obvious to children of Choate's age ends the inquiry—not merely as a "matter of contributory negligence or assumption of risk, but of lack of duty to the child" (*id.* at 117-

injury or death to anyone in its path is readily apparent, even to young children"); *Wolf v. Nat'l R.R. Passenger Corp.*, 697 A.2d 1082, 1086 (R.I. 1997); and *Davis v. Tex. & Pac. Ry.*, 547 S.W.2d 48, 49 (Tex. Ct. App. 1977) ("danger of slipping on the step of a freight car moving at a 'moderate speed'" was obvious as a matter of law).

18)—and compels entry of judgment for defendants.[11] *Id.* at 126-27; *accord Booth*, 224 Ill. App. 3d at 725; *Salinas v. Chicago Park Dist.*, 189 Ill. App. 3d 55 (1st Dist. 1989).

II. The Appellate Court Erred In Holding That The *Kahn* Doctrine's Subjective Element Precludes Liability Only When The Child Trespasser Is Aware Of The "Full" Danger Of The Condition At Issue.

Even when the danger is not deemed to be obvious to children *generally*, "the *particular child's* appreciation of the risk" has "consistently been recognized as sufficient to free a defendant landowner" of any duty to that plaintiff under *Kahn*. *Colls*, 212 Ill. App. 3d at 933 (emphasis added). Courts accordingly have recognized that "consideration of the particular minor plaintiff's knowledge is appropriate where the minor has some greater understanding of the alleged dangerous condition." *Hagy*, 190 Ill. App. 3d at 840; *see also Osborne v. Claydon*, 266 Ill. App. 3d 434, 441 (4th Dist. 1994); *Swearingen*, 181 Ill. App. 3d at 362; *Guenther v. G. Grant Dickson & Sons, Inc*. 170 Ill. App. 3d 538, 543 (2d Dist. 1988); *Alop*, 154 Ill. App. 3d at 485-87. Under this principle, "there can be no liability to a minor who, in fact, appreciated the risk." *Colls*, 212 Ill. App. 3d at 950; *see*

[11] In previous briefing, Choate relied on cases involving *invitees*, suggesting that the obviousness of the danger should not be dispositive. When the plaintiff is an *invitee*, the existence of an open and obvious condition is not an "automatic or *per se* bar to the finding of a legal duty." *Bucheleres v. Chi. Park Dist.*, 171 Ill. 2d 435, 449 (1996); *id.* at 451 (quoting Restatement (Second) of Torts § 343A, which addresses duties to "invitees"). But that principle cannot avail Choate, who was a *trespasser*. Under the *Kahn* doctrine, there is *never* a "reasonably foreseeable risk of harm" when a child trespasser is injured by an obvious danger, so the trespasser cannot, as a matter of law, "recover[] for injuries caused by a danger found to be obvious." *Cope*, 102 Ill. 2d at 286; *see Mt. Zion*, 169 Ill. 2d at 117, 125. Thus, even if the "general rule of no liability for open and obvious conditions" has in some respects been relaxed for individuals "*lawfully* on [the defendant's] premises," that is not the case when the "[p]laintiff . . . was a *trespasser*." *Lange v. Fisher Real Estate Dev. Corp.*, 358 Ill. App. 3d 962, 972 (1st Dist. 2005) (second emphasis added). The "rule of no liability for open and obvious conditions" continues to apply to trespassers. *Id.*; *Porter v. Union Elec. Co.*, 2009 WL 3065150, at *2 n.18 (S.D. Ill. Sept. 23, 2009).

Cope, 102 Ill. 2d at 289 (holding that "the defendants owed no duty" because the condition did not "present[] perils that were not appreciated by plaintiff's decedent").

Defendants proposed a special interrogatory that would have asked the jury: "[A]t the time and place of Dominic Choate's accident, did he appreciate that attempting to jump onto a moving freight train presented a risk of harm to him?" Tr. 1847. It is settled 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); *Simmons v. Garces*, 198 Ill. 2d 541, 563 (2002). Yet the trial 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. Choate did not even try to defend that manifestly erroneous ground on appeal.[12]

Nevertheless, the First District affirmed on the ground, asserted by Choate for the first time on appeal, that defendants' proposed interrogatory "was not in proper form" because it omitted the adjective "full" before "risk of harm." A23-24 ¶ 95. According to the court, "the relevant inquiry" under *Kahn*'s subjective element was whether Choate "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.* Under the First District's rule, unless Choate knew that he could suffer

[12] The plaintiff's subjective appreciation of the risk entails a "'*lack of duty to the child*'" (*Colls*, 212 Ill. App. 3d at 934 (quoting DOBBS, *supra*, PROSSER AND KEETON ON TORTS § 59, at 409)), which is "separate and distinct from . . . the parties' comparative fault" (*Bucheleres*, 171 Ill. 2d at 447). *See also Mt. Zion*, 169 Ill. 2d at 117-18; *Newby v. Lake Zurich Cmty. Unit Dist. 95*, 136 Ill. App. 3d 92, 105 (2d Dist. 1985) (plaintiff's "appreciation of the risk" goes to the "duty element"); *LaSalle*, 132 Ill. App. 3d at 615 (comparative fault is no substitute for a "specific finding that plaintiff 'appreciated the risk' in jumping on a moving freight train").

"death or dismemberment[] from jumping aboard the moving freight train," *Kahn*'s subjective element did not preclude liability and the trial court accordingly was not required to give the proposed interrogatory. *Id.* The Appellate Court was doubly mistaken: *Khan*'s subjective element does not require awareness of the "full" extent of the danger, and, in any event, the special-interrogatory statute would be eviscerated if courts could avoid the obligation to give an interrogatory on the basis of a wording quibble not raised at trial.

A. The subjective element of the *Kahn* doctrine requires only general appreciation of the condition's dangerousness, not awareness of the precise injury that the plaintiff eventually suffered.

The First District's conclusion that addition of the adjective "full" to defendants' proposed interrogatory was necessary to accurately state the law conflicts with prior Illinois decisions as well as decisions from other states applying Section 339.

1. In *Shull v. Harristown Township*, 223 Ill. App. 3d 819 (4th Dist. 1992), for example, an eight-year-old child was injured while 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*" to which he could be injured, the property owner is not "responsible for injuries suffered by the child" so long as the plaintiff knew generally that the condition was dangerous. *Id.* at 826-27 (emphasis added). In other words, it is immaterial 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).

Other Appellate Court cases likewise have not required that the plaintiff have had knowledge of the "full" risk in order for liability to be precluded. In *LaSalle*, for example, the First District stated that liability under *Kahn* is "inappropriate" if the jury makes a "specific finding that plaintiff 'appreciated the risk' in jumping on a moving freight train" (132 Ill. App. 3d 607 at 615)—with nary a "full" in sight. Along the same lines, *Colls* held that it was a "valid legal principle[] that there can be no liability to a minor who, in fact, appreciated the risk" and that "language focusing the jury's attention squarely on the minor's appreciation of risk" should "appear in the instruction." 212 Ill. App. 3d at 950; *see also Alop*, 154 Ill. App. 3d at 486 (plaintiff's testimony showed that she knew "she would stand the risk of becoming injured"); *cf. Hootman*, 129 Ill. App. 3d at 649 (plaintiff need not "have been previously exposed to the precise type of risk involved" in order to be on notice of it).

2. Courts in other jurisdictions likewise have concluded that a plaintiff's actual knowledge that a condition is dangerous precludes liability under Restatement Section 339 even when the plaintiff was not aware of the full extent of the danger. *See, e.g.*, *Leger v. Bemis Bros. Bag. Co.*, 1 Mass. L. Rptr. 262 (Mass. Super. Ct. 1993) (a child who realizes "generally that there are risks" cannot establish a duty even when he does not "realize every possible risk"); *Stopczynski v. Woodcox*, 671 N.W.2d 119, 122 (Mich. Ct. App. 2003) ("it is not necessary that the user understand the precise nature of every possible injury that might result from diving into an above-ground pool") (quotation marks omitted); *Mayle v. McDonald Steel Corp.*, 2011 -Ohio- 5234 ¶ 55 (Ohio Ct. App. 2011) (awareness of "specific dangers associated with hydraulic rollers" unnecessary when plaintiff knew of "dangers of bodies of water in general"); *Bush v. Ohio Edison*,

2006 -Ohio- 4465 ¶¶ 12, 14 (Ohio Ct. App. 2006) (no duty is owed when a "child knowingly encounters a risk that he *generally* understands"; the plaintiff need "not *fully* comprehend the *specific* risk") (emphasis added); *Entergy Gulf States, Inc. v. Isom*, 143 S.W.3d 486, 493-94 (Tex. Civ. App. 2004) ("ignorance of a specific danger is not enough to satisfy . . . section 339(c) if the child is aware of the general danger") (quotation marks omitted); *Ledbetter v. Ashland Oil & Refining Co.*, 363 S.W.2d 492, 495 (Tex. Civ. App. 1962) (plaintiff's awareness of the "possibility of getting hurt" was "determinative," even though she did not "anticipate[] the very nature of the injury"); *Alston v. Balt. & Ohio R.R.*, 433 F. Supp. 553, 569 n.102 (D.D.C. 1977) ("Plaintiff need not have foreseen the precise injury . . . if the possibility of harm was clear . . . .") (quotation marks omitted).

3. Even if this Court were writing on an entirely clean slate, the proposition that the *Kahn* doctrine's subjective element does not require appreciation of the full extent of the danger posed by the condition at issue follows naturally from the fact that *Kahn* is a limited exception to the general rule that landowners owe no duty to trespassing children. As this Court has explained, children "have no greater right than do adults to go upon the land of another," which means that their youth, "in and of itself, imposes no duty upon an occupier of land to . . . prepare for their safety." *Mt. Zion*, 169 Ill. 2d at 116. Accordingly, the limited solicitude that the *Kahn* doctrine extends to children who cannot be expected to be aware of the danger of particular conditions does not turn landowners into insurers or require them to "protect against the ever-present possibility" of injury to trespassing children. *Corcoran*, 73 Ill. 2d at 326-27.

"The purpose of the duty" is only to "protect children from dangers which they do not appreciate and not to protect them against harm resulting from their own immature

recklessness in the case of known and appreciated danger." Restatement (Second) of Torts § 339, cmt. m; DOBBS, *supra*, PROSSER AND KEETON ON TORTS § 59, at 408. Thus, the justification for imposition of a duty evaporates once the child appreciates the "risk involved in . . . *coming within the area made dangerous*" by the condition. Restatement (Second) of Torts § 339(c) (emphasis added). Put another way, a landowner should be "free to rely upon the assumption" that once the child appreciates that the condition could harm him in *some* fashion, he stands on the same footing as an adult and could "make his own intelligent and responsible choice" (*cf. Mt. Zion*, 169 Ill. 2d at 117) not to "put[] himself in such close proximity to a known danger" (*Tex. Utils. Elec. Co. v. Timmons*, 947 S.W.2d 191, 195 (Tex. 1997)). Once a child knows that a condition could injure him, he knows enough to avoid it, and the fact that the injury he ultimately suffers may be more severe than he may have anticipated is immaterial.

If allowed to stand, the First District's rule, which allows a plaintiff to reach a jury merely by claiming that the injury he sustained (*e.g.*, loss of a limb) is different in degree from the injuries he thought he could suffer (*e.g.*, a broken leg or a sprained ankle), would greatly enervate *Kahn*'s subjective element. It would, moreover, encourage the very kind of questionable testimony that took place here. *Compare* Tr. 1628, 1633-34, 1636 (testimony of Choate's mother that she had told him about a child who had lost both of his legs after a run-in with a train and made clear the "severity" of injuries that could result) *with* Tr. 1722-23 (Choate's testimony that even though his mother warned him dozens of times about the danger of moving trains, he did not remember his mother ever telling him specifically that he could lose a limb).

B. Because *Kahn*'s subjective element does not require awareness of the "full" risk, defendants' proposed interrogatory was in proper form and the trial court's failure to give it was highly prejudicial.

As we have just discussed, defendants' proposed interrogatory did not misstate the law by omitting the adjective "full" and hence was proper in form. The trial court accordingly had "no discretion" to reject it. *Morton v. City of Chi.*, 286 Ill. App. 3d 444, 451 (1st Dist. 1997). Its error in doing so therefore requires, at minimum, a new trial. *See Van Hattem v. Kmart Corp.*, 308 Ill. App. 3d 121, 132 (1st Dist. 1999) (trial court's "refusal to submit" proposed interrogatory that was proper in form was "reversible error").

In fact, however, a new trial is unnecessary because, under the correct articulation of *Kahn*'s subjective element, no reasonable jury could find that Choate failed to appreciate that jumping on moving trains is dangerous. Because the evidence on this point is so overwhelming, the Appellate Court should have ordered judgment in favor of defendants.

To begin with, when asked during his deposition, "[a]nd you recognize that on the day of the accident the train tracks were dangerous" and that the "train that you were grabbing onto was dangerous," Choate replied "[y]es." Tr. 1762-63; D. Choate Dep. 127-28 (A59). Although the Appellate Court asserted that this testimony "indicate[d] only that plaintiff was aware at the time of the deposition (*after* he had suffered his injuries) that the train and the tracks were dangerous (A17 ¶ 65), when the exchange is 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 on that premise, and Choate himself has never asserted otherwise. To the contrary, at trial his counsel stated that "[o]bviously [Choate] *was* cognizant, as anybody would be, that a moving train would be dangerous." Tr. 112

(emphasis added). Moreover, in his appellate brief, Choate 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." App. Ct. Pl. Br. 43 (emphasis added).[13] Choate's answer to our petition for leave to appeal likewise acknowledged that Choate "recognized . . . *on the day of the accident as well*" that train tracks are dangerous. Ans. to PLA 11 (emphasis added).

As construed by both parties and the trial court at the time of trial—and not as reinterpreted *sua sponte* by the Appellate Court—Choate's deposition testimony was a binding judicial admission that he appreciated the risk at the time of the accident, and by itself should be dispositive. *See Van's Material Co. v. Dep't of Rev.*, 131 Ill. 2d 196, 211 (1989); Sup. Ct. R. 212(a)(2). But even were the deposition testimony regarded as ambiguous, the evidence that Choate knew that moving trains are dangerous was so overwhelming as to dictate entry of judgment for defendants.

To summarize briefly, Choate admitted that his mother had repeatedly warned him of the dangers of moving trains (Tr. 1722); Choate admitted that he had been caught trespassing on railroad property and warned both by the arresting officer and by his mother that he could get hurt (Tr. 1724-25); all five of Choate's companions testified that they knew that moving trains are dangerous (Tr. 800, 804, 831-32, 862, 865, 884, 888,

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[13] The Appellate Court's recharacterization of Choate's deposition testimony is particularly troubling because the adversary system is undermined when courts reach out to affirm on the basis of an argument that the appellee has never raised at any time. Thus, this Court has stated that "the 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 ("we 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.").

945, 953), which is circumstantial evidence that Choate did as well; Choate saw Spindler try to grab the train first and then "pull[] [his hand] right back in" because he seemed afraid (Tr. 1742-43); Choate's first two attempts to climb onto the train ended in failure (Tr. 1688-89); and the train was so deafeningly loud that Choate said he could not hear the warnings shouted by Patton and four of his companions (Tr. 1742, 1751).

In the face of this overwhelming evidence that Choate was aware that moving trains are dangerous, the *only* contrary evidence was (1) Choate's conclusory assertion at trial that he did not appreciate the danger "while [he] was doing it" (Tr. 1758); and (2) Choate's testimony, "contrary to his mother's testimony, that she never told him he could be killed or lose an arm or a leg" and his denial that he had received "any graphic warnings from his mother regarding how badly he might be hurt in a train accident" (A17 ¶ 66; Tr. 1723). Choate's self-serving testimony was not, however, enough to create a "factual dispute[] of some substance." *Pedrick*, 37 Ill. 2d at 505.

This Court's cases make clear that "[t]he presence of *[s]ome* evidence of a fact which, when viewed alone may seem substantial, does not always, when viewed in the context of all of the evidence, retain such significance." *Pedrick*, 37 Ill. 2d at 504 (emphasis added). When one party's "weak evidence has so faded in the strong light of all of the proof that only one verdict is possible of rendition," the court must render judgment in favor of the other party. *Rosochacki*, 41 Ill. 2d at 490. In *Pedrick* itself, this Court held that the record before it "so overwhelmingly favor[ed] defendant that no contrary verdict based on this evidence could ever stand," given the "dubious probative value" of the plaintiffs' testimony in contrast to the "unequivocal testimony" supporting the defendant "by persons with no apparent interest in the outcome." 37 Ill. 2d at 511.

Under *Pedrick*, the decision below cannot stand. In view of his admission that he was warned repeatedly that moving trains are "dangerous" (Tr. 1722), his acknowledgment that a condition is "dangerous" if it "could take a body part" or "hurt" or "kill" him (Tr. 1757-58), and the testimony of his *own mother* that she warned him about the *very injury* that he suffered (Tr. 1634, 1636), Choate could not create a jury question simply by denying that the warnings were as graphic as his mother said. Choate's self-serving denial had at best "dubious probative value" given "his [prior] contrary statements" and "his inherently improbable testimony" that he did not appreciate the risks of jumping onto a moving train despite repeated warnings. *In re Marriage of Gordon*, 233 Ill. App. 3d 617, 662-63 (1st Dist. 1992). To accept the First District's conclusion that "the equivocal and contradicted testimony of [Choate] is sufficient to overcome all of the other evidence introduced," including "the testimony of the plaintiff's own witness," would be to "ignore all the other evidence" and to revert to the "'scintilla-of-evidence' rule overruled in *Pedrick*." *Golin v. Rukavina*, 209 Ill. App. 3d 547, 560-61 (1st Dist. 1991). Thus, defendants are entitled to judgment under *Kahn*'s subjective element.

C. Whether or not awareness of the "full" risk is the correct standard, defendants are entitled to a new trial because it was error to affirm on the basis of an objection to form that Choate never raised at trial.

Even assuming *arguendo* that the substance of *Kahn*'s subjective element really does require appreciation of the "full" risk, an independent basis for a new trial is that Choate did not object to the wording of the proposed interrogatory in the trial court. For the decision below to embrace Choate's belated semantic quibble—especially when it is clear that the trial court would not have given the interrogatory with or without the adjective "full"—fundamentally undermines the special-interrogatory mechanism. 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). That view is the right one, because 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." *Id.* at 469. That is all the more so when, as here, the supposed error in form would be impossible to discern from extant case law.

The Appellate Court brushed off Choate's failure to make the proper objection below by citing the general rule that the trial court can be affirmed on "any basis appearing in the record." A24 ¶ 96. That principle may be applicable when the basis on which the Appellate Court rules is one that the appellant could not have overcome even if an objection had been made on that basis in the trial court. For example, if a trial court excludes a letter from the defendant to the plaintiff on the legally erroneous ground that it is inadmissible hearsay, the Appellate Court permissibly may affirm on the legally valid ground that the letter constituted an offer of settlement. In that circumstance, the plaintiff would not be prejudiced because there would have been no way to "cure" the defect. But it would be manifestly unfair to apply this rule, when, as here, the defect (if there was one) easily could have been corrected had it been brought to defendants' attention in the trial court. Indeed, the special interrogatory would cease to carry out its function "as guardian of the integrity of a general verdict" (*Simmons*, 198 Ill. 2d at 555) if the bait-and-switch approach employed here is allowed to take hold. Because the basis for Choate's *actual* objection to defendants' proposed interrogatory—that his appreciation of

the risk was subsumed by the jury's consideration of comparative fault—did not justify the trial court's refusal to give it, and because the objection as to form raised on appeal could have been easily corrected had it been raised at trial, defendants are entitled, at the very least, to a new trial.

III. Defendants Are Entitled To Judgment Because No Reasonable Jury Could Find That The Cost Of Preventing Trespassing Children From Jumping Onto Moving Trains Was Slight Compared To The Risk.

To recover under the *Kahn* doctrine, Choate also had to show that defendants could have remedied the "condition" at a cost that is "slight when compared to the risk." *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 off the right-of-way along the one-mile corridor between the grade crossings at Central and Ridgeland Avenues and built a new pedestrian overpass at Austin Avenue. A18 ¶ 71. According to the First District, the jury reasonably 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 roughly $200,000 cost of such improvements was "slight" for purposes of the *Kahn* doctrine. A19-22 ¶¶ 76, 81, 84. That conclusion is grievously flawed.

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

The First District brushed aside the total burden of sealing off the entirety of defendants' rights-of-way—nearly 1,000 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).

That premise is wrong as a matter of Illinois law. The "condition" ostensibly to be remedied was trespassing children jumping on moving trains. Children had tried to jump

on trains at other places (A7 ¶ 22), and, indeed, Choate himself introduced evidence of "prior [train-hopping] incidents that . . . weren't . . . in the same locality" (Tr. 164, 168, 1443; C1336). Before the Appellate Court, Choate acknowledged that he "could have engaged in [his] daredevilry anywhere." App. Ct. Pl. Br. 38. It follows that, if a remedial duty were imposed *here*, it would apply *everywhere* that trains are accessible to children—that is, the entirety of defendants' operations, the "magnitude" of which this Court "may take judicial notice of." *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 234 (2010).

The First District's focus on the cost of remedying the "condition" at the specific location of Choate's accident is squarely contrary to this Court's precedent. For example, in the course of rejecting a duty to warn about snow at one location on a highway, this Court has explained that a "decision in [plaintiffs'] favor would require the defendants to post warning signs under *comparable* weather circumstances on *every* highway." *Lansing v. McLean Cnty.*, 69 Ill. 2d 562, 573 (1978) (emphasis added). "The impracticability and the expense" of doing so precluded, as a matter of law, the imposition of a duty. *Id.* To similar effect are *Krywin*, 238 Ill. 2d at 232, which held that railroads have no duty to remove natural accumulations of snow from their platforms, and *Graham v. City of Chicago*, 346 Ill. 638 (1931), which held that "[i]n view of the generality of ice and snow in the wintertime, . . . it would be an unreasonable requirement to compel a municipality to remove them from walks and streets" (*id.* at 641). *See also Lamkin v. Towner*, 138 Ill. 2d 510, 525 (1990) ("limit[ing] application of the [purported] duty" based on "location" would be "illogical"). The principle reflected in this Court's precedents is simple: Even if it would be inexpensive to remedy the condition at the particular time and place where

the accident happened—and, to be clear, that is not so here (*see infra* pp. 46-50)—recognition of a duty would entail imposing a like burden "*each* time" (*Krywin*, 238 Ill. 2d at 234 (emphasis added)) and at every "*similar* dangerous place[]" (*Graham*, 346 Ill. at 641 (emphasis added)). It is this inordinate *society-wide* cost that precludes recognition of a duty to remedy ubiquitous conditions—here, access to trains in operation.

For this very reason, the Seventh Circuit has concluded that Illinois law "bars recovery as a matter of law" when a trespassing child attempts to "hop a train." *Ill. State Trust Co. v. Terminal R.R. Ass'n*, 440 F.2d 497, 501 (7th Cir. 1971). Explaining that "effectively foreclos[ing]" the "practice of hopping rides" would "require fencing or patrolling of defendant's entire right-of-way," the court stated that it "[did] not believe Illinois law imposes any such requirement" that railroads shoulder the "enormous burden" that would be placed upon them were liability imposed. *Id.*

The First District's decision likewise conflicts with a heretofore uniform line of Appellate Court authority requiring courts to consider the total cost to society of imposing the proposed duty on everyone, not just the defendant before the court.[14]

The duty imposed by the decision below also is at odds with decisions from other jurisdictions. Recognizing that only system-wide changes 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 &*

[14] *E.g.*, *Hanks v. Mt. Prospect Park Dist.*, 244 Ill. App. 3d 212, 218-19 (1st Dist. 1993); *Jones v. Chicago Transit Auth.*, 206 Ill. App. 3d 736, 777 (1st Dist. 1990); *Serritos v. Chicago Transit Auth.*, 153 Ill. App. 3d 265, 271 (1st Dist. 1987); *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).

Hartford R.R., 276 A.2d 890, 893 (Conn. 1970); *e.g.*, *Holland*, 431 A.2d at 603 n.11 ("courts have consistently held that . . . railroads are generally under no duty to erect fences" against child trespassers being injured by moving trains); *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). "[T]he enormous territory encompassed by [railroads'] rights of way," coupled with "the practical impossibility of adequately fencing or guarding them against trespassers," has led one court to remark with approval that "[t]he great weight of authority throughout the country holds that . . . railroads are ordinarily under no duty to keep children . . . from boarding their cars" in motion. *Egan v. Erie R.R.*, 148 A.2d 830, 835-36 (N.J. 1959).

As another court has explained in refusing to impose such a duty:

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

Edwards v. Consol. Rail Corp., 567 F. Supp. 1087, 1111 (D.D.C. 1983) (quotation marks omitted; emphasis added), *aff'd*, 733 F.2d 966 (D.C. Cir. 1984).[15] Were a duty to be imposed on landowners to prevent children from getting onto the moving trains at this location in Chicago Ridge, Illinois, "it would be *equally* applicable to trains traversing

[15] *See also, e.g.*, *Nolley*, 183 F.2d at 570 (refusing to impose duty on railroad under Minnesota law "to construct an insurmountable fence or wall . . . or to encircle its tracks with . . . a ring of guards"); *George v. Tex. & New Orleans R.R.*, 290 S.W.2d 264, 266 (Tex. Civ. App. 1956) ("it would impose an intolerable burden to obligate the railroad to also see that no intruders rush into obvious dangers after the train has passed"); *Norfolk & Portsmouth Belt Line R.R. v. Barker*, 275 S.E.2d 613, 615-16 (Va. 1981) (rejecting duty to "prevent . . . trespass" "along [the] entire track system").

populated areas" throughout the state. *Joslin*, 11 Cal. Rptr. at 270 (emphasis added). To hold "that railways must install childproof fences or to police the right-of-way in order to prevent children from being attracted to moving trains, would place an unreasonable if not an intolerable burden" on them, militating against recognition of a duty under Section 339(d) of the Restatement. *Id.*

In sum, a decision imposing upon *these* defendants a duty to seal off the right-of-way where *Choate's* accident happened necessarily would impose upon *all railroads* a duty to erect fencing and build overpasses *everywhere*. Only system-wide construction—cordoning off every railroad track throughout the state with impenetrable boy-proof fences and dotting the landscape with overpasses—could abate the risk that trespassing children might jump onto moving trains. Far from being "slight," the burden "to erect fences on *all* land adjacent to railroad property would be intolerable" (*Hanks*, 244 Ill. App. 3d at 219 (emphasis added)), meaning that, as a matter of law, there can be no such duty under *Kahn*.

B. Dr. Berg's *ipse dixit* that improvements could be limited to the accident site was not sufficient to sustain Choate's burden under the cost element of *Kahn*.

In view of the above authority that mandates evaluation of system-wide costs as a matter of law, Dr. Berg's bald denial that remedial measures would have to be replicated wherever trespassing children could gain access to a moving train—*i.e.*, everywhere along defendants' rights of way—is beside the point. But even if it were open in *principle* for a plaintiff to prove that replicating the remedial measures system-wide would be unnecessary under the circumstances of a particular case, Dr. Berg's testimony did not create a question of fact on this point. *See Damron v. Micor Distrib., Ltd.*, 276 Ill. App. 3d 901, 907 (1st Dist. 1995).

Dr. Berg agreed that accidents such as Choate's "essentially involve[] a young boy attempting to jump onto a moving freight train" in order to "try[] to show off." Tr. 1279-80. Choate admitted that he tried "to jump on the train to impress" his girlfriend (Tr. 1743), which he plainly could have done anywhere he and his friends encountered a train. Yet Dr. Berg limited his analysis to people "traversing"—*i.e.*, crossing—the tracks "somewhere between Ridgeland and Central." Tr. 1289. His proposals could have done nothing to abate the "condition" that injured Choate, which was the risk that a trespassing child would try to jump onto a moving train. Dr. Berg "completely ignored [this] factor[] in reaching his determination." *Royal Elm Nursing & Convalescent Ctr., Inc. v. N. Ill. Gas Co.*, 172 Ill. App. 3d 74, 79 (1st Dist. 1988).

The particular location where Dr. Berg asserts defendants should have built an overpass and erected fencing was far from the only one at which trespassing children might try to jump on moving trains. The "practice of hopping rides" was by "no means confined to" the specific location where the accident occurred. *Ill. State Trust*, 440 F.2d at 501. Thus, imposition of a duty on defendants under these circumstances would effectively require them to upgrade *all* of their rights-of-way; an improvement at any *one* location "could not adequately have prevented children from boarding the train at some *other* point." *Scibelli v. Penn. R.R.*, 108 A.2d 348, 352 (Pa. 1954) (emphasis added). Dr. Berg's *ipse dixit* that his proposed improvements would have been an effective remedy was impermissibly "based on assumptions . . . contradicted by the evidence" (*Royal Elm Nursing*, 172 Ill. App. 3d at 79) and thus was not sufficient to satisfy Choate's burden of proof on *Kahn*'s cost element.

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, Dr. Berg's cost estimates and feasibility conclusions lacked a sufficient foundation. Furthermore, as a matter of law, the expenditures contemplated to remedy the condition within just this 6,000-foot rail corridor were not "slight" within the meaning of *Kahn*.

1. Dr. Berg provided no foundation for his testimony that a new overpass could be built at Austin at all, let alone for $150,000. Dr. Berg had never designed or built such a bridge. Tr. 1320-21. 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 and was unfamiliar with its procedures (Tr. 1328), which provide for an extensive application and hearing process (*see* 625 ILCS 5/18c-7401(3); Tr. 1948-50).[16] Dr. Berg further admitted that he had not "done any design studies," sketches, or "cost estimate[s]" (Tr. 1323, 1360); considered how the approaches to the overpass would function (Tr. 1254, 1359-60); or determined the overpass's width or how high it would have to be to comply with the ICC's clearance requirements (Tr. 1323-24, 1361). Dr. Berg also brushed aside the cost of other planning considerations, including compliance with the ADA (Tr. 1328, 1358, 1360); the overpass's impact on traffic flow, land use, and other property owners (Tr. 1354-55); and

[16] Illinois law vests the ICC with exclusive authority over all railroad crossings; no crossing may be opened, closed, or modified without its prior approval. 625 ILCS 5/18c-7401(3). As illustrated by, *inter alia*, the unrebutted testimony of Thomas Livingston, CSXT's Vice President for State Relations, the process is an involved one. 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. 1942-44, 1948-50).

the need to coordinate its construction with the two affected municipalities, Chicago Ridge and Oak Lawn (Tr. 1275-76; DX19). Most strikingly of all, the overpass would physically project beyond the railroad's property and deposit traffic on private property, so defendants would need to acquire easements or title. Tr. 1275, 1354, 2092. *Yet Dr. Berg's $150,000 estimate for an overpass entirely ignored the cost of property acquisition*. Tr. 2092. In sharp contrast to Dr. Berg's patently unrealistic cost estimates, defendants' expert, Carl Bradley, testified that one ADA-compliant pedestrian overpass he reviewed cost $7.5 million to build. Tr. 2093-94.

As for fencing, Dr. Berg admitted that the "actual costs" would be unknown until a field survey was completed, which he had not done. Tr. 1311. He also acknowledged that chain-link fences could be cut and that children had, in fact, "cut down the fence on the other side of the tracks [from where the accident occurred] many times." Tr. 1303, 1312; *see also* Tr. 1727, 2081; DX18G, 18H (photographs). Thus, simply installing chain-link fences along the "corridor" would not be enough, and defendants would "have no choice but to continue [to] repair" them. Tr. 1312. Yet Dr. Berg had no idea how much maintaining a fence would cost. Tr. 1309. He had never been involved in fence construction. Tr. 1309. Topping it all off, it is doubtful that *any* chain-link fence "would have been capable of restraining [Choate] from 'hopping' . . . trains when he was of a mind to do so." *Alston*, 433 F. Supp. at 557 n.17. Choate enjoyed climbing trees and fences (Tr. 1728), and it "defies both logic and the evidence" to suppose that the modest fence proposed by Dr. Berg could have restrained him (*Alston*, 433 F. Supp. at 557 n.17; *see also Butler v. Newark County Country Club*, 909 A.2d 111, 114 (Del. 2006) ("to construct a boy-proof fence at a reasonable cost would tax the inventive genius of an

Edison"); *Nolley*, 183 F.2d at 569 (only a "wholly insurmountable" fence, "like a castle wall, would have served to keep [the trespassing child] off the right of way").

For all these reasons, Dr. Berg's testimony about the feasibility and cost of his proposed improvements was "based on mere speculation and conjecture" and did not "create a question of fact." *Damron*, 276 Ill. App. 3d at 909.

2. Furthermore, even accepting at face value Dr. Berg's assertion that the proposed overpass and fencing would cost only roughly $200,000, a single overpass midway through the 6,000-foot corridor at Austin could not possibly be an effective remedy, as it would not prevent trespassers from jumping onto moving trains at either end of the corridor, where the crossings are at-grade. Dr. Berg recognized 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. At the very least, the existing crossings at Ridgeland and Central would have to be converted to overpasses as well.

Indeed, Dr. Berg himself expressly qualified his opinions on the sufficiency of constructing an overpass at Austin Avenue alone. He confessed that "at some point … you might want" still *another* "crossing point … where [Choate's] incident occurred," since "no one would know" whether the proposed overpass at Austin would do the trick. Tr. 1255, 1318-19. Thus, defendants might be obliged to construct an "additional pedestrian bridge" at the site of the accident if trespassers were to continue to cut the fence at that location and have access to moving trains. Tr. 1318, 1348-49.

Defendants are aware of no case that has ever imposed a duty on a landowner to build even *one* overpass over its property to accommodate trespassers. 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—*i.e.*, at Ridgeland, Austin, Central, and the site of the accident—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.

* * *

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."); Tr. 1306-07, 2070-71. Because only an unrealistically

comprehensive system of barriers and overpasses 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. The duty imposed by the decision below abrogates the principle that railroads are not obliged to seal off their entire rights-of-way.

CONCLUSION

The Court should reverse the judgment below with directions to enter judgment in favor of defendants. At minimum, a new trial should be granted.

Dated: February 8, 2012

Respectfully submitted,

Evan M. Tager (*pro hac vice*)
Brian J. Wong (*pro hac vice*)
MAYER BROWN LLP
1999 K St. NW
Washington, DC 20006
(202) 263-3000

David R. Schmidt
George H. Brant
FEDOTA CHILDERS, P.C.
70 W. Madison St. – Suite 3900
Chicago, IL 60602
(312) 236-5015

Michele L. Odorizzi
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

CERTIFICATE OF COMPLIANCE

The undersigned, one of the attorneys for defendants-appellants, certifies that this brief conforms to the requirements of Rule 315(h) and Rules 341(a) and (b). The length of this brief, excluding the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

_____

Brian J. Wong (*pro hac vice*)

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 brief and the incorporated Rule 342(a) appendix 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 20008, before the hour of 5:00 p.m. on February 8, 2012, for overnight delivery to the following addresses:

Milo W. Lundblad
Brustin & Lundblad, Ltd.
100 W. Monroe Street – Fourth Floor
Chicago, IL 60602

Leslie J. Rosen
Leslie J. Rosen Attorney At Law
30 N. LaSalle Street
Suite 4020
Chicago, IL 60602

_____

Brian J. Wong (*pro hac vice*)

CERTIFICATE OF MAILING

The undersigned hereby certifies that he is one of the attorneys for defendants-appellants and that he filed 20 copies of the foregoing brief and the incorporated Rule 342(a) appendix by causing the same to be delivered, delivery charges prepaid, to a third-party commercial carrier at 1999 K St. NW, Washington, DC 20008, before the hour of 5:00 p.m. on February 8, 2012, for overnight delivery to the following address:

Carolyn Taft Grosboll
Clerk of the Court
Illinois Supreme Court
Supreme Court Building
200 East Capitol Avenue
Springfield, IL 62701-1721

_____
Brian J. Wong (*pro hac vice*)

Appendix
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ILLINOIS OFFICIAL REPORTS

Appellate Court

***Choate v. Indiana Harbor Belt R.R. Co.*, 2011 IL App (1st) 100209**

Appellate Court Caption	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.
District & No.	First District, First Division Docket No. 1–10–0209
Filed	June 27, 2011
Modified on denial of rehearing	August 1, 2011
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader*.)	Defendant railroad's motion for judgment *n.o.v.* was properly denied in an action for the injuries the minor plaintiff suffered when his attempt to jump aboard a slow-moving freight train ended with the loss of his leg below his knee, notwithstanding the railroad's contention that attempting to jump aboard the train was an open and obvious danger for which the railroad owed plaintiff no duty, since the evidence did not so overwhelmingly favor defendant that no contrary verdict could stand, there was conflicting evidence as to whether plaintiff subjectively appreciated the danger, and the evidence as to whether proposed improvements to the right-of-way would have prevented plaintiff's injuries did not overwhelmingly favor the railroad.
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 03–L–12237; the Hon. William J. Haddad, Judge, presiding.
Judgment	Affirmed.

Counsel on Appeal

Fedota Childers, P.C. (David R. Schmidt and George H. Brandt, of counsel), Mayer Brown, LLP (Michele Odorizzi, of counsel), both of Chicago, and Mayer Brown, LLP, of Washington, D.C. (Evan M. Tager and Brian J. Wong, of counsel), for appellants.

Hall Prangle & Schoonveld, LLC, of Chicago (Hugh C. Griffin, of counsel), Sandberg Phoenix & von Gontard, PC, of Edwardsville (Philip J. Lading, A. Courtney Cox, and Anthony L. Martin, of counsel), Association of American Railroads (Louis P. Warchot and Daniel Saphire, of counsel), Shook Hardy & Bacon, LLP (Mark A. Behrens and Christopher E. Appel, of counsel), Washington Legal Foundation (Daniel J. Popeo and Richard A. Samp, of counsel), all of Washington, D.C., for *amici curiae.*

Brustin & Lundblad, Ltd. (Leslie J. Rosen, of counsel), Law Offices of Leslie J. Rosen (Leslie J. Rosen, of counsel), both of Chicago, for appellees.

Rubin Machado & Rosenblum, Ltd., of Chicago (Richard J. Rosenblum, of counsel), for *amicus curiae*.

Panel

JUSTICE ROCHFORD delivered the judgment of the court, with opinion.

Presiding Justice Hall and Justice Hoffman concurred in the judgment and opinion.

OPINION

¶ 1 Minor-plaintiff,[1] Dominic Choate, by Vickie Choate, his mother and next friend, and Vickie Choate, individually, brought a negligence action against defendants, Indiana Harbor Belt Railroad Company (IHB), the Baltimore and Ohio Chicago Terminal Railroad Company (B&OCT), and CSX Transportation, Inc. (CSX), to recover damages for personal injuries plaintiff suffered while attempting to jump aboard a moving freight train traveling 9 to 10 miles per hour. The jury returned a verdict in favor of plaintiff in the amount of $6.5 million, which it reduced to $3.9 million after finding that plaintiff was 40% comparatively negligent. On appeal, defendants contend the circuit court erred by: (1) denying their motion for

[1]Plaintiff was 18 years old at the time of trial and had reached the age of majority.

judgment notwithstanding the verdict because plaintiff's attempt to jump aboard a moving freight train constituted an open and obvious danger for which defendants owed the minor plaintiff no duty, and because plaintiff failed to present competent evidence of remedial measures defendants reasonably could have implemented that would have prevented plaintiff from jumping aboard the moving freight train; (2) failing to give effect to an allegedly binding judicial admission made by plaintiff as to his subjective appreciation of the danger involved in jumping on a moving freight train; (3) refusing to give a special interrogatory asking the jury whether plaintiff appreciated at the time he was injured that attempting to jump on a moving freight train presented a risk of harm to him; (4) excluding testimony of plaintiff's companions that they recognized that jumping onto a moving freight train was dangerous, while at the same time allowing plaintiff to introduce evidence that other minors had attempted to jump on moving freight trains; (5) allowing plaintiff's expert witness to offer conclusions lacking a factual foundation and to opine on issues outside the scope of his expertise; (6) admitting certain testimony from a special agent of the IHB police department that was irrelevant and beyond his level of expertise; (7) admitting the school psychologist's testimony regarding plaintiff's low-average intelligence; and (8) allowing plaintiff to cross-examine defendants' engineering expert using a photograph for which no foundation was established. Defendants also contend they are entitled to a new trial because the verdict was against the manifest weight of the evidence. We affirm.

¶ 2 While attempting to jump aboard a moving freight train which was traveling 9 to 10 miles per hour, plaintiff fell on the tracks and the train ran over his left foot, necessitating amputation of his left leg below his knee. Plaintiff filed suit against defendants, alleging that they owned, operated, managed, maintained and controlled the train tracks where he was injured and that they failed to adequately fence the area or otherwise prevent minor children from accessing the tracks or warn them of the danger. The circuit court initially granted summary judgment in favor of defendants, finding from plaintiff's deposition testimony that he had subjectively appreciated the danger of jumping aboard the moving freight train and therefore defendants owed him no duty of care. Plaintiff subsequently filed a motion to reconsider that the circuit court granted, finding that an objective standard applied as to whether the danger of jumping aboard a moving freight train was so obvious as to negate any duty owed by defendants. Finding that this should be a question of fact for the jury, the circuit court vacated the earlier order granting summary judgment in favor of defendants. The cause proceeded to trial.

¶ 3 Evidence at trial established the following facts. In July 2003, plaintiff was 12 years and 9 months old and had finished the sixth grade. Dr. Richard Lencki, a school psychologist, testified he performed individual intelligence testing on plaintiff in January 2003 during the sixth grade school year. The testing showed that plaintiff had a full scale IQ of 83, which was a "low-average" score in the 13th percentile, meaning that 87% of children his age scored higher than him. Dr. Lencki specifically determined that plaintiff was not mentally retarded. Plaintiff could read at a fifth grade level and his math reasoning skills were at a fourth grade level. Plaintiff was capable of meeting his sixth grade requirements and he had received supplemental educational services to help him do so.

¶ 4 On July 30, 2003, plaintiff and his friends Charlie Spindler, Steve Weyer, Alisa Van

Witzenburg, Jessica Gunderson and Brittany Edgar gathered at the parking lot of an apartment building at 5810 West 107th Court Way in Chicago Ridge, Illinois. Three railroad tracks run in a northwest-southeast direction behind the parking lot. Defendant CSX owns the tracks, while defendant IHB patrols the right-of-way. Defendant B&OCT is wholly owned by CSX.

¶ 5 Looking north from the parking lot, one sees a chain-link fence around a portion of the tracks; the fence does not extend all the way around the tracks. There is a sign mounted on the fence near where it ends, which reads:

"DANGER
NO
TRESPASSING
NO
DUMPING"

Plaintiff testified he did not see this sign on July 30, 2003. Another fence is on the other side of the tracks. That fence had a hole in it and was rolled back so that people could walk through it to get to the tracks.

¶ 6 Plaintiff was scooting his bicycle around the parking lot, about 50 feet from the railroad tracks, and talking to his friends when an eastbound freight train appeared on the middle of the three tracks. Plaintiff testified that the train's speed was 9 to 10 miles per hour and that the train kept going at a steady speed and never stopped. Alisa, Brittany, and Jessica testified that they thought the train might have been stopped for part of the time, but they all agreed that the train was moving at the time plaintiff was injured. Brittany testified that the train was moving "slow."

¶ 7 Plaintiff testified that after a couple of minutes, he, Charlie, and Steve began walking toward the tracks. They stepped onto the railroad right-of-way, defined as "the track or roadbed owned, leased, or operated by a rail carrier which is located on either side of its tracks and which is readily recognizable to a reasonable person as being railroad property or is reasonably identified as such by fencing or appropriate signs." 625 ILCS 5/18c–7503(3) (West 2002). Under the Illinois Vehicle Code, no unauthorized person is permitted to "walk, ride, drive or be upon or along the right of way or rail yard of a rail carrier within the State, at a place other than a public crossing." 625 ILCS 5/18c–7503(1)(a)(i) (West 2002). The parties agree that plaintiff and his companions were trespassers as soon as they stepped onto the railroad right-of-way.

¶ 8 Plaintiff testified their original intention was to wait for the train to pass and then cross the tracks to visit Steve's house on the other side. Alisa similarly testified to plaintiff's, Charlie's, and Steve's original intent to cross the tracks to reach Steve's house. Alisa further testified that they did not want to walk around the train because it would take them a half-hour to do so.

¶ 9 Plaintiff testified that while the train was blocking their path across the tracks, he and Charlie decided on the spur-of-the-moment to jump onto the train. Plaintiff testified that Charlie tried first by attempting to grab onto the ladder on the side of the train. Charlie was

unsuccessful in his attempt and stepped away from the train. Plaintiff then attempted to grab hold of the ladder. Plaintiff testified his motivation in doing so was to impress Alisa, whom he was dating at that time. Plaintiff had never before attempted to jump aboard a moving train, nor had he seen anyone successfully do so.

¶ 10 Plaintiff testified he made three attempts to jump on the train. Brittany testified she and the other girls yelled at plaintiff to stay away from the train, but plaintiff testified he never heard the warning because the train was so loud that it was hard to hear. Plaintiff testified that on his first attempt, he stood flat-footed on the ground and did not run along the side of the train. Although plaintiff was only about 4 feet 10 inches tall at the time, he was able to touch the bottom rung of the ladder. In attempting to "cup" his hand around the rung of the ladder, two of his fingers were bent backwards and he was forced to pull his hand back. Plaintiff testified that the bending of his fingers did not cause him any pain.

¶ 11 Plaintiff testified that on his second attempt, he ran alongside the train and grabbed the ladder. However, his shoes began slipping on the rocks, and so he was again forced to let go. Plaintiff testified that as he was running, he was able to keep up with the train and that, "if [he had] wanted to, [he] would have been able to pass the ladder that [he] was initially trying to get onto."

¶ 12 Plaintiff testified that on his third attempt, he grabbed hold of the ladder with both hands and pulled his body up. His right foot stepped onto the ladder. Plaintiff testified he does not recall what happened next; his next memory is of waking up on the rocks. Plaintiff tried to stand up, but his knee bent backwards and he fell back to the ground. Plaintiff looked down and saw that his left foot had been severed. Alisa testified that plaintiff's injury occurred during his third attempt to jump on the train. Alisa stated that during that attempt, plaintiff slipped off and his left foot went under the train's wheel.

¶ 13 Plaintiff testified that a man named Austin came over to help him, and then an ambulance arrived and took him to the hospital. Surgeons amputated his left leg "a couple inches below [his] knee."

¶ 14 Austin Patton testified that on July 30, 2003, he walked out the back door of his apartment at 5818 107th Court Way in Chicago Ridge and saw a group of grade-school boys and girls in the parking lot. Two boys were standing in a grassy area near the train tracks. A freight train traveling about 10 miles per hour was going by on the second track. Mr. Patton yelled at the boys to stay away from the tracks, but the train was so loud that they could not hear him. The boys approached the train and one of the boys tried to grab onto a ladder on the side of the train. He was knocked down, after which he made no further attempt to grab hold of the ladder. The other boy (whom he later identified as plaintiff) gripped onto the ladder and was pulled to the right. Plaintiff lost his grip, fell down, and the train ran over his foot. As a result, plaintiff "lost the tip of his foot at an angle." Mr. Patton ran over, pulled plaintiff off the tracks and put a towel over his leg, and told a nearby person to call 911. He also flagged down a nearby ambulance. Mr. Patton also testified that prior to July 30, 2003, he had seen children alongside the railroad tracks all the time, and he had observed children cross the railroad tracks in both directions.

¶ 15 Steve Trnka, a firefighter/paramedic employed by Chicago Ridge, testified he had lived

in Chicago Ridge until he was 18 years old, and during that time he had at least twice crossed the tracks where plaintiff was injured. When he was in high school in the 1980s, it was a pretty common occurrence for children to cross the tracks. Mr. Trnka testified that on July 30, 2003, he arrived at the scene shortly after 5:30 p.m. and saw that plaintiff's foot had been severed. Mr. Trnka gave plaintiff oxygen, started an IV, and provided him with nitrous oxide. Mr. Trnka then drove plaintiff to the hospital.

¶ 16 Plaintiff testified he had crossed the railroad tracks at 107th Street one time prior to July 30, 2003. Also, in November 2002, plaintiff had been stopped by IHB police for being on railroad property near Austin Avenue in Chicago Ridge. The officer warned plaintiff that he could get hurt on railroad property and his mother also lectured him to stay away from railroad trains and tracks. Plaintiff further testified that his mother had warned him over a dozen times prior to July 30, 2003, that he should stay away from railroad trains and railroad tracks.

¶ 17 Plaintiff's mother, Vickie Choate, testified she received a letter from the IHB police sometime between 1998 and 2000, informing her that plaintiff had been discovered on the railroad tracks. In response, Ms. Choate warned plaintiff to stay away from trains or otherwise he was going to get hurt. Ms. Choate testified she had warned plaintiff against being around trains on other occasions and had told him he could get hurt by a train and that somebody she knew from her childhood had lost both of his legs from a train accident. Plaintiff testified, though, that although his mother warned him that railroad trains and tracks were dangerous, she never told him he could get killed or that he could lose an arm or a leg as a result of a train accident. Plaintiff denied that his mother gave him graphic warnings about how badly he might be hurt by a train accident.

¶ 18 Plaintiff testified he agreed that the definition of "dangerous" is "something that could kill you or take a body part." Plaintiff agreed that, by this definition, his attempt to board a moving freight train traveling 9 to 10 miles per hour was a dangerous thing to do. However, plaintiff testified that at the time he was attempting to board the moving train, he did not know he was doing something dangerous; he only knew it was dangerous after he had been injured. Plaintiff testified that as he was attempting to jump on the train, he thought he "was going to get on the train, ride it for a couple of feet, and then [he] was going to get off, and everything would be fine."

¶ 19 Plaintiff's answers to deposition questions regarding his recognition of the dangerousness of the train and train tracks were admitted for impeachment purposes. We will discuss those questions and answers in detail later in this opinion.

¶ 20 Victor Barks testified he is the chief of the IHB police department, which patrols IHB property to prevent theft and vandalism. IHB established a "three strikes" program whereby if an officer saw a pedestrian on railroad property outside of a designated crossing area, the officer filled out a contact card and contacted the pedestrian's parents by letter if he was younger than 18 years of age. In a given year, IHB officers wrote out over 1,000 contact cards. If the pedestrian under the age of 18 was caught a second time on railroad property outside of a designated crossing area, the IHB police called the parents and sent them a second letter. If the same pedestrian was caught committing a third such violation, a police

officer from the village or city where the violation occurred then wrote up a citation and the pedestrian was required to "go into the court system." Chicago Ridge was one of the villages that participated in IHB's three strikes program.

¶ 21 Charles Rice, a former special agent for the IHB police department, testified that pursuant to the three strikes program, a contact card for plaintiff was filled out on November 7, 2002. The contact card stated that plaintiff was on the service road just west of Austin Avenue and that he had been warned and released. Mr. Rice testified that a letter would have been sent to plaintiff's parents informing them that plaintiff had been found on railroad property.

¶ 22 James Griffith, a special agent for the IHB police department, testified he initiated the Operation Lifesaver program, whereby he visited schools within walking distance of the railroad and talked to boys and girls about railroad safety. Pursuant to the Operation Lifesaver program, Mr. Griffith visited schools in Chicago Ridge and informed the kids that they should not trespass on railroad property or jump on or cross through trains. Mr. Griffith testified that pursuant to the three strikes program, he had filled out contact cards for children he had observed crossing through a standing train in the general area where plaintiff was injured. Mr. Griffith had stopped and warned children under the age of 13 for catching rides on trains. Over the years, Mr. Griffith had seen approximately 50 children catching such rides on trains.

¶ 23 Plaintiff's expert, Dr. William Berg, Ph.D., testified to what defendants reasonably could have done to prevent plaintiff from being injured. Dr. Berg first explained he had received a Ph.D. in civil engineering from the University of Illinois and had been a professor of civil engineering at the University of Wisconsin for 28 years. Civil engineers are involved with the planning, design, and operation of public works facilities. Dr. Berg's particular specialty is transportation. His master's thesis addressed safety at railroad highway grade crossings, and he has published over 60 papers of which a large percent dealt with railroad issues, including causal factors associated with train collisions.

¶ 24 Dr. Berg testified that for 15 to 20 years he served on a committee of the Transportation Research Board of the National Academy of Sciences studying rail highway grade crossing safety. The focus of the committee was to minimize collisions between trains and motor vehicles or trains and pedestrians. To do so, the committee examined the nature of the usage of crossings, as well as people's knowledge, attitudes, and behavior patterns. The committee examined the effectiveness of warning devices and engineering improvements, with the objective of learning more about these systems so as to attain higher levels of safety. Dr. Berg has been retained by numerous railroads over the years on matters like the one at bar.

¶ 25 Dr. Berg testified that plaintiff was injured on tracks running between Central Avenue and Ridgeland Avenue. The tracks at this location are almost 6,000 feet in length (a little over one mile) and contain no crossing for vehicles or pedestrians. Dr. Berg noted there are schools and homes on each side of the tracks and he opined that people are going to want to cross the tracks on foot or by bicycle to visit their friends and go to school, as well as to visit two nearby parks containing baseball diamonds and tennis courts. Dr. Berg reviewed discovery in the case that supported his opinion, noting that at the location of plaintiff's injuries, railroad police had issued an average of 15 tickets per year for a six-year period to

persons crossing the tracks outside of a public crossing. Dr. Berg also reviewed deposition testimony from young people in the area who testified they were crossing the tracks on a somewhat regular basis. Further, part of a fence had been rolled back so as to allow pedestrians to approach and cross the tracks.

¶ 26 Dr. Berg opined that "[t]here's absolutely no question that young people are regularly crossing the tracks along this 6,000-foot corridor" to visit friends, schools, and parks on the other side. Since there is no designated place to cross the tracks other than the two main arterials that are 6,000 feet apart, Dr. Berg noted that people are going to cross at the intermediate points. Dr. Berg further testified that "young people and trains don't mix" and that from an engineering standpoint, one wants to provide some separation between the areas where people congregate and the area where the trains are located.

¶ 27 Dr. Berg opined that the corridor between Central Avenue on the east and Ridgeland Avenue on the west, which included the area where plaintiff was injured, was not reasonably safe for children because there were no established crossing points for a very long distance. That "puts them in conflict with trains." Even though IHB conducted Operation Lifesaver educational programs and issued tickets to trespassers, further engineering efforts were needed to accommodate the demand of pedestrians to cross the tracks.

¶ 28 Dr. Berg opined that a public facility was needed to accommodate pedestrians and bicyclists. Such a facility would consist of either an at-grade crossing with appropriate warning devices, or a grade separation such as "a ramp that goes up high enough and then an overpass over the tracks and a ramp coming back down." To encourage pedestrians to use this established crossing point, they would be "channelize[d]" with appropriate fencing that would discourage them from crossing at other points. Dr. Berg testified that an overpass would be more effective than an at-grade crossing because pedestrians can traverse an overpass regardless of whether or not a train is present.

¶ 29 Dr. Berg testified he would construct the overpass at Austin Avenue, because that location is midway between Central Avenue and Ridgeland Avenue. An overpass at Austin Avenue would provide relatively convenient access for people who want to go from the neighborhood north of the tracks to the schools to the south. Dr. Berg testified that once the overpass at Austin Avenue is constructed, the railroads should monitor the extent to which pedestrians continue to climb over and under the fence and cross the tracks near the site of where plaintiff was injured. If pedestrian traffic at that site remains high, then another overpass there should be considered.

¶ 30 Dr. Berg testified he was not suggesting that defendants should put up a fence around all of the "miles and miles of right-of-way." Rather, the fencing should be put up along the 6,000-foot corridor between Central Avenue and Ridgeland Avenue because the pedestrians in that area demonstrated a clear demand to travel from one side of the tracks to the other in order to access schools, houses, and parks. Such fencing would channel the pedestrians to the centrally located Austin Avenue crossing point, thereby serving to promote and advance safety in this corridor.

¶ 31 Dr. Berg opined that more likely than not, plaintiff would not have been injured had there been fencing which channeled pedestrians to a centrally located Austin Avenue crossing

point. The reason is that plaintiff and his friends originally had intended to cross the tracks to go to Steve's house, but were prevented from doing so by the freight train. As there was no impediment to going close to the train, plaintiff approached the tracks and then made the ill-fated decision to jump aboard. Had there been fencing which channeled pedestrians to a crossing point at Austin Avenue, plaintiff and his friends likely would have crossed the tracks at Austin Avenue instead of waiting for the train to pass and deciding on the spur-of-the-moment to jump aboard.

¶ 32 Dr. Berg testified that as part of his work as an engineer, he had become familiar with the costs of constructing the proposed fencing and overpass. 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 in the areas that do not have any fencing would be approximately $27,000. The cost of constructing an eight-foot chain-link fence would be approximately $37,500. An overpass at Austin Avenue would cost no more than $150,000, unless there also was a full gate installation at a highway crossing requiring track circuitry and electronics, which could cost approximately $250,000. However, Dr. Berg testified that such a full gate installation would not be necessary for an overpass at Austin Avenue.

¶ 33 Dr. Berg testified that an overpass at Austin Avenue would have to comply with the Americans with Disabilities Act (ADA) and other federal laws regarding making the overpass handicapped accessible and that the concurrence of the Illinois Commerce Commission (ICC) would need to be secured. Dr. Berg testified that compliance with the ADA, other federal laws, and the ICC would not significantly run up the costs because the designers of the overpass would be aware of and take into account the federal requirements and would know how to secure the requisite approvals from the ICC. Dr. Berg also testified that construction of an overpass at Austin Avenue would not impact waterways or wildlife environment in such a way as to add any significant costs to the project. Finally, Dr. Berg testified that to the extent an overpass at Austin Avenue would impact private property owners, the engineers for the project would talk to and work with the property owners to overcome any problems. Dr. Berg testified that in a similar situation in Madison, Wisconsin, he had been personally involved in routing a new bike path along a railroad right-of-way onto private property. The property owners there cooperated and did not pose any problems. Dr. Berg testified that, similar to the routing of the bike path in Madison, any problems associated with the overpass's impact on private property owners here would also not be insurmountable.

¶ 34 Defendants' expert, Carl Bradley, testified he was self-employed as a consultant with respect to railroad-related injuries and accidents. Mr. Bradley previously had been employed as a brakeman for a railroad from 1960 until 1966, as a conductor from 1966 to 1976, and eventually was promoted to terminal superintendent in 1979. Mr. Bradley later moved on to railroad management positions in Colorado, Texas, and California and then retired in 2000 and became a consultant.

¶ 35 Mr. Bradley testified he disagreed with Dr. Berg's opinion that chain-link fencing which channeled pedestrians to an overpass at Austin Avenue likely would have prevented plaintiff from being injured. Mr. Bradley noted the unlikelihood that the chain-link fence would remain intact throughout the 6,000-foot corridor between Central Avenue and Ridgeland

Avene, as kids were likely to cut holes in the fence. Mr. Bradley opined that a big concrete or steel wall erected along the corridor would likely keep trespassers off the right-of-way, but he doubted the property owners would agree to the construction of such a wall considering that it would be so unsightly.

¶ 36 Mr. Bradley testified that Dr. Berg had underestimated the costs of constructing an overpass at Austin Avenue, and that he failed to sufficiently address whether the overpass would be ADA-compliant or whether local villages would support such a structure.

¶ 37 Mr. Bradley testified that before he retired in 2000, the city of Roseville, California, proposed building an ADA-accessible pedestrian overpass 25 feet above the railroad track. It had a roof on top and cost $7.5 million. On cross-examination, Mr. Bradley admitted that he had seen overpasses cost much less than $7.5 million.

¶ 38 Following all the evidence, the jury returned a verdict in favor of plaintiff in the amount of $6.5 million, which it reduced to $3.9 million after finding that plaintiff was 40% comparatively negligent. Defendants appeal. The American Tort Reform Association, the Association of American Railroads, and the Illinois Civil Justice League, Washington Legal Foundation, and Allied Educational Foundation filed *amici curiae* briefs in support of defendants. The Illinois Trial Lawyers Association filed an *amicus curiae* brief in support of plaintiff. The *amici curiae* briefs largely mirror the arguments of the parties they support.

¶ 39 First, defendants contend the circuit court erred in denying their motion for judgment notwithstanding the verdict because plaintiff's act of jumping aboard a moving freight train presented an open and obvious danger for which defendants owed the minor plaintiff no duty of care. Judgments notwithstanding the verdict should be entered only when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). The circuit court's decision denying defendants' motion for judgment notwithstanding the verdict is reviewed *de novo*. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006).

¶ 40 Plaintiff bears the burden of proving that defendants owed him a duty of care. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 116 (1995). Prior to the supreme court's decision in *Kahn v. James Burton Co.*, 5 Ill. 2d 614 (1955), the "attractive nuisance" doctrine governed the duty of owners and occupiers of land (hereinafter referred to collectively as landowners) to a trespassing child who was injured on their premises. *Cope v. Doe*, 102 Ill. 2d 278, 285 (1984). Under the attractive nuisance doctrine, the defendant landowner was liable for injuries to the child caused by a condition that attracted him to the premises. *Cope*, 102 Ill. 2d at 285. The courts employed the fiction that the child was an invitee because defendant enticed the child to enter the premises by maintaining a condition that was attractive. *Cope*, 102 Ill. 2d at 285. Defendant owed a duty to take reasonable precautions protecting the child from injuries. *Cope*, 102 Ill. 2d at 285.

¶ 41 In *Kahn*, the supreme court rejected the attractive nuisance doctrine and held that the liability of landowners upon whose land a child is injured is determined with reference to the customary rules of ordinary negligence. *Kahn*, 5 Ill. 2d at 624. Generally, landowners owe no duty to keep their premises in any particular condition promoting the safety of persons

who come on the premises without invitation. *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 325 (1978). However, in *Kahn*, the supreme court recognized:

> "[A]n exception exists where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a defective structure or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children. In such cases there is a duty upon the owner or other person in possession and control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it. [Citation.] The element of attraction is significant only in so far as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of harm to the child." *Kahn*, 5 Ill. 2d at 625.

¶ 42 In *Corcoran*, 73 Ill. 2d at 326, the supreme court noted that *Kahn* brought Illinois law into harmony with section 339 of the Restatement (Second) of Torts, which states:

> "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children." Restatement (Second) of Torts § 339 (1965).

¶ 43 Thus, a duty is imposed on the landowner only if he "knows or should know that children frequent the premises *and* if the cause of the child's injury was a *dangerous* condition on the premises." (Emphasis in original.) *Corcoran*, 73 Ill. 2d at 326. A dangerous condition is "one which is likely to cause injury to the general class of children who, by reason of their immaturity, might be incapable of appreciating the risk involved." *Corcoran*, 73 Ill. 2d at 326. If both these prerequisites are met, the harm to children is deemed sufficiently foreseeable for the law to impel the landowner to remedy the condition. *Corcoran*, 73 Ill. 2d at 326.

¶ 44 However, the supreme court has held that *Kahn* imposes no duty on landowners to protect against conditions that pose obvious risks of danger that children would be expected to appreciate and avoid. *Corcoran*, 73 Ill. 2d at 326; *Mt. Zion*, 169 Ill. 2d at 117. "The rationale for this rule is that, since 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*, 102 Ill. 2d at 286. "The exception for obvious dangers is 'not merely a matter of contributory negligence or assumption of risk, but of lack of duty to the child.' " *Mt. Zion*, 169 Ill. 2d at 117-18 (quoting Prosser and Keeton on Torts § 59, at 409 (W. Page Keeton *et al.* eds. 5th ed. 1984)).

¶ 45 There is both an objective *and* subjective test for determining whether a danger is obvious to a trespassing child. Under the objective test, a danger is considered obvious to a trespassing child if "children of similar age and experience would be able to appreciate the dangers on the premises." *Salinas v. Chicago Park District*, 189 Ill. App. 3d 55, 61 (1989). Under this test, any subjective inability of the trespassing child to appreciate the danger is not considered when a risk is deemed obvious to children generally. *Salinas*, 189 Ill. App. 3d at 61.

¶ 46 Under the subjective test, a danger is considered obvious to a trespassing child if he has "some *greater* understanding of the alleged dangerous condition than would a typical minor of his age" that allows him to subjectively appreciate the full risk of harm. (Emphasis added.) *Swearingen v. Korfist*, 181 Ill. App. 3d 357, 362 (1989); see also *Colls v. City of Chicago*, 212 Ill. App. 3d 904, 946 (1991); *Hagy v. McHenry County Conservation District*, 190 Ill. App. 3d 833, 840 (1989). The rationale comes from the following comments to section 339 of the Restatement (Second) of Torts, which the *Swearingen* court found "persuasive" (*Swearingen*, 181 Ill. App. 3d at 362):

> "The purpose of the duty is to protect children from dangers which they do not appreciate and not to protect them against harm resulting from their own immature recklessness in the case of known and appreciated danger. Therefore, even though the condition is one which the possessor should realize to be such that young children are unlikely to realize the full extent of the danger of meddling with it or encountering it, the possessor is not subject to liability to a child who in fact discovers the condition and appreciates the *full risk* involved, but none the less chooses to encounter it out of recklessness or bravado." (Emphasis added.) Restatement (Second) of Torts § 339, cmt. m, at 204 (1965).

¶ 47 I. Whether Plaintiff's Act of Jumping Aboard the Moving Freight Train Posed an Obvious Danger Under the Objective Test

¶ 48 First, defendants contend they are entitled to judgment notwithstanding the verdict because plaintiff's act of jumping aboard the moving freight train traveling 9 to 10 miles per hour posed an obvious danger that children of plaintiff's age and experience can be expected to appreciate as a matter of law. In support, defendants cite *LeBeau v. Pittsburg, C., C. & St. L. Ry. Co.*, 69 Ill. App. 557 (1897), *Fitzgerald v. Chicago, Burlington & Quincy R.R. Co.*, 114 Ill. App. 118 (1904), and *Briney v. Illinois Central R.R. Co.*, 401 Ill. 181 (1948). In *LeBeau*, Leo LeBeau, who was 10 years and 5 months old, attempted to jump on a moving freight train of unidentified speed and fell under the wheel of one of the cars. *LeBeau*, 69 Ill. App. at 558. As a result, his right leg was required to be amputated. *LeBeau*, 69 Ill. App. at

558. LeBeau, by his next friend, brought suit against the defendant railroad, alleging it was negligent in failing to warn him to keep away from the railroad crossing. *LeBeau*, 69 Ill. App. at 559. The court instructed the jury to return a verdict in favor of the railroad. *LeBeau*, 69 Ill. App. at 558. The appellate court affirmed, holding as a matter of law that "[j]umping from the ground upon a moving freight train is dangerous, all men and all ordinarily intelligent boys ten years of age know it to be so." *LeBeau*, 69 Ill. App. at 560. In *Fitzgerald*, 12-year-old William Fitzgerald attempted to climb aboard a "slowly" moving freight train and fell in front of the wheels, causing his legs to be crushed so badly that they were required to be amputated. *Fitzgerald*, 114 Ill. App. at 119-20. Fitzgerald, by his next friend, brought suit against the defendant railroad. *Fitzgerald*, 114 Ill. App. at 120. At the close of Fitzgerald's case, the circuit court instructed the jury to find the railroad not guilty. *Fitzgerald*, 114 Ill. App. at 120. The appellate court affirmed, noting that "[i]n [*LeBeau*], under similar circumstances we held that a boy ten years and five months of age, of ordinary intelligence, as we must presume from the evidence the plaintiff was, knows that it is dangerous to attempt to get on a moving freight train. Such is the law in this state, and we cannot depart from it." *Fitzgerald*, 114 Ill. App. at 120-21. However, neither of these decisions is binding as they were decided prior to 1935 (*LeBeau* was 1897 and *Fitzgerald* was 1904). See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 95 (1996) ("[a]ppellate court decisions issued prior to 1935 had no binding authority").

¶ 49 In *Briney*, Daniel C. Briney, who was eight years and nine months old, attempted to jump aboard a freight train moving at approximately four miles per hour but he slipped and fell in such a manner that his left leg was run over, requiring amputation. *Briney*, 401 Ill. at 184. Briney, by his next friend, brought suit on the theory that the defendant railroad impliedly invited him to come on its right-of-way and throw switches for its employees in exchange for gifts. *Briney*, 401 Ill. at 185. A jury returned a verdict in Briney's favor for $35,000. *Briney*, 401 Ill. at 182. The supreme court reversed, holding that Briney's effort to jump aboard the train had no connection with the alleged invitation and that he was a trespasser at the time of the injury. *Briney*, 401 Ill. at 187-88. The supreme court held that since Briney was a trespasser, the defendant railroad only owed him the duty not to wilfully and wantonly injure him. *Briney*, 401 Ill. at 186. No such duty was breached. *Briney*, 401 Ill. at 188-91.

¶ 50 *Briney* is not applicable here, as it was decided seven years before *Kahn* and as the court did not consider whether the defendant railroad owed the minor plaintiff a duty of care if his act of attempting to jump aboard the moving train was foreseeable, nor did it address whether the danger of such an act was so open and obvious as to negate any duty owed by the railroad.

¶ 51 We find two more recent cases, *La Salle National Bank v. City of Chicago*, 132 Ill. App. 3d 607 (1985), and *Engel v. Chicago & North Western Transportation Co.*, 186 Ill. App. 3d 522 (1989), both decided subsequent to *Kahn*, to be dispositive. In *La Salle*, nine-year-old Charles Murphy was severely injured when he fell while climbing aboard a moving freight train of unidentified speed owned and operated by Consolidated Rail Corporation (Conrail), after gaining access to the railroad tracks by climbing through a hole in a fence constructed and maintained by the city of Chicago (the city). *La Salle*, 132 Ill. App. 3d at 609. The fence, which was erected pursuant to a contract between the city and Conrail's predecessor,

separated the city's land from that of the railroad. *La Salle*, 132 Ill. App. 3d at 611, 613. The city allowed the fence to remain in a state of disrepair despite its knowledge that children were using the hole in the fence to gain access to the railroad tracks. *La Salle*, 132 Ill. App. 3d at 613.

¶ 52 Murphy brought suit against Conrail and the city alleging negligence and wilful and wanton conduct. *La Salle*, 132 Ill. App. 3d at 609. The jury found in favor of Conrail and the city as to wilful and wanton conduct, but found in favor of Murphy as to negligence and awarded him damages of $1,130,000. *La Salle*, 132 Ill. App. 3d at 609. The jury determined Murphy had been 18% negligent and reduced his damage award to $926,600. *La Salle*, 132 Ill. App. 3d at 609.

¶ 53 On appeal, the city argued in pertinent part that the jury's finding that Murphy was 18% comparatively negligent constituted a conclusive determination that he appreciated the danger of climbing aboard the moving train and therefore he should be precluded from recovering any damages. *La Salle*, 132 Ill. App. 3d at 615. The appellate court affirmed the jury award, holding that, under *Kahn*, the city owed Murphy a duty of ordinary care and that it was a jury question as to whether the city had breached that duty resulting in injury to Murphy. *La Salle*, 132 Ill. App. 3d at 615. The appellate court further held that the jury's finding of 18% comparative negligence on the part of Murphy did not constitute a finding that he appreciated the risk involved in attempting to climb aboard a moving freight train. *La Salle*, 132 Ill. App. 3d at 615.

¶ 54 In *Engel*, 12-year-old John Engel filed suit against the Chicago Park District to recover damages for injuries he sustained when he jumped from a moving freight train traveling four or five miles per hour. *Engel*, 186 Ill. App. 3d at 524-25. Prior to the accident, Engel had met some friends at Hermosa Park, which was operated by the Chicago Park District. *Engel*, 186 Ill. App. 3d at 525. The entire park was fenced, but for at least two years prior to Engel's injury, the west side of the fence had a large hole extending from the top of the fence to the bottom which children and adults used as a short cut to gain access to railroad tracks bordering the west side of the park. *Engel*, 186 Ill. App. 3d at 525. The Chicago Park District failed to repair the hole in the fence, despite its knowledge of the hole's existence and its awareness that children used the hole to gain access to the railroad tracks and to jump aboard and take short rides on the trains (a practice known as "flipping" the trains). *Engel*, 186 Ill. App. 3d at 525.

¶ 55 On the day he was injured, Engel and his friends decided to go to a nearby store for candy. *Engel*, 186 Ill. App. 3d at 527. The shortest route to the store was through the hole in the fence and over the railroad tracks. *Engel*, 186 Ill. App. 3d at 527. Engel noticed a train traveling four or five miles per hour. *Engel*, 186 Ill. App. 3d at 527. Engel got on a ladder on the side of the train and rode for approximately 30 feet before jumping off to join his friends. *Engel*, 186 Ill. App. 3d at 527. Engel spun around and fell and his left leg went under the train. *Engel*, 186 Ill. App. 3d at 527. Engel's leg was amputated in the hospital. *Engel*, 186 Ill. App. 3d at 527.

¶ 56 The jury returned a verdict in Engel's favor for $5 million in compensatory damages. *Engel*, 186 Ill. App. 3d at 527. On appeal, the Chicago Park District argued it owed no duty

to Engel as a matter of law to protect him from the obvious danger of climbing aboard a moving train and, therefore, the case never should have gone to the jury. *Engel*, 186 Ill. App. 3d at 528. Engel responded that although the supreme court has held that fire, drowning in water, and falling from a height are obvious dangers children reasonably may be expected to fully understand and appreciate (see *Corcoran*, 73 Ill. 2d at 327 (citing Restatement (Second) of Torts § 339, cmt. j, at 203 (1965))), the danger of jumping aboard a slow-moving train should not be presumed to be fully understood and appreciated by all children as a matter of law but, rather, should be individually assessed as questions of fact. *Engel*, 186 Ill. App. 3d at 528.

¶ 57 The appellate court agreed with Engel and affirmed the jury award. Citing *La Salle* as persuasive authority, the court held:

> "The main reason the case cannot be determined as a matter of law is that the 'obviousness' of the danger is not such that no minds could reasonably differ. The policy determination that most children are presumed to know the risks of injury inherent in certain types of activities, such as playing with fire or playing in bodies of water does not *per se* extend to the train-flipping cases. Under different facts than are present in this case, however, a judge could find that the danger was obvious to a plaintiff or that the landowner was unaware of the condition and find no duty existed as a matter of law." *Engel*, 186 Ill. App. 3d at 530-31.

¶ 58 Defendants here argue that the present case presents those "different facts" supporting a finding as a matter of law that the danger from plaintiff's jumping aboard the moving freight train was so objectively obvious as to preclude a duty on the part of defendants. Specifically, defendants point out that the train here was moving twice the speed of the train in *Engel*. Also, whereas Engel had seen people jump onto moving trains seven or eight times without incident (*Engel*, 186 Ill. App. 3d at 526), plaintiff here admitted he had never seen anyone successfully jump on a train and had in fact seen his friend Charlie Spindler try unsuccessfully to jump aboard the train only moments before his attempt. Also, plaintiff himself testified to his own two unsuccessful attempts to jump on the train prior to the third attempt leading to his injuries. Defendants contend that on these facts, they owed no duty as a matter of law because children of similar age and experience would appreciate the danger of attempting to jump aboard the moving freight train and, as such, that the circuit court should have granted their motion for judgment notwithstanding the verdict.

¶ 59 We disagree. Although the train was running twice as fast as the train in *Engel*, it still was traveling only 9 to 10 miles per hour. Plaintiff testified he was able to keep up with the train while running beside it, and that if he had wanted to, he could have run past the ladder hanging alongside. Plaintiff also testified that despite his small size, he was able to reach up and grab the ladder while standing flat-footed, which indicates he was not required to take a large leap in order to gain access thereto. Prior to plaintiff's jump, Charlie put his hand out toward the train and then pulled it back in and (according to Mr. Patton) he fell down, but there was no testimony that Charlie was hurt in any way thereby. After Charlie stepped away, plaintiff then made two unsuccessful attempts to jump on the train prior to his injuries. On the first attempt his fingers struck the ladder and were bent back, but plaintiff testified "there wasn't no pain or nothing." On his second attempt, plaintiff ran alongside the train and

grabbed onto the ladder, but he was forced to let go when his shoes began slipping on the rocks. There was no evidence that plaintiff was hurt thereby. Plaintiff was injured on his third attempt to jump aboard the freight train. The "obviousness" of 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, and the ladder of which was within reach of the plaintiff while standing flat-footed, is not such that no minds could reasonably differ. Accordingly, we reject defendants' argument that they are entitled to judgment notwithstanding the verdict because plaintiff's act of jumping aboard said freight train was an obvious danger that children of plaintiff's general age and experience can be expected to appreciate as a matter of law. The issue was one of fact for the jury to determine; viewed in the light most favorable to plaintiff, the evidence does not so overwhelmingly favor defendants that no contrary verdict could stand. Defendants' argument for judgment notwithstanding the verdict is unavailing.

¶ 60 Defendants cite cases in other jurisdictions holding as a matter of law that young children should objectively recognize the danger of attempting to jump aboard a moving train. See, *e.g.*, *Holland v. Baltimore & Ohio R.R. Co.*, 431 A.2d 597 (D.C. 1981) (and the cases cited therein); Restatement (Second) of Torts § 339, Appendix, Reporter's Note, at 133-34 (1966) (and the cases cited therein). As there is Illinois authority on the point of law in question, we need not look to other states for guidance. *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 744 (2000).

¶ 61 Defendants cite a leading treatise, Prosser and Keeton on Torts § 59, at 407 (W. Page Keeton *et al.* eds. 5th ed. 1984), which observes that certain courts in other states have held that the peril of moving vehicles is a danger that children can be expected to understand as a matter of law. As discussed above, we need not look to out-of-state cases when there is Illinois authority on the point in question. Further, we note that another leading treatise, 1 Dan D. Dobbs, The Law of Torts § 236, at 613 (2001), states:

> "The highest tradition of the common law requires justice according to the facts of the case, not according to a model of cases in general, and it is not beyond conception that some children would foreseeably be unable to appreciate the risk of moving trains, just as they are unable to appreciate the risk of other moving machinery."

¶ 62 On the facts of the present case, it is not beyond conception that children of plaintiff's general age and experience would foreseeably be unable to appreciate the risk of jumping aboard the moving freight train traveling 9 to 10 miles per hour. As discussed above, the issue was one of fact for the jury to determine; viewed in the light most favorable to plaintiff, the evidence does not so overwhelmingly favor defendants that no contrary verdict could stand. Accordingly, defendants' argument for judgment notwithstanding the verdict fails.

¶ 63 II. Whether Plaintiff's Act of Jumping Aboard the Moving Freight Train Posed an Obvious Danger Under the Subjective Test

¶ 64 Next, defendants contend they are entitled to judgment notwithstanding the verdict because plaintiff subjectively appreciated the danger and full risk of harm from jumping aboard the moving freight train and therefore defendants owed him no duty of care. In

support, defendants point to the following evidence: plaintiff's mother had repeatedly warned him of the dangers of moving trains and had even told him that he could lose his limbs in a train accident; plaintiff had been caught trespassing on railroad property prior to July 30, 2003, and had been warned to stay away by railroad police officers; the train that injured him was large and loud, further indicating to plaintiff its dangerousness and full risk of harm; Mr. Patton and several of plaintiff's friends at the scene knew the danger of jumping aboard a moving train and warned him against approaching the train; and plaintiff's first two attempts to jump on the train ended in failure. Defendants contend all this evidence indicates that plaintiff subjectively appreciated the danger and full risk of harm from jumping aboard the moving freight train, but that he recklessly disregarded the risk to impress Alisa. Defendants cite Restatement (Second) of Torts § 339, cmt. m, at 204 (1965), which states "the possessor is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved, but none the less chooses to encounter it out of recklessness or bravado." Defendants contend they owed plaintiff no duty as a matter of law due to his subjective appreciation of the danger and full risk of harm from jumping aboard the moving freight train and, therefore, the circuit court should have granted their motion for judgment notwithstanding the verdict.

¶ 65 However, there was contrary evidence indicating plaintiff did not subjectively appreciate the danger and full risk of harm. Specifically, plaintiff testified at trial that, at the time he was attempting to board the moving train, he did not know he was doing something dangerous, which he defined as "something that could kill you or take a body part"; he testified he only knew it was dangerous after the injuries occurred. Defendants contend that plaintiff was impeached with his deposition testimony in which he responded yes when asked whether he currently recognizes that "on the day of the accident" the train tracks were dangerous and that the train was dangerous. Plaintiff's deposition testimony indicates only that plaintiff was aware at the time of the deposition (*after* he had suffered his injuries) that the train and the tracks were dangerous. The deposition testimony is unclear as to when plaintiff *first* recognized that the train and the tracks were dangerous, *i.e.*, whether he recognized the danger before he was injured or whether he recognized the danger only after he was injured; thus, the deposition testimony does not clearly contradict his trial testimony that he was unaware of the danger and full risk of harm at the time of his injuries.

¶ 66 In addition, there was other evidence indicating that plaintiff did not subjectively appreciate the danger and full risk of harm at the time he was injured. Specifically, plaintiff testified, contrary to his mother's testimony, that she never told him he could be killed or lose an arm or a leg as a result of a train accident. Plaintiff denied receiving any graphic warnings from his mother regarding how badly he might be hurt in a train accident. Plaintiff also testified he never heard the warnings from Mr. Patton or his own friends to stay away from the train. Finally, although plaintiff's two previous attempts to jump aboard the train had been unsuccessful, he was not injured on either of these attempts. Plaintiff testified to his belief at the time he was injured that he would be able to jump on and off the train with no problems.

¶ 67 As there was conflicting evidence regarding whether plaintiff subjectively appreciated the danger and full risk of harm at the time he was injured, we cannot say that the evidence,

when viewed in the light most favorable to plaintiff, so overwhelmingly favors defendants that no contrary verdict could ever stand. Accordingly, the circuit court did not err in denying defendants' motion for judgment notwithstanding the verdict.

¶ 68 III. Whether Plaintiff Showed the Expense of Remedying the Dangerous Condition Was Slight as Compared to the Risk to Children

¶ 69 Next, defendants contend the circuit court erred in denying their motion for judgment notwithstanding the verdict because plaintiff failed to prove that the expense or inconvenience of remedying the dangerous condition was slight compared to the risk to children. See *Kahn*, 5 Ill. 2d at 625. In particular, defendants contend that the testimony of plaintiff's expert, Dr. Berg, was insufficient to establish this element of the *Kahn* test for three reasons: (1) Dr. Berg's proposed improvements would not have prevented plaintiff from jumping aboard the train; (2) Dr. Berg's proposed improvements are prohibitively costly, as they would require defendants to fence their entire right-of-way; and (3) Dr. Berg's proposed improvements could not feasibly be implemented. We address each argument in turn.

¶ 70 A. Would Dr. Berg's Proposed Improvements Have Prevented Plaintiff From Jumping Aboard the Moving Freight Train?

¶ 71 Dr. Berg testified to the dangerous condition resulting from approximately 6,000 feet of tracks between Central Avenue and Ridgeland Avenue that contained no crossing for vehicles or pedestrians. Dr. Berg noted that young persons regularly were crossing along the 6,000-foot corridor to access schools, homes, and parks. Dr. Berg opined that to prevent injury-causing collisions from occurring, engineering efforts were needed to accommodate the pedestrian demand to cross the tracks. Specifically, Dr. Berg opined that either an at-grade crossing or an overpass should be constructed at Austin Avenue, which was the mid-way point between the 6,000 feet of tracks, to provide convenient access for persons wanting to cross the tracks. Dr. Berg preferred an overpass because pedestrians would be able to cross the train tracks even if a train was passing by. Dr. Berg opined that fencing should be put up along the 6,000-foot corridor to "channelize" pedestrians toward the new crossing point at Austin Avenue and discourage them from crossing at other points.

¶ 72 Defendants argue that Dr. Berg's proposed engineering improvements at most would have reduced the risk that persons would cross the tracks at an unauthorized location between Central Avenue and Ridgeland Avenue. Defendants argue that the engineering improvements "would have done nothing to abate the condition that injured [plaintiff], which was the ever-present risk that trespassing children would try *to jump onto a moving train* wherever they could gain access to the tracks." (Emphasis in original.) Accordingly, defendants contend the circuit court should have granted them judgment notwithstanding the verdict.

¶ 73 We disagree. Dr. Berg noted that plaintiff's original intent was to cross over the tracks to reach his friend's, Steve's, house on the other side, but that he was prevented from doing so by the passing freight train. While waiting for the freight train to pass, plaintiff

approached the tracks and made the spur-of-the-moment decision to jump aboard the train to impress Alisa. Dr. Berg testified that, more likely than not, plaintiff would not have been injured had there been fencing which channeled pedestrians to a centrally located crossing point at Austin Avenue, which would have allowed plaintiff to cross over the tracks instead of waiting around and then deciding to jump aboard the moving freight train. Defendants' expert, Mr. Bradley, disagreed with Dr. Berg's opinion that chain-link fencing which channeled pedestrians to an overpass at Austin Avenue would have prevented plaintiff from being injured. However, it was the province of the jury to listen to the competing experts and weigh all the evidence (*Bosco v. Janowitz*, 388 Ill. App. 3d 450, 462 (2009)), and it obviously gave greater weight to Dr. Berg's testimony. Viewed in the light most favorable to plaintiff (*Pedrick*, 37 Ill. 2d at 510), Dr. Berg's testimony was sufficient for the jury to find that had there been fencing which channeled plaintiff to the Austin Avenue crossing point, he likely would have crossed there and gone to Steve's house instead of deciding to jump aboard the moving freight train. Thus, defendants' argument for judgment notwithstanding the verdict fails, as the evidence regarding whether Dr. Berg's proposed improvements would have prevented plaintiff from jumping aboard the moving freight train did not so overwhelmingly favor defendants that no contrary verdict could ever stand.

¶ 74 B. Would Dr. Berg's Proposed Improvements Require Defendants to Fence Their Entire Right-of-Way?

¶ 75 Defendants next argue that to prevent children from jumping on trains, fencing would have to be constructed over the *entire* right-of-way, not merely the corridor between Central Avenue and Ridgeland Avenue, and that multiple overpasses "dotting the landscape" also would have to be constructed. Defendants contend such protective measures against train-hopping children would be wholly impracticable and costly and therefore that the circuit court here should have granted them judgment notwithstanding the verdict. Defendants cite *Illinois State Trust Co. v. Terminal R.R. Ass'n of St. Louis*, 440 F.2d 497 (7th Cir. 1971), in which seven-year-old David Land fell under the wheels of a railroad car while attempting to jump aboard a moving train of unidentified speed. *Illinois State Trust*, 440 F.2d at 498-99. Land brought a personal injury action against Terminal Railroad Association of St. Louis (Terminal). The circuit court entered a directed verdict in favor of Terminal. *Illinois State Trust*, 440 F.2d at 498. On Land's appeal, the Seventh Circuit Court of Appeals affirmed, holding in pertinent part: "[t]he only methods of insuring that such injuries would not recur would be to fence the right-of-way at crossings where there is any likelihood of children's presence or to construct an overpass or underpass or place a guard at all such crossings. We do not believe Illinois law imposes any such requirement." *Illinois State Trust*, 440 F.2d at 501.

¶ 76 In the present case, Dr. Berg never testified that defendants should be required to fence all their rights-of-way and to construct overpasses or underpasses at all crossings. Instead, Dr. Berg testified defendants would not have to put up a fence over all of the "miles and miles of right-of-way" but, rather, only along the 6,000-foot corridor between Central Avenue and Ridgeland Avenue in the areas that do not have any fencing. Dr. Berg reasoned

that the 6,000-foot corridor posed a unique danger to children because it constituted over a mile of tracks without any type of crossing point, and that the demand for such a crossing was high given that travel across the tracks along that corridor was necessary to access schools, houses, and parks on the other side. Accordingly, 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. Viewed in the light most favorable to plaintiff, Dr. Berg's testimony was sufficient for the jury to find that the fencing and overpass would be limited to the 6,000-foot corridor and would not have to be replicated elsewhere along the right-of-way. Thus, defendants' argument for judgment notwithstanding the verdict fails, as the evidence regarding whether Dr. Berg's proposed improvements would require defendants to fence their entire right-of-way did not so overwhelmingly favor defendants that no contrary verdict could ever stand.

¶ 77 C. Could Dr. Berg's Proposed Improvements Feasibly Be Implemented?

¶ 78 Defendants next argue that the circuit court should have granted them judgment notwithstanding the verdict because there was no factual support for a finding that Dr. Berg's proposed improvements along the 6,000-foot corridor feasibly could be implemented, much less that their expense or inconvenience would be slight. Specifically, defendants argue that Dr. Berg never had been involved in the design or construction of an overpass and had not provided a detailed design or cost estimate of the overpass he advocated; he had not settled on the basic design parameters of the overpass; he "brushed aside" planning issues such as compliance with the ADA and other accessibility requirements, the overpass's environmental impact, its impact on traffic flow, land use, and other property owners, and the need to coordinate its construction with Chicago Ridge and Oak Lawn; he dismissed the notion that defendants would have difficulty securing permission from the ICC to build the overpass; he ignored the costs of acquiring easements or title from neighboring property owners; he failed to take into account the costs of maintaining the chain-link fence; and he dramatically understated the costs for installing fencing.

¶ 79 Review of Dr. Berg's testimony indicates that he 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. Specifically, Dr. Berg testified to his work experience as a civil engineer specializing in transportation and his years of experience working to make railroad crossings safe. During his years of work as a civil engineer, Dr. Berg had become familiar with the costs of constructing the proposed fencing and overpass. Dr. Berg testified that the cost of constructing a six-foot chain-link fence along both sides of the 6,000-foot corridor in the areas that do not have any fencing would be approximately $27,000, and that the cost of constructing an eight-foot chain-link fence would be approximately $37,500. An overpass at Austin Avenue would cost a maximum of $150,000, unless there was also a full gate installation, in which case the cost would increase by $100,000; however, Dr. Berg testified that such a gate would not be required at Austin Avenue and so the cost would remain approximately $150,000. Contrary to defendants' arguments, Dr. Berg did not "brush aside" planning issues, but rather he testified to the need for the improvements to comply with the ADA and other federal laws as well as the need to

secure the concurrence of the ICC. Based on his experience, the costs of compliance with the ADA, other federal laws, and the ICC would not be significant. Also, contrary to defendants' arguments, Dr. Berg testified that the improvements would have negligible impact on the environment and that such an impact would not significantly increase the costs of the project. Dr. Berg further testified to the ability of engineers to work with property owners to overcome any problems, and gave as an example his personal experience routing a new bike path along a railroad right-of-way. Finally, Dr. Berg testified that he expected the maintenance of the fence to cost very little.

¶ 80 Defendants' expert, Mr. Bradley, testified contrary to Dr. Berg that fencing which channeled pedestrians to an overpass at Austin Avenue likely would not have prevented plaintiff from being injured. Mr. Bradley also testified that Dr. Berg had underestimated the costs of constructing an overpass and he noted that a pedestrian overpass in the city of Roseville, California, had cost $7.5 million. On cross-examination, though, Mr. Bradley admitted that he had seen overpasses cost much less than $7.5 million.

¶ 81 The jury found Dr. Berg to be more credible than Mr. Bradley. We will not substitute our judgment therefor. *Davis v. Kraff*, 405 Ill. App. 3d 20, 37 (2010). Viewed in the light most favorable to plaintiff, Dr. Berg's testimony enabled plaintiff to satisfy the *Kahn* test by providing a sufficient factual foundation for the jury to find that the proposed improvements along the 6,000-foot corridor between Central Avenue and Ridgeland Avenue feasibly could be implemented and that their expense or inconvenience would be slight as compared to the risk to children. Accordingly, as the evidence on this issue does not so overwhelmingly favor defendants such that no contrary verdict could ever stand, we affirm the denial of defendants' motion for judgment notwithstanding the verdict.

¶ 82 In their petition to reconsider, defendants argue that Dr. Berg made a mathematical error in estimating the cost of fencing. Dr. Berg testified that defendants should construct a 6- to 8-foot-high fence along both sides of the 6,000-foot corridor in the areas that do not have any fencing. Dr. Berg also testified that the cost for installing the new chain-link fencing would be $18 per foot for a six-foot fence and $24 to $26 per foot for an eight-foot fence. Dr. Berg testified that this worked out to $27,000 for a six-foot fence and $37,500 for an eight-foot fence that would cover both sides (12,000 feet) of the corridor.

¶ 83 When defendants questioned Dr. Berg during cross-examination about his mathematical computations, he further testified that only approximately 25% of the corridor (3,000 feet) would require fencing. We note that, when the figures of $18 per foot for a six-foot fence and $24 to $26 per foot for an eight-foot fence are multiplied by 3,000 feet, they come out to $54,000 for a six-foot fence and between $72,000 and $78,000 for an eight-foot fence. Nobody performed this math for the jury, though, and Dr. Berg never specifically testified to any figures other than $27,000 and $37,500 as the respective costs for installing a six-foot or eight-foot fence along both sides of the corridor in the areas that do not have any fencing. During closing arguments, plaintiff specifically cited Dr. Berg's testimony and stated that "he estimated *** that the cost of completing the fence for this corridor would cost somewhere between $27,000 and $37,000." Defendants made no objections thereto.

¶ 84 Even if evidence *had* been presented to the jury that $54,000 and $72,000 to $78,000 are

more accurate estimates of the respective costs for installing a six-foot or eight-foot fence along both sides of the 6,000-foot corridor in the areas that do not have any fencing, our holding here would remain unchanged because the jury could find that such costs remain relatively slight compared to the risks to children if such fencing is not installed. Accordingly, we deny the petition to reconsider and affirm the denial of defendants' motion for judgment notwithstanding the verdict.

¶ 85 IV. Whether the Court Erred In Its Evidentiary Rulings

¶ 86 Next, defendants contend the circuit court erred in admitting a certain portion of plaintiff's deposition testimony for impeachment purposes only instead of as a judicial admission. Judicial admissions are " 'deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.' " *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 475 (2010) (quoting *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998)). Judicial admissions bind the party making them and cannot be controverted. *Rath v. Carbondale Nursing & Rehabilitation Center, Inc.*, 374 Ill. App. 3d 536, 538 (2007). Where admissions at a pretrial deposition are deliberate, detailed and unequivocal as to a factual matter within the party's personal knowledge, those admissions are conclusively binding on the party-deponent and he may not contradict them at trial. *Van's Material Co. v. Department of Revenue*, 131 Ill. 2d 196, 212-13 (1989). Whether deposition testimony constitutes a judicial admission because it is unequivocal is a question of law subject to *de novo* review. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 187 (1999).

¶ 87 The pertinent portion of plaintiff's deposition testimony is as follows:

> "Q. [Defense attorney:] So you recognize train tracks as being dangerous; correct?
>
> A. [Plaintiff:] 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."

¶ 88 Defendants contend this testimony constituted a judicial admission that, at the time he was injured, plaintiff subjectively appreciated the danger and full risk of harm in jumping aboard the moving freight train and, as such, that the circuit court erred in admitting said testimony for impeachment purposes only and allowing plaintiff to contradict his admission at trial.

¶ 89 Careful review of the questions asked, and the answers given, during the pertinent deposition testimony reveals that plaintiff made no admission as to his appreciation of the danger and full risk of harm at the time he was injured. As cited above, defendants asked plaintiff whether he "recognize[s]" that, on the day he was injured, the train tracks and train were dangerous; by posing the questions in the present tense, defendants were asking plaintiff about his current recognition (at the time of the deposition questioning) as to the

dangers of the train tracks and train. Plaintiff's affirmative answers thereto only indicated his recognition, at the time of the deposition questions, that the train tracks and train posed a danger to him on the day of his injuries. Defendants never asked plaintiff whether he recognized the danger prior to his deposition testimony. Defendants also never specifically asked plaintiff whether he recognized the danger at the time he was injured, or whether he only recognized the danger after he was injured. Plaintiff's testimony therefore does not constitute deliberate and unequivocal statements as to his subjective appreciation of the danger and full risk of harm in jumping aboard the moving freight train at the time he was injured. The circuit court did not err in admitting said testimony for impeachment purposes only, and not as a binding judicial admission.

¶ 90 As a result of our disposition of this issue, we need not address plaintiff's argument that he made no judicial admission because defendants' questions asked him to testify to conclusions regarding the "dangerousness" of the train tracks and train instead of to concrete facts within his knowledge.

¶ 91 Next, defendants contend the circuit court erred by failing to give the following special interrogatory proposed by defendants:

> "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?"

¶ 92 Section 2–1108 of the Code of Civil Procedure sets forth the law governing special interrogatories:

> "Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." 735 ILCS 5/2–1108 (West 2008).

¶ 93 The circuit court's denial of a request for a special interrogatory is reviewed *de novo*. *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 6 (2006).

¶ 94 The circuit court can refuse to submit a special interrogatory to the jury only where the interrogatory is in improper form. *Hooper*, 366 Ill. App. 3d at 6. A special interrogatory is in proper form where it relates to an ultimate issue of fact on which the rights of the parties depend and where an answer to the special interrogatory would be inconsistent with some general verdict that the jury might return. *Hooper*, 366 Ill. App. 3d at 6.

¶ 95 In the present case, the proposed special interrogatory was not in proper form because an affirmative answer thereto would not have been inconsistent with the general verdict in plaintiff's favor. The special interrogatory asked the jury whether plaintiff appreciated that attempting to jump aboard the moving freight train presented "a risk of harm to him" at the time and place of the "accident." However, as discussed earlier in this opinion, the relevant inquiry is whether plaintiff appreciated the "*full* risk" of harm involved in jumping aboard

the moving freight train. See Restatement (Second) of Torts § 339, cmt. m, at 204 (1965); *Swearingen*, 181 Ill. App. 3d at 362; *Colls*, 212 Ill. App. 3d at 933. Plaintiff's appreciation of the *full* risk of harm (*i.e.*, death or dismemberment) from jumping aboard the moving freight train would have negated defendants' duty toward him and therefore would have been inconsistent with the general jury verdict in his favor. However, plaintiff's appreciation of some lesser risk of harm (*e.g.*, falling and spraining his ankle) would not have similarly negated defendant's duty toward him and would not have been inconsistent with the jury verdict in his favor. As the proposed special interrogatory only asked the jury whether plaintiff appreciated "*a* risk of harm" and not the "*full* risk of harm" from jumping aboard the moving freight train, the special interrogatory was not in proper form and the circuit court committed no error in refusing to give it to the jury.

¶ 96 Defendants argue that plaintiff failed to object below to the improper wording of the proposed special interrogatory, and as such that he has waived this argument on appeal. We disagree. Plaintiff is the appellee here, not the appellant. An appellant waives an issue by failing to raise it in the circuit court. *Cooney v. Magnabosco*, 407 Ill. App. 3d 264, 268 (2011). However, "an appellee may raise any argument or basis supported by the record to show the correctness of the judgment below, even though he had not previously advanced such an argument." *In re Veronica C.*, 239 Ill. 2d 134, 151 (2010). Also, we can affirm the circuit court on any basis appearing in the record, regardless of the ground relied upon by the circuit court or whether its rationale was correct. *Cooney*, 407 Ill. App. 3d at 268. As discussed, the improper wording of the proposed special interrogatory prevented it from being in the proper form and supports the circuit court's decision not to give it to the jury, and we affirm on that basis.

¶ 97 Next, defendants take issue with various other evidentiary rulings made by the circuit court regarding the admissibility of evidence. Review is for an abuse of discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 92 (1995).

¶ 98 First, defendants contend the circuit court erred by barring them from questioning plaintiff's friends who were with him on July 30, 2003, as to whether they knew that jumping aboard a moving freight train was dangerous. Defendants contend such testimony was relevant and admissible to show that children of plaintiff's same general age and experience appreciated the danger of jumping on a moving freight train, as well as to show that plaintiff himself appreciated said danger. We find no abuse of discretion, as evidence of plaintiff's friends' knowledge of the dangers of jumping aboard the moving freight train was admitted at trial and argued to the jury. Specifically, the circuit court permitted plaintiff's friend Brittany to testify that "all" the girls in the parking lot on July 30, 2003, yelled at plaintiff to stop "playing around" the train and to "come back down." Brittany testified that she specifically yelled at plaintiff to "get off the f***ing tracks and don't go by the f***ing train." Brittany's testimony indicated her own awareness, as well as the awareness of the other children at the scene, as to the dangerousness of jumping aboard the moving freight train. During closing arguments, defense counsel told the jury that the railroad's message about the dangers of trains had gotten through to plaintiff's friends. Thus, contrary to defendants' argument here, the jury was adequately made aware of plaintiff's friends' knowledge of the dangers of jumping on the moving freight train. The circuit court

committed no abuse of discretion, and plaintiff suffered no prejudice, in the exclusion of any duplicative testimony concerning his friends' knowledge of said danger.

¶ 99 Next, defendants contend the circuit court erred by admitting evidence of other incidents of children jumping onto moving trains about which plaintiff was totally unaware. The circuit court committed no abuse of discretion in admitting this evidence. Pursuant to *Kahn*, 5 Ill. 2d at 625, plaintiff was required to prove that defendants knew young children habitually frequented their railroad tracks and that this presented a danger likely to injure them because they, by reason of their immaturity, were incapable of appreciating the risk of harm involved. To prove defendants knew young children habitually frequented their railroad tracks, the circuit court correctly permitted plaintiff to introduce evidence of numerous instances when IHB agents caught other children attempting to board trains. The fact plaintiff was unaware of these other incidents has no bearing on their admissibility into evidence on this point.

¶ 100 Next, defendants contend the circuit court erred in allowing Dr. Berg to testify about adolescent behavior, an issue about which he had no expertise. Specifically, defendants argue that the court improperly allowed Dr. Berg to testify that trains present a risk of harm to children due to their lack of maturity. Dr. Berg testified that his opinions regarding trains' risk of harm to children due to their lack of maturity is based on his work experience as a civil engineer "dealing with safety along railroad tracks" as well as his involvement with Operation Lifesaver personnel who go into the schools and explain railroad safety to children. Thus, Dr. Berg's testimony was based on the expertise he developed over the course of his career specializing in transportation and safety-related issues. The circuit court committed no abuse of discretion by admitting Dr. Berg's testimony as to the risk of harm trains posed to children due to their lack of maturity.

¶ 101 Defendants make cursory references to Dr. Berg's testimony violating Rule 213 (Ill. S. Ct. R. 213 (eff. Jan. 1, 2007)) or otherwise constituting an inadmissible legal opinion invading the province of the circuit court. Defendants' cursory references are insufficient to comply with Rule 341(h)(7)'s requirement that their brief contain arguments in support of their issues. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006). Accordingly, these issues are waived.

¶ 102 Next, defendants contend the circuit court erred in allowing Dr. Berg to testify on redirect examination about the effectiveness of IHB's policing efforts, an issue about which he had no expertise. The circuit court committed no abuse of discretion where defendants opened the door during cross-examination when they questioned Dr. Berg about IHB's policing efforts. See *People v. Crisp*, 242 Ill. App. 3d 652, 658 (1992).

¶ 103 Next, defendants contend the circuit court erred in admitting certain testimony of James Griffith, the special agent for the IHB police department, that was irrelevant and beyond his level of expertise. Specifically, defendants complain about Mr. Griffith's testimony that during his Operation Lifesaver presentations, he determined that kindergartners or preschool age children might not appreciate the dangers of the railroad to the same degree as some high school or junior high school students. Any error here actually inured to defendants' benefit, where Mr. Griffith's testimony supported defendants' argument that they owed no duty to

plaintiff due to the ability of children in his age range (junior high school and high school age) to appreciate the risks of danger involved here. In the absence of any prejudice to defendants, the circuit court committed no reversible error in the admission of Mr. Griffith's testimony.

¶ 104 Next, defendants make a brief reference that Dr. Lencki's testimony regarding plaintiff's low-average intelligence was inadmissible. Defendants provide no argument in support thereof and have waived review of the issue. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006).

¶ 105 In their *amicus curiae* brief, the Illinois Civil Justice League, Washington Legal Foundation, and Allied Educational Foundation argue that the circuit court erred in admitting Dr. Lencki's testimony for purposes of determining plaintiff's "mentality to appreciate the danger" of jumping aboard the freight train. As discussed above, "when ascertaining a child's appreciation of danger, our courts do not consider the subjective understandings and limitations of the child when a risk is deemed obvious to children generally. [Citations.] An undue burden would be placed on landowners in requiring them to focus on a minor's subjective inability to appreciate a risk." *Salinas*, 189 Ill. App. 3d at 61. "[A]lthough it is proper to consider the minor's actual knowledge where the child has some greater understanding than a typical child of his age [citations], defendants are not expected to foresee the unique mental and physical limitations of a particular minor in terms of ability to appreciate the risk." *Colls*, 212 Ill. App. 3d at 946.

¶ 106 Thus, the circuit court erred in admitting Dr. Lencki's testimony for the purposes of showing plaintiff's subjective inability to appreciate the danger in jumping aboard the 9- to 10-mile-per-hour moving freight train. The error here was harmless, though, where Dr. Lencki testified that, the almost 13-year-old plaintiff (who had just finished sixth grade at the time he was injured), was not mentally challenged and that he was intelligent enough to meet his sixth grade requirements with the help of some supplemental educational services that already had been provided to him. Dr. Lencki's testimony indicates that plaintiff did not have any significantly decreased intelligence hampering his ability to appreciate the danger. Accordingly, defendants suffered no prejudice by the admission of Dr. Lencki's testimony.

¶ 107 Next, defendants contend the circuit court erred by allowing plaintiff to cross-examine defendants' expert, Mr. Bradley, with a photograph for which he never established a foundation. The record indicates that, during direct examination, Mr. Bradley testified that Dr. Berg's proposed improvements (chain-link fencing and an overpass at Austin Avenue) would not be effective because it was unlikely any chain-link fencing would remain intact given that holes routinely are cut in such fences. Mr. Bradley also testified during direct examination that a steel or concrete wall could keep trespassers off the right-of-way, but that the property owners would not approve because such a wall would be unsightly. During cross-examination, plaintiff exhibited a photograph of a concrete wall, which Mr. Bradley agreed might not be susceptible to being cut. Defendants now argue on appeal that plaintiff introduced no foundational evidence with respect to who constructed the concrete wall exhibited in the photograph, where the wall was located, or how much it cost. Defendants argue that the court should not have permitted plaintiff to cross-examine Mr. Bradley with this photograph in the absence of proper foundational evidence. Any error was harmless, though, where Mr. Bradley's testimony on cross-examination regarding the photograph was

consistent with his testimony on direct examination that such a concrete wall could keep trespassers off the right-of-way. Defendants suffered no prejudice from Mr. Bradley's cross-examination on the photograph, and accordingly there was no reversible error.

¶ 108 Defendants argue that plaintiff improperly referenced the photograph during closing arguments. Defendants waived review by failing to object thereto. *Dienstag v. Margolies*, 396 Ill. App. 3d 25, 41 (2009).

¶ 109 Next, defendants contend a new trial is warranted because the verdict was against the manifest weight of the evidence. A verdict is against the manifest weight of the evidence when the opposite conclusion is evident or when the jury findings are unreasonable, arbitrary, and not based on any of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992).

¶ 110 Defendants argue that the manifest weight of the evidence shows that plaintiff fully appreciated the danger of jumping aboard a moving freight train and that defendants could not have inexpensively prevented him from embracing that risk. As discussed extensively above, plaintiff testified at trial that at the time he attempted to jump aboard the freight train, he did not appreciate the danger. Dr. Berg testified in considerable detail as to how defendants could have eliminated the danger at relatively low cost compared to the risk to children. Said evidence supported the jury's verdict, which was not against the manifest weight of the evidence.

¶ 111 Defendants make a cursory argument that the jury's finding that plaintiff was only 40% at fault was against the manifest weight of the evidence. Defendants fail to convincingly show why the finding of 40% fault was unreasonable, arbitrary, and not based on any of the evidence, or why an opposite conclusion is evident. In the absence of such a showing, we must reject defendants' argument that the jury's comparative fault finding is against the manifest weight of the evidence.

¶ 112 V. Whether Public Policy Considerations Require Reversal of the Judgment

¶ 113 The *amici*, the American Tort Reform Association, the Association of American Railroads, the Illinois Civil Justice League, Washington Legal Foundation, and Allied Educational Foundation, argue that public policy considerations require reversal of the judgment below. Specifically, they argue: (1) the judgment improperly transforms landowners into insurers against all injuries suffered by trespassing children; (2) the judgment improperly rewards bad behavior by compensating a trespasser who was injured due to his own irresponsible behavior; (3) the judgment substantially erodes the open and obvious danger exception to landowner liability, and injects substantial confusion into the law governing child trespassers; (4) the judgment saddles railroads with an extreme financial burden by requiring them to fence all their miles of right-of-way and to otherwise erect barriers to prevent trespasser entry; and (5) such a financial burden also will force railroads to divert funds from railroad operations that have a high utility to the general public. The *amici* argue that an opinion affirming the judgment below will allow these negative consequences to take effect to the detriment of all landowners and railroads and, ultimately, to the general public who rely thereon.

¶ 114 As discussed above, we affirm the judgment. However, our opinion here will not have

the far-reaching consequences attributed to it by the *amici*. Our holding does not transform landowners into insurers against all injuries suffered by trespassing children, but rather requires them to compensate only those children to whom they breached a duty of care owed under *Kahn*. Our holding does not improperly reward bad behavior by compensating a trespasser who was injured due to his own irresponsible behavior, but rather it affirms a jury verdict finding the railroads 60% liable to a trespassing child who foreseeably did not appreciate the dangers and full risk of harm from jumping aboard the slow-moving freight train and to whom a duty was owed under *Kahn*. Our holding does not substantially erode the open and obvious danger exception to landowner liability; rather, to the contrary, our holding affirms the continued viability of that exception and conforms with *Engel* in finding that the issue of whether the exception applied here was a question of fact and not a question of law. Our holding does not saddle railroads with an extreme financial burden by requiring them to fence all their miles of right-of-way and to otherwise erect barriers to prevent trespasser entry; rather, it affirms a jury verdict based in part on Dr. Berg's testimony that defendants were required to take remedial measures only along the 6,000-foot corridor between Central Avenue and Ridgeland Avenue. The total cost of the remedial measures (*i.e.*, chain-link fence plus overpass), as testified to by Dr. Berg, was approximately $175,000, which would not unduly hamper railroad operations having a high utility to the general public. We do not address whether defendants (or any other railroad) are required to fence their miles of right-of-ways or take other preventive measures against trespassers outside the 6,000-foot corridor between Central Avenue and Ridgeland Avenue.

¶ 115 VI. Conclusion

¶ 116 For all the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not address plaintiff's arguments regarding the applicability of the frequent trespass doctrine or scientific research in the area of adolescent brain development.

¶ 117 Affirmed.

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

DOMINIC CHOATE, Plaintiff-Appellee, vs. INDIANA HARBOR BELT RAILROAD COMPANY, an Indiana corporation, THE BALTIMORE and OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corp., CSX TRANSPORTATION, INC., a Virginia corp., Defendants-Appellants	)	Case No. 03 L 12237 Judge William J. Haddad Judge Presiding

NOTICE OF APPEAL

Defendants-Appellants, INDIANA HARBOR BELT RAILROAD COMPANY, THE BALTIMORE and OHIO CHICAGO TERMINAL RAILROAD COMPANY and CSX TRANSPORTATION, INC., by and through their undersigned attorneys, FEDOTA CHILDERS, P.C., and pursuant to Supreme Court Rules 301 and 303, hereby appeal to the Appellate Court of Illinois, First District, from the judgment entered against them on a jury's verdict by the Circuit Court of Cook County, Illinois, County Department, Law Division, on July 14, 2009, and made appealable by that Court's Order of December 18, 2009, which denied their joint Post-Trial Motion.

The Defendants-Appellants request that the judgment entered against them be reversed and vacated by the Appellate Court; and judgments be entered in favor of the Defendants-Appellants, or that Defendants-Appellants be granted a new trial and all other relief which the Appellate Court of Illinois deems just and reasonable.

Respectfully submitted on behalf of
Indiana Harbor Belt Railroad Company,
The Baltimore and Ohio Chicago Terminal Railroad
Company, and CSX Transportation, Inc.

By: _____
George H. Brant

_____
David R. Schmidt

Attorneys for Defendants-Appellants

David R. Schmidt
George H. Brant
FEDOTA CHILDERS, P.C.
70 W. Madison Street - Suite 3900
Chicago, IL 60602
312-236-5015
312-236-8559 FAX
Firm Atty. No. 41424
Attorneys for Defendants-Appellants

Order: Jury Verdict/Plaintiff 9101

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Dominic Choate)
Plaintiff(s),)
vs.) NO. 03 L 12237
Indiana Harbor Belt Railroad Co Baltimore and Ohio Chicago Terminal Railroad Co and CSX Transportation Inc. Defendant(s))

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ORDER

This cause coming forth to be heard for a jury trial, the jury having rendered a verdict in favor of the Plaintiff(s) Dominic Choate,

and against the Defendant(s) Indiana Harbor Belt Railroad Baltimore & Ohio Chicago Terminal Railroad Co and CSX Transportation, Inc.

IT IS HEREBY ORDERED THAT judgment is entered on the verdict in favor of Plaintiff (s) Dominic Choate,

against the Defendant(s) Indiana Harbor Belt Railroad Co Baltimore & Ohio Chicago Terminal Railroad Co, and CSX Transportation Inc in the sum of $ 3,900,000.00 plus costs.

Withdraw exhibits.

ENTERED
JUDGE WILLIAM J. HADDAD-1867
JUL 14 2009
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

BB

V MMT

ENTER:

Judge Judge's No.

Attorney Number: 21626
Attorney Name: Brustin Sandblad Ltd
Address: 100 W. Monroe #500
City: Chicago IL 60603
Telephone: 312-263-1250

C 26

03L12237 Dominic Choate Vs Indiana Harbor Belt RailRoad

VERDICT FORM B

We, the jury, find for the Plaintiff and against the Defendants. We assess the damages in the sum of $ 6,500,000, itemized as follows:

CC BB

The disfigurement $ 200,000

Loss of a normal life experienced and reasonably certain to be experienced in the future. $ 2,500,000

Pain and suffering experienced and reasonably certain to be experienced in the future. $ 3,000,000

Reasonable expense of necessary medical care received and reasonably certain to be received in the future $ 800,000

We further find the following:

V MMT

First: Without taking into consideration the question of reduction of damages due to the negligence of the Plaintiff, we find that the total amount of damages suffered by Plaintiff as a proximate result of the occurrence in question is $ 6,500,000

Second: Assuming that 100% represents the total combined negligence of all persons whose negligence proximately contributed to the plaintiff's damages, including the Plaintiff and the Defendants, we find that the percentage of such negligence attributable solely to Plaintiff is 40 percent(%)

Third: After reducing the total damages sustained by Plaintiff by the percentage of negligence attributable solely to Plaintiff, we assess Plaintiff's recoverable damages in the sum of $ 3,900,000.

8101

[*Signature Lines*]

Jessica Alvarez (Foreperson)

Jaime Arturi

Guillermo Suarez

John S Young

Leonardo Soto

Charlene Lewis

Linda Wardell

Danny Lill

ENTERED
JUDGE WILLIAM J. HADDAD-1867
JUL 14 2009
CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL
DEPUTY CLERK

FILED
Law Div.-160
JUL 14 2009
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL

4487-0020 DRS/GHB tty. No. 41424

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CC BB

DOMINIC CHOATE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 03 L 12237
	)	
INDIANA HARBOR BELT RAILROAD COMPANY, an Indiana corporation, THE BALTIMORE and OHIO CHICAGO TERMINAL RAILROAD COMPANY, an Illinois corp., CSX TRANSPORTATION, INC., a Virginia corp.,	)	
	)	
Defendants.	)	

ORDER

THIS MATTER COMING ON TO BE HEARD on Post-Trial Motion of the defendants, INDIANA HARBOR BELT RAILROAD COMPANY, THE BALTIMORE and OHIO CHICAGO TERMINAL RAILROAD COMPANY and CSX TRANSPORTATION, INC., due Notice having been given and the Court having heard argument thereon.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants' Post-Trial Motion is denied. 5946

IT IS FURTHER ORDERED that defendants are entitled to a set-off of Twenty-five Thousand ($25,000.00) Dollars from the jury verdict in conjunction with the finding of a good faith settlement previously entered in this matter between plaintiff and defendant Burlington Northern Santa Fe Railroad. 4246B, 4362

The plaintiff's recoverable damages are accordingly $3,875,000.

ENTER:

Judge

Dated: _____, 2009

David R. Schmidt
George H. Brant
FEDOTA CHILDERS, P.C.
70 W. Madison Street - Suite 3900
Chicago, IL 60602
312-236-5015
312-236-8559 FAX

Judge William J. Haddad

DEC 18 2009

Circuit Court - 1867

BB

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

DOMINIC CHOATE, a minor, by VICKIE CHOATE, his Mother and next Friend, and VICKIE CHOATE, individually,

Plaintiffs,

vs.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY and INDIANA HARBOR BELT RAILROAD,

Defendants.

No. 03 L 12237

Report of proceedings had at the motion in the above-entitled cause before the HONORABLE MARCIA MARAS, Judge of said Court, commencing at 10:45 a.m. on the 25th day of November, A.D., 2008.

APPEARANCES:

BRUSTIN & LUNDBLAD, LTD, by
MR. MILO W. LUNDBLAD and
MR. MARK SZAFLARSKI
On behalf of the Plaintiffs;

FEDOTA CHILDERS, by
MR. DAVID R. SCHMIDT and
MR. GEORGE H. BRANT
On behalf of the Defendants.

THE COURT: You want to identify yourselves for the record and you can sit there and remain seated. I have a couple of pages that I wrote out.

MR. BRANT: Okay.

THE COURT: Since I didn't have ...

MR. LUNDBLAD: Good morning, your Honor. Milo

EXHIBIT B

Lundblad for plaintiff.

MR. SCHMIDT: Good morning, your Honor. Dave Schmidt for the defendant CSI Transportation and the other defendant, and Mr. Brant as well.

MR. BRANT: George Brant.

THE COURT: Case No. 03 L 12237. I originally ruled on 5108, and there was a motion to reconsider that was filed by the plaintiffs and fully briefed.

In review of the original decision, I found it to be quite inarticulate at best due to multiple assignments that I had during that time which prohibited a written and orally presented decision.

In that decision on 5108 I found no duty under the Nelson case, which is 364 Ill. App. 3d 181, where generally no liability of the landowner exists to a trespasser except in cases of the frequent trespass upon a limited area. And this makes -- when there is frequent trespass upon a limited area makes the

trespasser into a licensee and the landowner owes a duty of ordinary care.

Here in my original decision, I tried to distinguish this situation from our case when I found that this was a, quote, jumping on the train case, end quote. What I meant there was even if the facts were there to establish a prima facie case under the frequent trespasser doctrine so as to create the status of a licensee in plaintiff with regards to crossing the

tracks, his actions of train-flipping were outside the parameters of any implicit license bestowed upon plaintiff, and he, I believe -- and I reference Rodriguez v. Norfolk & Western Railroad, 228 Ill. App. 3d 1024, and he, I believe, is then viewed as a trespasser for purposes of analysis under the Kahn doctrine, which is a separate and distinct doctrine from the frequent trespasser doctrine.

So in my review of the motion to reconsider with regard to the frequent trespasser doctrine, I would deny the motion to reconsider and vacate my 5108 decision. I do however agree with plaintiff's motion to reconsider that my trespasser's, slash, willful and wanton analysis was inaccurate because of Kahn's reason is a duty which would not be imposed upon the owner in

ordinary negligence, i.e., no liability to a trespasser absent willful and wanton misconduct will be imposed only if such person knows or should know that children frequent the premises and if the cause of that shows his injury was a dangerous condition on the premises.

A dangerous condition has been defined as one which is, quote, likely to cause injury to the general class of children, who by reason of their immaturity, might be incapable of appreciating the risk involved in the Kahn doctrine, K A H N, does not impose a duty on owners or occupiers of land to remedy conditions involving obvious risks that children would be expected

to appreciate and avoid.

My 5108 decision found that under the Kahn doctrine defendant owed no duty to plaintiff because his train-flipping was for, quote, showing-off purposes, and presented an open and obvious risk that he should have appreciated and avoided.

Plaintiffs argue that I erroneously applied the subjective, not an objective, standard and that this decision was tantamount to a finding that plaintiff was contributorily negligent as a matter of law, as which in children between ages 7 to 14 is always a question of fact which must be left to the jury to determine, taking

into consideration the age, capacity, intelligence, and experience of the child.

They cite Dr. Heilbronner's testimony about plaintiff's lack of appreciation of this danger; that it further bolsters their position that this portion of the 5108 ruling was erroneous as a matter of law.

If my original decision was one based on the contributory negligence theory, plaintiff is absolutely correct; but I do not believe it was. Perhaps the confusion was caused by the appellate court's analysis in Engle, which is 186 Ill. App. 3d 522, where a minor plaintiff, 12 years old, just like our plaintiff was, in the practice of grabbing a short ride on slow-moving freight trains, which park district employees were aware was happening.

Defendant Chicago Park District argued that since the dangers of hopping freight trains is obvious, the objective determination -- excuse me -- an objective determination judgment should have been entered as a matter of law. Plaintiff Engle distinguished train-flipping from those universal life experiences where all children are presumed to know the risks such as falling from heights, drowning, or being burnt.

The Engle court recognized that the only

remaining question on the issue of duty was whether the risks of flipping trains were quote, obvious, end quote, to the 12-year-old plaintiff as a matter of law.

See Cope v. Doe, 102 Ill. 2d 278. The court held if a danger is, quote, obvious to a child, it is not foreseeable and therefore no duty to remedy a dangerous condition exists.

Plaintiffs and defendants disagree with the result of the Engle court's analysis. Plaintiff asserts that the Engle court held that whether or not a 12-year-old has the capacity to appreciate the danger of hopping on a moving training is for the jury to decide when it held that the, quote, main reason the case cannot be determined as a matter of law is that the obviousness of the danger is not such that no minds could reasonably be different, end quote.

As plaintiff had seen others, including employees of the railroad, successfully mount and

dismount the slow-moving trains, the first district in Yacoub, Y A C O U B, 248 Ill. App. 3d 958, has interpreted Engle holds that the dangers associated with train-flipping are not open and obvious to children.

Defendants argue that the circumstances of the case at bar are exactly the, quote, different facts, end

quote; that the Engle court spoke of when it acknowledged that a judge could find under different facts that the danger of train-flipping was obvious to a plaintiff and find that no duty existed as a matter of law.

The case at bar, plaintiff has acknowledged that he appreciated his risk and that he jumped the train with three attempts to show off to a girl. Dr. Heilbronner testified that his attention-seeking disorder diminished his mental capacity. These considerations are also subjective based however, and I believe that the standard is an objective one as pronounced in Engle and other decisions such as Cope and Corcoran. Cope at 102 Ill. 2d, 278, and Corcoran, 73 Ill. 2d, 316; and therefore should be a question of fact for the jury as to whether this risk, quote, so obvious as to relieve defendants of any liability under Kahn.

So for these reasons I vacate my decision of 5108 and deny defendant's motion for summary judgment on basis of duty under the Kahn doctrine, but on reconsideration on the frequent trespasser doctrine, I

would grant it as to that doctrine.

So your motion for summary judgment is granted in part and denied in part, okay, for the reasons stated

in open court. Okay.

MR. LUNDBLAD: All right.

THE COURT: Thank you for your time and patience.

And this is off the record.

(Discussion off the record.)

THE COURT: For the record there is an oral motion by --

MR. SCHMIDT: I said could she put this on the record?

THE COURT: I said for the record there's an oral motion by defendants to -- make it a motion under -- I don't know if 308 is the correct -- I guess it is because it's all parties and all issues. There's one issue left so it would be a 304(a), wouldn't it, because it's not -- it's to all issues and all parties? Figure it out. It's either 308 or --

MR. SCHMIDT: It's either 308 or 304.

THE COURT: -- 304(a), and then I'll -- How much time do you need for do that?

MR. SCHMIDT: Well, I would asks for at least two to three weeks to put this together.

THE COURT: This is off the record.

(Which were all the proceedings had in the above-entitled cause.)

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Terry M. Barfield, being first duly sworn, on Certified Shorthand Reporter oath doing business in the City of Chicago, County of Cook and the State of Illinois;

That she reported in shorthand the proceedings had at the foregoing motion;

And that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid and contains all the proceedings had at the said motion.

_____
TERRY M. BARFIELD, CSR

CSR No. 084-004536

SUBSCRIBED AND SWORN TO
before me this_____day of
_____, A.D., 2008.

_____
NOTARY PUBLIC

Order CCG 02-300M-2/24/05 ( )

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

M.B. M.B. 2008 4285 4957-P 5285 C.C. VGB

Choate

v.

Burlington Northern Santa Fe R.R.

No. 03 L 012237

ENTERED
JUDGE MARCIA MARAS-1781
NOV 25 2008
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ORDER

This matter coming to be heard on the motion of plaintiff to reconsider this Court's ruling of May 1, 2008 which granted the motions of Defendants CSX and Indiana Harbor Belt Railroad for summary judgment; the motion to reconsider having been fully briefed and argued before the Court;

It is hereby ordered that said motion to reconsider is granted in part and the summary judgment granted to defendants as to plaintiff's theories based on the Kahn doctrine is vacated for the reasons stated on the record;

It is hereby further ordered that plaintiff's motion to reconsider is denied in part as to the plaintiffs' theories based on the frequent trespass doctrine of Nelson and the summary judgment granted as to this theory stands for the reasons stated on the record;

Atty. No.: 21626
Name: Bresler & Sheldon LLP
Atty. for: π
Address: 100 W. Monroe Suite 500
City/State/Zip: Chicago IL 60603
Telephone: (312) 263-1250

ENTERED:

Dated: 11-25-08

Marcia Maras

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY

COUNTY DEPARTMENT - LAW DIVISION

DOMINIC CHOATE, a minor, by)
VICKIE CHOATE, his mother)
and next friend, and VICKIE)
CHOATE, individually,)
Plaintiffs,)
-vs-) No. 03 L 12237
THE BURLINGTON NORTHERN and)
SANTA FE RAILWAY COMPANY, and)
INDIANA HARBOR BELT RAILROAD,)
et al.,)
Defendants.)

REPORT OF PROCEEDINGS HAD in the above-entitled cause before the HONORABLE MARCIA MARSA, Judge of The Circuit Court of Cook County, Illinois, taken before JUDY A. KELAHAN, a Notary Public within and for the County of Kane, State of Illinois, Certified Shorthand Reporter #084-000815 of said state, at Room 2006 Daley Center, Chicago, Illinois, commencing at 2:00 p.m. on May 1, 2008.

EXHIBIT A

APPEARANCES:

BRUSTIN & LUNDBLAD, LTD.
BY: MILO W. LUNDBLAD, ESQ.
100 West Monroe Street - Suite 500
Chicago, Illinois 60602
(312) 263-1250
On behalf of the Plaintiffs;

FEDOTA & CHILDERS, P.C.
BY: DAVID R. SCHMIDT, ESQ.
70 West Monroe Street - Suite 3900
Chicago, Illinois, 60602
(312) 236-5015
On behalf of the Defendants,
Indiana Harbor Belt Railroad Co.,
The Baltimore and Ohio Chicago
Terminal Railroad Co., and
CSX Transportation, Inc.

(2:00 p.m.)

THE COURT: Good afternoon. I apologize. I know when I scheduled this original decision for Monday afternoon, it was before I got an emergency triple motion involving constitutional issues and it was heard for the first time on Tuesday. I inherited it from someone that recused themselves and it went to trial Monday, so it happens that I have to drop everything sometimes and so I apologize.

Then I had a sick day Monday. When I came back Tuesday morning and saw that I didn't have the motion with regard to the videotape, because the e-mail hadn't gone through and I didn't have the guts of it, that's when I decided to put it to today. I apologize if I inconvenienced you.

I have had a chance to read the cases and almost the entire record in this matter and what happened to Dominic Choate was a terrible thing, but I think in the analysis of the case law there seems to be two cases with regard to jumping on or flipping trains, and that is the Engel case and the LaSalle National Bank. Engel is 186 Ill. App. 3rd 522 and LaSalle is 132 Ill. 3rd 607.

They are not exactly on point. They kind

of mix up the theories, I think, the general premise being no duty to a trespasser except to refrain from willful and wanton misconduct, and the Kahn Doctrine is an exception.

Under Kahn, we have a situation here where this train was almost gone. The children were arguably waiting or congregating with their friends. No engineer saw them go by. The train was around -- the engine was around the curve, the testimony was clear, so nobody noticed this happening.

Dominic Choate is on record appreciating this danger and he is a boy of eleven, twelve, thirteen years old who can appreciate the danger, unlike the eight year old girl that was in, I think, the Engel case -- no, it's LaSalle, the Kahn Doctrine, I think, would apply.

This record is replete with, you know, with the testimony of experts about the beaten path, et cetera.

Whether we should look at the videotape, which I did look at the DVD, and I have read the cases that were provided, but under this scenario I don't think it matters because even if there --

Even if you could -- plaintiff could put

us into the four requirements for the Permitted Trespass Doctrine, when you look at the restatement, that is the statement Section 334 in the cases that talk about these matters, the restatement talks about "what is the purpose".

The purpose is these people are walking around the curve and the train knew people were there, walking, and it hits them.

The Miller case, which is found at -- and I apologize, I didn't have time to write this all down, as usual -- Miller versus General Motors, 207 Ill. App. 3rd 148, again talks about the purpose, what is the purpose of the person being there.

Even assuming for "arguendo's sake" that this was a frequent trespass, under the case law and liability, if it was extended in this case, doesn't apply if it were to be extended because the plaintiff becomes --

Under Frequent Trespasser, in essence, the plaintiff becomes a licensee and there is another -- there is a duty there.

But this is a crossing case, unlike all the other cases that were cited in the briefs. This is a "jump on the train because I want to show off to my

girlfriend" case. That's how I distinguish it.

I know I took great consideration in coming to this decision, but I think it's a "jumping on the train". It's a deliberate act.

At that point, it doesn't matter. He is not a licensee anymore. He is not in that permitted use.

The cases talk about permitted use. Rodriguez talks about that, the Pennsylvania case that the defendants cited, which is the Gall case, 383 Pennsylvania Sup. 250.

It's all about what is the characteristic of this person; and I believe that by the deliberate act of deciding to jump on the train to show off to your girlfriend takes you out of any status as a licensee and puts you into a trespasser mode.

And there is no evidence of willful and wanton misconduct here, so I find, as a matter of law, there is no duty to Dominic Choate as the plaintiff.

Thank you very much.

MR. SCHMIDT: Thank you, Your Honor.

THE COURT: When the order is ready, Vito will bring it to me. Thank you.

(2:15 p.m.)

STATE OF ILLINOIS)
) SS:
COUNTY OF K A N E)

I, JUDY A. KELAHAN, a Notary Public within and for the County of Kane, State of Illinois, and a certified shorthand reporter of said state, do hereby certify that the foregoing was stenographically reported by me and thereafter reduced to typewriting and that the foregoing constitutes a true record of the testimony given by said witness before this reporter;

That I am not a relative of, or employee or attorney or counsel for, any of the parties, nor a relative or employee of any attorney or counsel for any of the parties hereto, nor interested directly or indirectly in the outcome of this action.

IN WITNESS WHEREOF, I do hereunto set my hand and affix my seal of office this day of , A.D. 2008.

JUDY A. KELAHAN, CSR, RPR
Notary Public, Kane County, Illinois
CSR #084-000815

ORDER CG N002-300M-2/28/05(43480658)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CHOATE

v.

BNSF, et al.

C.C. VGB

No. 03 L 11237

ENTERED
JUDGE MARCIA MARAS-1781
MAY 01 2008
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ORDER

This cause coming on to be heard on Motion for Summary Judgment of defendants CSX Transportation, Indiana Harbor Belt, and Baltimore & Ohio Chicago Terminal, the Court having heard argument thereon and being fully advised in the premises, IT IS HEREBY ORDERED, ADJUDGED and DECREED that, pursuant to the ruling stated on the record in open Court, the Motion is granted and judgment is entered on behalf of defendants CSXT, IHB, & BOCT.

4226 X 2
4280 X 2
8022-P

Atty. No.: 41424
Name: Schmidt / Fabbri Childress
Atty. for: d/s CSXT, IHB, BOCT
Address: 70 W Madison St. #3900
City/State/Zip: Chicago, IL
Telephone: (312) 853-9616

ENTERED:

Dated: 5-1-08

Judge Marcia Maras

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

C 22

A50

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

DOMINIC CHOATE, a Minor by)
Vickie Choate, his Mother)
and Next Friend, and)
VICKIE CHOATE, individually,)
Plaintiffs,)
vs.)Case No. 03 L 12237
THE BURLINGTON NORTHERN)
AND SANTA FE RAILWAY)
COMPANY, et al.,)
Defendants.)

The discovery deposition of DOMINIC CHOATE, taken in the above-entitled cause, before MICHELLE L. BARTA, a notary public of Cook County, Illinois, on the 14th day of September 2005, at 150 North Wacker Drive, Chicago, Illinois, pursuant to notice.

Reported by: Michelle L. Barta, C.S.R, R.P.R.
License No: 084-004033

APPEARANCES:

MARVIN A. BRUSTIN, LTD., by
MR. MILO LUNDBLAD,
100 West Monroe Street, Suite 500
Chicago, Illinois 60603
(312) 263-1250
Representing the Plaintiffs;

DALEY & MOHAN, by
MR. DANIEL J. MOHAN,
150 North Wacker Drive, Suite 1550
Chicago, Illinois 60606
(312) 422-9999
Representing The Burlington Northern
and Sante Fe Railway Company;

FEDOTA CHILDERS, by
MR. DAVID R. SCHMIDT
70 West Madison Street, Suite 3900
Chicago, Illinois 60602
(312) 236-5015
Representing CSX Transportation;

APPEARANCES:

LAW OFFICES OF STEVEN I. RAPAPORT, by
MR. STEVEN I. RAPAPORT
630 Dundee Road, Suite 120-B
Northbrook, Illinois 60062
(847) 559-9270
Representing Porada Family
Limited Partnership.

ALSO PRESENT:
Ms. Vickie Choate,
Mr. Richard Dennis,
Mr. Mike Scully.

INDEX

EXHIBITS

NUMBER	IDENTIFICATION
(No exhibits marked)	

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accident or sometime before and after?
A: Immediately after. Immediately after my accident. He helped me.
Q: Does your mom work?
A: Yes, she does.
Q: Do you know where she works now?
A: T.G.I. Fridays.
Q: And do you know generally what her hours are?
A: No.
Q: Is she a full-time employee as far as you know of?
A: Yes.
Q: When your mom is at work, is there anybody that is at home with you?
A: My sister.
Q: And wh[illegible]
A: She works at Nick's Barbecue.
Q: Is she finished with school?
A: I am not sure.
Q: As far as you know, she is not going to college right now?
A: Yeah.
Q: Okay. Then do you know —

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Melanie Moran, do you know does she have a job?
A: I am not sure.
Q: And do you know whether she goes to school or not?
A: I'm not sure.
Q: Okay. What do you do for fun now?
A: I play my video games or I try shooting basketball. Not much.
Q: Like if your friends come over, what do you guys do?
A: We just sit around, play games, talk.
Q: Anything else that you do for fun now?
A: Not really.
Q: Before your accident, what did you do for fun?
A: I played basketball. I rode bikes. I played football, soccer, hockey. Basically every sport.
Q: Did you do the things with friends frequently?
A: Not really.
Q: Before the accident you didn't?
A: I mean occasionally. Not too much, but —

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Q: Okay. Did you see them — Did you see your friends before the accident more than you see them now?
A: Yes.
Q: What did you — or what do you like about sports?
A: Running and the fun and being with my friends.
Q: Okay. Did you ever play on any teams?
A: I played on a soccer team for three years.
Q: Okay. Where was that, do you remember?
A: That was in Summit.
Q: When was the last grade, if you remember, that you played any type of organized sport?
A: I never played any sport inside of school.
Q: Outside of school?
A: I played them outside of school but not on any teams.
Q: Okay. And was the soccer team that you played on in Summit, was that when you were — that was when you were a younger kid?

Page 28

A: Yes.
Q: You were, what, second grade then?
A: Yes.
Q: Okay. Did you ever play any type of dare games with your friends?
A: No.
Q: Did anybody ever dare you to do things?
A: No.
Q: No? Okay. Did you ever do things for fun like climb trees or stuff like that?
A: Yeah, I like climbing trees.
Q: Did you ever try to, you know, beat traffic or anything like that? Is that anything you have ever tried?
A: No.
Q: What is fun about climbing trees?
A: Getting to the top and trying to get back down.
Q: Okay. Would you sometimes do things that you would know were dangerous because it was fun?
A: If I knew that it would hurt me, no.
Q: How would you know that something would hurt you?

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A: Well, if it looked dangerous or it had something to do that could take a body part or either kill me, I wouldn't do it.
Q: Okay. How would you make that decision?
A: I think about it before I did it.
Q: Like kind of what would you think when you were thinking about something and you were thinking about do I try it or not? How would you make that —
A: I would think about the consequences.
Q: Okay. Did that apply to some things that you would do in school as well?
A: I really didn't understand the question.
Q: Did sometimes you have troubles in school with the teachers?
A: Yes.
Q: Okay. And would you be using the same type of thinking, like thinking about what was going to happen in those situations or not so much?
A: No. I really don't understand.
Q: Okay. Okay. Say you were in a

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situation where you had trouble with the teacher. How did that usually occur?
A: Well, I either wasn't listening or not paying attention or not doing something I was supposed to do.
Q: Okay. And what would happen typically?
A: I would get a detention.
Q: Okay. And would you ever have any words, harsh words with a teacher?
A: No.
Q: Okay. Would you ever get in trouble?
A: Sometimes.
Q: Did you ever think about in situations where you were having trouble with the teacher the consequences of that action?
A: Yeah.
Q: And would sometimes you go ahead and have conflict with the teacher anyway even though you knew there was consequences?
A: No.
Q: So if you thought there was consequences, you would never have a conflict with the teacher?
A: No.

Page 31

Q: All right. When you're at a — say at a stop and go light, you know, are you familiar that when the traffic is going that you're not going to walk across the street against the light? Is that something that you're —
A: Yes.
Q: — familiar with?
A: Yes.
Q: Okay. How is it that you judge that as being safe or dangerous?
A: I really don't understand.
Q: If you're on a busy street that's moving fairly quickly, how is it that you make a determination that you should or should not go across the street?
A: Well, when it's green I shouldn't cross it because I could get hit by a car going across.
Q: So if the traffic is moving with a green light, you shouldn't cross —
A: No.
Q: — across that stream of traffic; right?
A: No.

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Q: Okay. If a car is coming towards you on a street and it's say 20 feet away but moving at a fairly good speed, is that something that you wouldn't want to walk in front of?
A: No, I wouldn't.
Q: You wouldn't want to?
A: No.
Q: Now, if it was 500 feet or a thousand feet away and you can see it way down the road and it was moving at the same speed, is that something that you would be okay running across in front of if there was no stop and go lights or anything like that?
MR. LUNDBLAD: Show an objection to this line of questioning. I am not sure it's relevant. Incomplete hypothetical.
BY MR. MOHAN:
Q: You can go ahead.
A: I really don't know.
Q: Well, are there sometimes where you are crossing a street and you see that there is some traffic down the ways a long distance and that you feel that it's safe to cross and that you do cross?

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Q: Okay. Here. In fact, I made some copies. I am showing you what has been marked as Exhibit No. 19. You understand that is a stop sign; is that right?
A: Yes.
Q: I am showing you Exhibit No. 20. You understand what that one means?
A: Yes.
Q: What does that mean?
A: Don't walk.
Q: I am showing you Exhibit No. 21. Do you understand what that one means?
A: It means to slow down.
Q: Right. And I am showing you Exhibit No. 22. Do you know what that one means?
A: It means not to enter.
Q: Not to enter, not to go there?
A: Yes.
Q: Showing you Exhibit No. 15 —
A: I know what that means.
Q: Do you know what that one means?
A: No trespassing. I am not sure about dumping.

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Q: What do you understand the sign that's shown in Exhibit No. 15 to mean?
A: Not to walk the tracks.
Q: Not to go there?
A: Yeah.
Q: Would you interpret that sign to mean don't go on the trains?
A: Yeah, but not really saw it.
Q: Pardon me?
A: If I would have saw it then, yeah.
Q: But that's how you would interpret that?
A: Yes.
Q: Are you currently on any medication?
A: No.
Q: You know what I mean by that?
A: Yes.
Q: Okay. Have you ever been on any medication for what you described as breakdowns or depression?
A: Yes.
Q: When were you on medication for what you have described as breakdowns or depression?
A: I was on it after I got out of the

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hospital since the accident up until maybe a month ago.
Q: Do you know the name of the medications that you were on?
A: Amitriptyline and Neurontin.
Q: Amitriptyline —
MR. RAPAPORT: What was the second one?
THE WITNESS: Neurontin.
BY MR. MOHAN:
Q: Neurontin?
A: Yes.
Q: And it was your understanding that those were medications for depression?
A: Depression and nerve pain.
Q: Neurontin is for nerve pain; correct?
A: Yes.
Q: Okay. Have you ever at any time in your life been on any other medications for what you have described as depression or breakdowns?
A: No.
Q: Before the accident, were you ever on any medication for depression or any — for anything?
A: No. I really didn't have depression.

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Q: Okay. Have you ever been — You said that in school before the accident you felt that you couldn't keep up?
A: Yes.
Q: Were you ever on any medication for an attention deficit?
A: I have tried to get medication for it; but the doctors, they wouldn't give it to me.
Q: What doctor did you try to get medication from?
A: I am not sure.
Q: Okay. Do you know what doctor ever prescribed any medication for you for what you have described as an inability to keep up in school?
A: No.
Q: Do you remember there being a doctor that you asked for or your mom asked for?
A: Yes. My mom has asked my doctor, but I am not sure of his name.
Q: Okay. Do you know where that doctor is located?
A: No.
Q: Do you know when you saw that doctor?

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A: Yes.
Q: And where were you planning to go from that point?
A: To Steve Wire's house.
Q: Okay. And where does Steve live?
A: He lives on the other side of the train tracks.
Q: Okay. He lives on — Do you know where he lives?
A: I am not sure of the address or the street.
Q: Okay. But he lives on the other side of the train tracks from where you were standing?
A: Yes.
Q: And then what happened?
A: After we were sitting there for a while the train had came.
Q: Okay. And where were you when the train — When the engine came by, where were you standing?
A: In the same spot that we were standing the whole time.
Q: In the parking lot?

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A: Yes.
Q: On the concrete?
A: Yes.
Q: Okay. And then what happened?
A: Then the train passed and the engineer like we always do, we say something to him, he says something back. I am not sure what he said that day or if he said anything. And then the train passed.
Q: Let's stop for a second. Do you remember seeing the engineer?
A: Yes.
Q: Okay. And you said you don't remember whether he said anything or not?
A: Yes.
Q: Okay. You don't remember whether you communicated with him or not?
A: No, I am not sure.
Q: Okay. And at that point no one was on or near the tracks, you were in the parking lot; correct?
A: Yes.
Q: Okay. Do you recall whether the engineer blew the horn or communicated with you in any way?
A: I don't remember him blowing the horn or trying to communicate in any way.
Q: Okay. Then what happened after the engine went by?
A: After the engine went by, like a few minutes later Steven Wire and Charlie stepped into the grass. I stepped into the grass with them after they had stepped up there. I set the bike down and then started walking towards them and we started talking. I am really not sure what we were talking about.
Q: Okay. Do you recall anything about the conversation that you were having at that point?
A: No.
Q: Okay. Where were the girls at that point when — when Charlie and Steven stepped into the grass?
A: They were standing on the concrete still in the parking lot.
Q: Okay. And there were the three girls still; correct?
A: Yes.
Q: What happened next?

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A: We were sitting there talking for a few minutes and the train passed and we got a little bit closer to the train.
Q: Okay.
A: And we were talking. I am not sure what we were talking about. Then we were going to wait for the train to go so we can go to Steve's house. Then I remember saying something. I am not sure what I said, but then I tried to grab onto the train and —
Q: Was there other kids — Were the other two boys up on the train tracks near you?
A: Yes.
Q: Okay. Were they standing as close to the train as you were?
A: Yes.
Q: Okay. Did any other boy attempt to grab or board the train?
A: I believe Charlie Spinnler tried to stick his hand out and he pulled it back in.
Q: And was that before you attempted to grab the train or after?
A: Before I attempted to grab it.
Q: Okay. And when Charlie attempted to

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grab the train, what happened?
A: He didn't — He stuck his hand out to grab it and then he pulled it back in.
Q: Did he touch the train?
A: I am not sure. I don't recall.
Q: Did his body move with the train or move as a result of being touched by the train as far as you know?
A: Not that I know of.
Q: Okay. Did Charlie fall to the ground upon being touched by the train or touching the train?
A: No.
Q: Okay. You didn't see Charlie fall to the ground?
A: No.
Q: Did you see him attempt to grab the train?
A: Yes.
Q: Okay. And he was unable to do that?
A: Yes.
Q: Why was he unable to grab the train?
A: I think because when he stuck his hand out he got a little bit afraid or he had missed

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the — I don't know. I believe the ladder that you call it. I am not sure.
Q: Okay. So he was attempting to grab onto a ladder on the side of the train?
A: Yes.
Q: And he was unable to do that?
A: Yes.
Q: Was the train moving at that point?
A: Yes.
Q: And was it moving fast enough where he was not able to grab onto the train?
A: No. It was moving slow enough to where he would be able to get on to it.
Q: Okay. But he was unable to; is that correct?
A: Yes.
Q: Did he try more than once or just once?
A: I am not sure.
Q: Okay. You think he might have tried more than once?
A: Maybe.
Q: And you were standing there watching him do that?
A: Yes.

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Q: And he was unable to get on the train; is that correct?
A: Yes.
Q: From what it looked like he was doing, was he trying to get on the train and grab it?
A: That's what it looked like, yes.
Q: Did you guys have any communication at that time? I mean, did you — Were you looking at each other? Were you winking at each other, talking, anything like that?
A: I am not sure if they were talking or not, but I was looking at him. I really couldn't hear him because it was loud.
Q: How far were you away from Steven and Charlie at that point?
A: Maybe like a foot apart from each other. Maybe two.
Q: Okay. Now, you said you weren't sure whether Charlie tried more than once to grab onto the train. Do you have an estimate of how many times he might have tried to grab onto the train?
A: No, I am not sure.
Q: Okay. But it was over a few minute

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period or a period of time that he was trying to grab on?
A: I don't understand.
Q: Okay. Did it happen all at once where he tried to grab on a bunch of different times or did he try to grab on and then he tried to grab on and then he tried to grab on again?
A: Most likely periods of time.
Q: So there was time that elapsed while he was trying to grab onto the train?
A: Yes.
Q: And he wasn't able to?
A: Yeah.
Q: Okay. And then what happened?
A: And then after he had tried grabbing onto it he sort of kind of like stepped away from it. I didn't say nothing to him and then I tried grabbing onto it.
Q: Okay.
A: When I — Go ahead.
Q: Did you try to grab on only once or more than once?
A: I believe more than once.
Q: Okay. All right. The first time that

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on the date or the day.
Q: Would it be fair to say it hasn't been in the last month?
A: No, it hasn't been in the last month.
Q: Okay. Do you have any plans as far as, you know, to see any type of psychologist or psychiatrist coming up?
A: Not that I am sure of.
Q: Okay. Is that something that you would be interested in?
A: Yes.
Q: Do you ever feel like the accident or something like it is happening currently?
A: I get phantom pains like every time feeling the train running — like running over my toes. I feel my toes. They pound constantly.
Q: You feel some phantom pain even now?
A: Yes.
Q: And how often does that happen?
A: I have it constantly.
Q: You have it all the time?
A: Yes.
Q: Are you taking any medication for that?

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A: Right now I am taking that Neurontin for the nerve pain. They said that that would help it, but so far it hasn't been.
Q: How long have you been taking the Neurontin?
A: Since I got out of the hospital.
Q: And have you discussed with the doctor that you feel that it's not controlling your pain?
A: I have told her. She said that since I have just went through another surgery that about in six months it should go away and if it don't, to make an appointment to see her.
Q: And what doctor is that?
A: Dr. Andrea Kramer.
MR. MOHAN: Do you want another break? I could use one actually.
(Whereupon, a short break was taken.)
BY MR. MOHAN:
Q: I have not too many more questions. Some of the other lawyers are obviously going to have some questions of you, Dominic.
A: Okay.

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Q: Do you remember what kind of shoes you were wearing that day on the day of the accident?
A: Yes.
Q: What kind of shoes were you wearing?
A: They were called British Knights and they were white and red.
Q: Are those tennis shoes?
A: Yes.
Q: Are they any type of unusual tennis shoe, high tops, low tops, running?
A: Low tops.
Q: Are they running shoes or basketball shoes? Do you remember?
A: Sort of a little bit of everything.
Q: Kind of like cross trainer?
A: Athlete.
Q: All right. Now, you have been next to trains, I am sure, or been waiting for trains at crossings before; is that right?
A: Yes.
Q: You have access to the train at a crossing just like you would in this area; is that right? I mean as far as if you wanted to

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grab onto a train at a crossing, you could do it?
A: Yes.
Q: Nothing stops you there?
A: I don't know what you call those things. The things that go down or —
Q: Right.
A: Those are the only things that stop you, but I wouldn't go and do it.
Q: But you can go around those; right?
A: If you wanted to. If you really wanted to. But why?
Q: There was on one side — Let's see. Let me show you. I am showing you what has been marked Exhibits No. 4 through No. 16. Do you recognize those as the scene of the accident and the area surrounding the accident?
A: (No audible response.)
Q: Yes?
A: Yes.
Q: Had you seen those before just now, those photographs?
A: I have never seen the photographs, but —

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Q: Your attorney didn't show you these photographs?
A: Oh, yes. My bad.
Q: Did you review any documents besides the photographs or any papers, anything, with your attorney at any time?
A: What do you mean? I don't understand.
Q: Okay. Did you go over any papers or pictures or images or objects at any time with your attorney?
A: Pictures, yes.
Q: Just pictures?
A: Basically all you said, yes.
pictures — Mostly pictures of the scene.
Q: Besides pictures, did you look at anything else?
A: No.
Q: Okay. Did you look at the police report?
A: (No audible response.)
Q: No?
A: No.
Q: Maps or anything like that?
A: Yes.

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Q: You did, okay. Anything else that you had looked at besides pictures and maps?
A: No.
Q: Okay. Looking at any of these pictures, can you tell us do any of them depict the area, show the area where the accident occurred?
A: One of the pictures, yes.
Q: Can you show me which one that is? Can you just pick that one out for me?
A: Exhibit No. 8.
Q: Okay. So —
MR. LUNDBLAD: Which number?
THE WITNESS: Exhibit No. 8.
BY MR. MOHAN:
Q: Showing you what has been marked Exhibit No. 8, is this the photograph that shows where the accident happened?
A: Yes.
Q: And just before the accident before you and the other two boys went onto the grass, where were you standing in this picture if you know?
A: Right around here.

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Q: Okay. And —
MR. SCHMIDT: Could we document where right around here is?
BY MR. MOHAN:
Q: Yes, absolutely. In fact — Let's see. For the record, when you say right around here, are you pointing towards the lower right-hand part of the picture where there appears to be from the camera a 7-31-03 or thereabouts?
MR. LUNDBLAD: Can we put it on the table so we can all see?
MR. MOHAN: Sure, absolutely.
THE WITNESS: I was standing about — right here about the middle of the parking lot.
BY MR. MOHAN:
Q: Okay. I will tell you what, why don't we do this: I have got a Xerox copy of the photograph. Can you just put a big X right where you were standing right before you went onto the grass? Okay. And is that the place that you were standing when the engine went by?
A: Yes.
Q: And then did you and the other boys move onto the grass?

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A: They moved onto the — the two, Steven Wire and Charlie Spinnler, moved onto the grass first. After they stepped onto the grass, I proceeded to go to the grass.
Q: Okay. And then by that point the train was moving past you and there were just cars next to you; correct?
A: Yes.
Q: And they were moving continuously?
A: Yes, they were.
Q: Okay. They — That train never stopped, did it?
A: No.
Q: And then you actually stepped over the first set of tracks; is that right?
A: I am really not sure if the train was on the first set or the higher part.
Q: Okay. You didn't know if it was on the first or the second set of tracks?
A: Correct.
Q: Now, as you proceeded from where you made the X, you had to go past the end of a fence; is that correct?
A: When I proceeded, I did go past the

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fence yet. I stepped onto the grass.
Q: So you went onto the grass and then to get onto the railroad tracks you actually proceeded past the end of a fence; is that right?
A: Yes.
Q: Okay. And then at the end of that fence there was a sign; is that right?
A: Yes.
Q: All right. And that sign is the sign that we already looked at on Exhibit No. 15; is that right?
A: Yes.
Q: Now, when you passed that sign, did you look at the sign?
A: No, I didn't look at the fence. The only thing I was looking at was in front of me.
Q: Did you read the sign?
A: No.
Q: Had you ever been over in that area before?
A: I have been by that area, yes.
Q: Have you ever crossed the tracks in that area before?

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A: Once before.
Q: One time before?
A: Yes.
Q: When was it that you crossed the tracks previously?
A: When I was going to Ridge Lawn School.
Q: From where?
A: I was walking home from Ridge Lawn which is on the side of the tracks that I was going to go to.
Q: Okay. So it's on the opposite side of the tracks from where you started; correct?
A: Yes.
Q: Okay. And what was the occasion that you crossed those tracks there?
A: Coming home from school. If I was to go home from school, I would have to walk all the way around to Central; and since there was no fence that would stop me from crossing and there was a beaten up path and a hole in the fence by the apartments, I took it and it made it — my trip about five minutes shorter, ten minutes shorter.
Q: Did you just take that once? You just took that path once?
A: Yes.
Q: Did you ever see any other kids taking that path?
A: Plenty of times.
Q: Did you ever talk to kids about taking that path?
A: No.
Q: Did you ever talk to kids about the no trespassing sign?
A: No.
Q: All right. Have you ever climbed over a fence?
A: I have climbed fences, not the train tracks or anything dangerous.
Q: Have you ever climbed over a fence to get someplace for a shortcut?
A: No.
Q: Never?
A: Nope.
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.
Q: I am just going to ask you some questions about — not so much the physical part of what you have experienced, but rather whether or not you ever like dream about it. Do you ever dream about the accident?
A: I have. I dream about it in — Throughout the day I have flashbacks all the time.
Q: Okay. Approximately how many times a day do you have — do you think about it or have a flashback as you call it?
A: Well, I think about it all the time; but I have flashbacks like maybe once every other day.
Q: And when you say flashbacks, what do you mean by that?
A: I keep getting the picture in my head of me seeing my foot hanging from my leg by the

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when the train first appeared?
A: Yes.
Q: Now, you had said something about engineers before. I think you said — Correct me if I am wrong. I think you said that sometimes you talk with engineers or you said something to engineers in trains?
A: Wave and sometimes they wave back. But in this situation I can't remember.
Q: Okay. Can you give me an estimate as to about how many feet away you think that train was from the parking lot? So you guys are standing there and the train first comes there. About how far away is that?
A: About 50 feet.
Q: About 50 feet, okay. Now, these times that you have mentioned previously that you have, you know, talked to an engineer or waved to an engineer, have you ever been closer to an engine than 50 feet, about the same type of distance, maybe a little further back? What do you think?
A: I have been closer when I was standing at the — where the —

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Q: At like a crossing at an intersection?
A: Yes.
Q: Okay. I would like to see if we could try to identify the speed a little bit of the train. Did the speed of the train change at all from the time that you first saw it and it first went by and the time when you guys started to approach it?
A: No.
Q: It kept a steady rate of speed?
A: It kept a steady speed.
Q: Okay. And Charlie and Steven were the ones who walked onto the grassy area first?
A: Yes.
Q: And you followed them?
A: Yes.
Q: Did they say anything to you at that time or did you say anything to them about where they were going and why you were going up onto the grass?
A: No.
Q: Did the girls say anything?
A: No.
Q: Did they stay behind in the parking lot?

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A: Yes, they did.
Q: And who was it who went up first to the rock area?
A: It was Charlie Spinnler.
Q: Okay. And he was the one who tried to grab onto the train first —
A: Yes.
Q: — as you described earlier?
A: Yes.
Q: Where was Steven Wire when this was going on?
A: He was about two feet away standing from side to side.
Q: I am sorry, two feet?
A: About two feet away if they were standing side to side.
Q: And where were you?
A: About another two feet away from them two. So there was a little gap in between each of us.
Q: Okay. Three of you kind of in a row, maybe not exactly but kind of?
A: Yes.

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Q: And left, center, right?
A: Right.
Q: Who would it be?
A: Charlie was on the left. Steve was in the center and I was on the right.
Q: Was this the first time you had ever walked onto railroad property and approached a train like you guys did that day?
A: Yes.
Q: Why did you do it?
A: Trying to show off.
Q: Okay. For who?
A: My girlfriend.
Q: Okay. Steven didn't try to get on the train; correct?
A: No.
Q: Did he say anything after — Let me start over again.
Did both you and Steven stand next to each other and watch Charlie and his attempts to get on the train?
A: Yes.
Q: After he tried the couple of times and it didn't work, did Charlie say anything to

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walked up onto the railroad property and railroad tracks and been this close before. Have you ever tried to do this before —

A: No.

Q: — hop a train before?

A: No.

Q: Why did you do it?

MR. LUNDBLAD: Objection. That's been asked and answered.

MR. MOHAN: You asked him.

MR. SCHMIDT: I asked him why he was there. I don't think I asked him why he tried to hop the train.

MR. MOHAN: He said showing off for his girlfriend.

MR. SCHMIDT: Okay.

BY MR. SCHMIDT:

Q: Showing off for your girlfriend?

A: Yes.

Q: Okay. After you had seen Charlie — After you had seen Charlie try and unsuccessfully attempt to do this, get on the train, is that the simple explanation why you tried to do it because you were trying to show

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off?

MR. LUNDBLAD: Objection. That's been asked and answered. You don't need to answer it again.

BY MR. SCHMIDT:

Q: Is there any other reason why you tried to do it other than show trying to show off?

A: No.

Q: Is there any reason why you had never tried to do this before?

A: Because I never thought of it and I never got that close to a train before.

Q: Why had you never thought of it before?

A: Because I have never been that close to a train.

Q: You have been that close to trains though at gate crossings at intersections?

A: Yes.

Q: Actually —

A: The crossing part where the cars are, yes.

Q: You talked about keeping up with the train in conjunction with what Charlie was doing and with what you were doing. I believe you

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said something about running alongside with the train and you had slipped, lost your footing on the rocks.

A: Yes.

Q: Was that the first time?

A: No, that's the second time.

Q: That was the second time?

A: Yes.

Q: Okay. If you were standing there next to the train and the train was going by and if you just started to walk down the tracks, could you keep pace with the cars? In other words, could you walk as fast as the train was going?

A: No.

Q: The train was going faster?

A: Yes.

Q: If you ran alongside the train, could you keep up with the train or was the train going faster?

A: Actually, I would have been going a little bit faster than the train would have. I would have been able to keep up with it if it was — if I was like speed walking, like hard speed walking.

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Q: And I believe it was your testimony that when Charlie tried to get on the train it didn't work out for him, that you don't remember him being thrown to the ground?

A: No.

Q: Okay. You said that you were wearing tennis shoes. What else were you wearing? What else did you have on that day?

A: I had on jogging pants.

Q: I am sorry, what?

A: I had jogging pants, like squishy ones, and a regular white shirt like I am wearing right now.

Q: Were you wearing a hat?

A: No.

Q: Do you know how high above the track the ladder was that you were trying to grab?

A: No, I am not sure.

Q: If I am not mistaken, you said that you were actually able to grab a hold of the ladder and you did climb up on the car?

A: Yes.

Q: Which foot first?

A: It was my left foot that hit that —

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