No. 10-0209

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DOMINIC CHOATE,	)	
	)	
Plaintiff-Appellee,	)	
	)	On Appeal from the Circuit Court
v.	)	Cook County, Illinois County
	)	Department, Law Division
INDIANA HARBOR BELT RAILROAD	)	
COMPANY, an Indiana corporation:	)	No. 03-L-12237
THE BALTIMORE AND OHIO	)	
CHICAGO TERMINAL RAILROAD	)	Honorable William J. Haddad,
COMPANY, an Illinois corporation; and	)	Judge Presiding.
CSX TRANSPORTATION, INC.,	)	
a Virginia corporation,	)	
	)	
Defendants-Appellants.	)	

BRIEF OF ILLINOIS CIVIL JUSTICE LEAGUE, WASHINGTON LEGAL FOUNDATION, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTERESTS OF *AMICI CURIAE*

The Illinois Civil Justice League (ICJL) is a coalition of Illinois citizens, small and large businesses, associations, professional societies, not-for-profit organizations, and local governments that have joined together to work for fairness in the Illinois civil justice system. The League's agenda is limited to working for, and preservation of, a civil justice system that is fair to all Illinois citizens and interests.

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states, including many in Illinois. WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

ICJL, WLF, and AEF are concerned that the decision below marks a significant expansion of the potential tort liability of landowners. In general, Illinois landowners owe no duty of care to trespassers – whether adult or children – except not to wilfully or wantonly injure them. The Illinois Supreme Court has created a limited exception to that rule with respect to children, but the exception has never been understood to require landowners to protect against the ever-present possibility that children will injure themselves on obvious or common conditions. *Amici* are concerned that the judgment in this case threatens to transform landowners into insurers against any and all injuries suffered by a trespassing child, regardless how fully the child recognized the danger in

which he placed himself.

Amici are particularly troubled by the trial court's inconsistent application of rules designed to determine whether the risks undertaken by trespassing children were open and obvious. The circuit court deemed relevant evidence that suggested a reduced capacity by the Plaintiff to comprehend the extreme recklessness of his conduct, yet suppressed evidence indicating that he fully comprehended the risk. *Amici* fear that such inconsistent application of rules governing landowner tort liability will significantly erode the rights of property owners within the State.

Amici do not address other issues raised in this appeal, including claims that the trial court erred in refusing to submit to the jury the Defendants' tendered special interrogatory, and in permitting Plaintiff's expert to testify on issues about which he lacked expertise.

STATEMENT OF THE CASE

Plaintiff Dominic Choate was injured in July 2003 when he attempted to jump onto a moving freight train in his hometown of Chicago Ridge, Illinois. Choate, who was nearly 13 at the time of the accident, testified at his deposition that he was aware of the riskiness of his actions and was motivated by a desire to impress his girlfriend. Choate does not allege that the train on which he was injured was being operated in a negligent manner. Rather, his suit for compensation is premised on a claim that the Defendants should have done more to prevent him from engaging in risky behavior.

Choate filed suit against Burlington Northern Sante Fe Railroad (the operator of the train), CSX Transportation, Inc. (the owner of the tracks), Indiana Harbor Belt

Railroad Co. (which patrols the railroad right-of-way), and The Baltimore and Ohio Chicago Terminal Railroad Co.[1] Plainitff conceded that he was trespassing on the railroad tracks at the time of his injury and that in general landowners owe no duty of care to those who trespass on their property. Plaintiff nonetheless contended that Defendants were liable for his injuries because: (1) they were aware of a "dangerous condition" on the railroad property – moving freight trains that individuals would want to jump onto; and (2) children are likely to be injured while attempting to jump onto the trains because they are incapable, in light of age and maturity, of appreciating the risk involved.

The trial court initially granted summary judgment to Defendants, on the ground that Choate had admitted that he understood the dangerousness of jumping onto trains (a practice sometimes referred to as "flipping"). The court later reversed itself, holding that it should be left up to the jury to decide whether the dangers of flipping were sufficiently obvious to relieve defendants of any liability. After a trial, the jury found in favor of Choate on liability and awarded him $6.5 million in damages.[2]

SUMMARY OF ARGUMENT

The only reason for treating a trespassing child more favorably than a trespassing adult is that the child may not recognize the full extent of the danger he is facing *and* that children his age cannot reasonably be expected to have such recognition. When, as here, the plaintiff child freely admits that he recognized the dangerousness of his actions, there

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[1] Burlington Northern later entered into a settlement with Choate and is not a party to this appeal.

[2] The trial judge entered judgment for $3.9 million to reflect the jury's finding that Choate was 40% at fault for his injuries.

is no longer a coherent rationale for affording special protection to a trespassing child. Accordingly, as a matter of law, Defendants owed Choate no duty of care when he trespassed on their property.

Nor is it relevant that Choate, despite his full awareness of the dangers, may have lacked the emotional maturity to resist acting recklessly in an effort to impress his girlfriend. A landowner is not subject to liability to a trespassing child who appreciates the full risk involved but nonetheless chooses to encounter it out of recklessness or bravado.

The trial court erred in suppressing evidence that Choate was fully aware of the risks of jumping onto a moving freight train, and it compounded its error by applying a double standard and allowing Choate to introduce evidence that he might have been less aware than the average 12-year-old that flipping trains is highly dangerous. That double standard was fundamentally unfair to Defendants and requires reversal of the underlying judgment.

The trial court also erred in determining that whether Defendants owed a duty of care to Choate was an issue of fact to be decided by the jury. In a cause of action for negligence, whether the defendant owed a duty of care to the plaintiff has always been deemed a question of law to be decided by the court. Whether Defendants owed a duty of care to Choate encompassed a number of subsidiary questions, including whether the "dangerous condition" exception to the no-duty-to-trespassing-children rule applied to this case. That subsidiary question should have been answered by the court, not the jury.

Finally, the foreseeability that children will jump onto moving trains does not by

itself create a duty to protect against it. Because the extreme danger of flipping trains is so obvious, Defendants owed no duty to Choate to protect him from his recklessness – even though it is a sad fact of life that some children inevitably will engage in reckless conduct no matter how aware they are of its dangerousness.

ARGUMENT

I. NO DUTY OF CARE IS OWED A TRESPASSER WHEN, AS HERE, HE IS AWARE OF THE RISKS HE IS INCURRING

Choate was trespassing on railroad property at the time that he jumped onto a fast-moving freight train. In general, a landowner owes no duty of care to a trespassing individual (whether an adult or a child) except not to willfully or wantonly injure him. *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 168 Ill.2d 110, 116 (1996). Illinois has created an "exception" to "the no-duty rule" when the trespasser is a child and can make the following showings:

> (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. If the trespassing child can make those showings, then the law imposes a duty on the owner or occupier of land to remedy the dangerous condition or "to otherwise protect children from injury resulting from it." *Id.*

Choate contends that he comes within the "dangerous condition" exception. In particular, he contends that children are incapable of appreciating the risks they incur

when they jump onto a moving freight train and thus that railroads must protect them from that risk.

A. Choate's Admission That He Recognized the Risks of Flipping Trains Precludes Application of the "Dangerous Condition" Exception Because the Sole Purpose of That Exception Is to Protect the Uninformed

The general rule that "owners or occupiers of the land are under no duty to keep their premises in any particular state or condition to promote the safety of persons who come upon the premises without invitation," *Corcoran v. Village of Libertyville*, 73 Ill.2d 316, 325 (1978), has long been recognized by Illinois. It evidences the State's desire to protect private property interests and "has evolved out of the notion that the law does not require an owner or occupier of land to anticipate the presence of persons wrongfully or unexpectedly on his land." *Id.*

Illinois first recognized the "dangerous condition" exception for child trespassers in 1955. *Kahn v. James Burton Co.*, 5 Ill.2d 614, 625 (1955). By doing so, the Illinois Supreme Court brought Illinois law "into harmony with" § 339 of the Restatement (Second) of Torts (1965). *Corcoran*, 73 Ill. 2d at 326.[3] Section 339 sets forth a "dangerous condition" exception which provides that a possessor of land can be held liable for physical harm to trespassing children if it maintains a dangerous, artificial condition on the land that causes the harm, and the plaintiff can demonstrate, *inter alia*, that "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."

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[3] Section 339 is substantially similar to § 339 of the Restatement of Torts (1935), which was in effect when *Kahn* was decided..

Restatement (Second) of Torts, § 339(c).

Section 339 makes absolutely clear that the *only* reason for treating a trespassing child more favorably than a trespassing adult is that the child may not recognize the full extent of the danger he is facing *and* that children his age cannot reasonably be expected to have such recognition. A comment to § 339(c) states explicitly:

> The purpose of the [dangerous condition] duty is to protect children from dangers which they do not appreciate. . . . 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 [of land] is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved.

Restatement (Second) of Torts § 339, Comment *m*, at 204 (1965). By way of illustration, Comment *m* describes a hypothetical situation in which a nine-year-old boy ventures onto a railroad's land and, while meddling with an unlocked turntable, injures his foot when it gets caught in the turntable. The railroad recognizes that its turntable presents a dangerous condition for young children who would not normally fully understand the dangers of a turntable. Nevertheless, because the trespassing boy is the son of a railroad engineer who has been repeatedly warned about the dangers of turntables, and so fully appreciates their risks, the Restatement illustration states that the railroad cannot be held liable for the boy's injuries. *Id.* at 204-05.

Similarly, the leading treatise on tort liability states unequivocally that a trespassing child is not entitled to invoke the "dangerous condition" exception if he was aware of the danger, even if other children of the same age generally lack such awareness:

> Since the principal reason for the rule distinguishing trespassing children from trespassing adults is the inability of the child to protect himself, the courts have

> been quite firm in their insistence that if the child is fully aware of the condition, understands the risk which it carries, and is quite able to avoid it, he stands in no better position than an adult with similar knowledge and understanding.

W. Keeton, *Prosser & Keeton on Torts* § 59, at 408 (5th ed. 1984).

Numerous Illinois appellate decisions have recognized the unavailability of the "dangerous condition" exception under such circumstances. *See, e.g., Colls v. City of Chicago*, 212 Ill. App. 3d 904, 933 (1st Dist. 1991) (stating that "the particular child's appreciation of the risk, if established in fact, has consistently been recognized as sufficient to free a defendant landowner of all liability for the child's injuries."); *Swearingen v. Korfist*, 181 Ill. App. 3d 357, 362 (2d Dist. 1989) (quoting extensively from § 339, Comment *m*; declaring that it deemed the comment "persuasive"; and adding, "we find that consideration of the minor's knowledge is appropriate where the minor has some greater understanding of the alleged dangerous condition than would a typical minor of his age."); *Hagy v. McHenry County Conservation Dist.*, 190 Ill. App. 3d 833, 840 (2d Dist. 1989).

Choate freely admitted at his deposition that he recognized the dangerousness of his efforts to flip a train.[4] Indeed, that was the very point of his efforts: he wanted to impress his girlfriend regarding his bravery and skill by undertaking a task they both knew to be dangerous. Defendants have explained at length why Choate's deposition statements constituted a judicial admission; *amici* will not repeat those arguments here.

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[4] Other evidence of his knowledge included evidence that he had been caught trespassing multiple times on railroad property and had been warned to stay away by railroad police officers; and his mother's testimony that she had warned him numerous times regarding the dangers of moving trains.

In light of the overwhelming evidence of Choate knowledge, the only permissible finding is that he was fully aware that flipping a train was dangerous, and therefore he is ineligible to invoke the "dangerous condition" exception. Accordingly, as a matter of law, Defendants owed Choate no duty of care when he trespassed on their property.

In the trial court, Choate's attorneys argued that even though "Dominic admitted that he knew trains could be dangerous," that admission was irrelevant because the relevant inquiry should focus on the knowledge of a typical child of the same age, not the plaintiff himself – case law has "consistently held that an objective rather than a subjective standard must be applied in determining whether a duty exists to protect children from a danger." Pl. Response to Def. Post-Trial Motion at 5 (hereinafter "Pl. Post-Trial Br."), R. C2743-C2773. Choate is correct that a trespassing child seeking to avoid the "no duty" rule must establish that a typical child of the same age would not have appreciated the risks inherent in meddling with the dangerous condition he encountered. But as the legal authority cited above makes clear, such a child must *also* demonstrate that he personally failed to appreciate those risks.

In light of the foregoing, the circuit court also clearly erred in ruling that Choate's deposition testimony could not be read into the record as substantive admissions and instead ruling that the admissions could only be used for impeachment purposes. Trespassing children are not permitted to recover for physical injuries caused by a dangerous condition whose danger they full appreciated. Choate's deposition testimony was directly relevant to the issue of his awareness of the danger inherent in flipping trains and was admissible as the statement of a party opponent.

B. A Trespassing Child Who Is Aware of the Danger May Not Invoke the "Dangerous Condition" Exception Based on His Immaturity

Choate's actual awareness of the dangers of flipping trains precludes his invocation of the "dangerous condition" exception, regardless what his reasons may have been for engaging in this risky activity. Choate's civil engineering expert witness, Dr. Berg, testified that even when children are aware that a behavior is highly risky, they nonetheless frequently engage in the behavior because they lack the "maturity" of adults to control their impulses. Before the trial court, Choate pointed to that testimony to support his contention that Defendants were aware that even fully-informed youth will try to flip trains and thus that the law imposes a duty on Defendants to take steps to prevent such activity. Pl. Post-Trial Br. 8-9, R. C2743-2773. That contention finds no support in Illinois case law.

To the contrary, Illinois law explicitly rejects the contention that a fully-informed-but-emotionally-immature child trespasser may invoke the "dangerous condition" exception. Comment *m* to § 339 states that the purpose of the dangerous condition exception 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." Restatement (Second) of Torts § 339, Comment *m*, at 204 (1965). The comment goes on to state that a possessor of land is not subject to liability to a trespassing child who appreciates the full risk involved "but none the less chooses to encounter it out of recklessness or bravado." *Id.*

In *Swearingen*, the appeals court relied on Comment *m* to affirm the grant of

summary judgment in favor of the landowner and against a boy who sustained injuries when he fell from a pulley device used by neighborhood children to ride between trees. *Swearingen*, 181 Ill. App. 3d at 361-63. The court concluded that the boy "was aware of the dangerous character of the pulley," particularly in light of the fact that "he was intimately aware of the way in which the pulley was constructed," *id*. at 363, and that one of his friends had fallen from the pulley device on a prior occasion. *Id.* at 360. The court held that the boy was not entitled to rely on the "dangerous condition" exception because he was aware of the risks involved, even though his continual use of the pulley device indicated that he may have lacked the maturity to avoid those risks: "What is important is the fact that the minor can appreciate the risk, not that he will in fact avoid it." *Id.* at 363 (citing § 339, Comment *m*). *See also Colls*, 212 Ill. App. 3d at 933 (stating that the "particular child's appreciation of the risk, if established in fact, has consistently been recognized as sufficient to free a defendant landowner of all liability for the child's injury" and citing § 339, Comment *m* for the proposition that a possessor of land is not subject to liability to a fully informed child who nonetheless "chooses to encounter [the risk] out of recklessness or bravado.").

Section 339's "recklessness or bravado" language accurately describes Choate's conduct in this case. He testified in his deposition that he was well aware of the danger of attempting to jump onto a moving freight train and did so not because he thought it was safe but because he wanted to impress his girlfriend with his bravery. Choate was not the first youth to be attracted to risky behavior precisely because he knew it was dangerous, but *Swearingen* and § 339 make clear that Defendants should not be required

to bear the costs of that risky behavior. Once Choate concedes he was fully aware of the dangerousness of his activity, he can blame no one but himself for his recklessness – regardless that a similarly informed adult would have been unlikely to engage in the same activity.

C. The Trial Court Fundamentally Misapprehended the Relationship Between the Objective and Subjective Components of the "Awareness of the Risk" Analysis

The trial court erred in suppressing evidence that Choate was fully aware of the risks of jumping onto a moving freight train, and it compounded its error by applying a double standard and allowing Choate to introduce evidence that he might have been less aware than the average 12-year-old that flipping trains is highly dangerous. That double standard was fundamentally unfair to Defendants and requires reversal of the underlying judgment.

In the absence of direct evidence that a trespassing youth was fully aware of the dangerous condition that ultimately led to his physical injury, courts apply an objective test of awareness. "This test is objective for it does not focus on the specific plaintiff's appreciation of risk, but rather on the risk appreciated by young children of similar age and experience." *Fuller v. Justice*, 117 Ill. App. 3d 933, 942 (2d Dist. 1983). As this Court has stated, "[W]hen ascertaining a child's appreciation of danger, our courts do not consider the subjective understanding and limitations of the child when a risk is deemed obvious to children generally." *Salinas v. Chicago Park District*, 189 Ill. App. 3d 55, 61 (1st Dist. 1989). The Court explained that such a subjective focus would be inappropriate because "[a]n undue burden would be placed on landowners in requiring them to focus on

a minor's subjective inability to appreciate a risk." *Id. See also, Swearigen*, 181 Ill. App. 3d at 362-63. In other words, a child's subjective knowledge of risk matters only if his knowledge is *superior* to other children in his age group; it cannot be used to for the purpose of demonstrating *reduced* knowledge and thereby permitting the trespassing child to avail himself of the "dangerous condition" exception when the danger is obvious to the typical child of the same age.

The trial court applied the subjective and objective components of risk awareness precisely backward. The court stymied Defendants' efforts to submit evidence that Choate was fully aware of the risk of flipping trains; it reasoned that such evidence was not relevant in determining whether the average 12-year-old is aware that jumping onto moving freight trains is dangerous. Yet the court repeatedly allowed Choate to introduce evidence that cut the other way – for example, evidence that he was a somewhat below-average student – thereby suggesting to the jury that Choate might have been incapable of understanding the dangerousness of his activity.

Amici respectfully suggest that such misapplication of the objective and subjective components of the "awareness of risk" analysis threatens to deprive landowners of their traditional freedom from liability to trespassers. Businesses whose property is attractive to child trespassers will become de facto insurers of any injuries that occur on their premises – without regard to whether the children were fully aware of the risks they were incurring.

II. WHETHER A LANDOWNER OWES A DUTY OF CARE TO TRESPASSERS IS A QUESTION OF LAW THAT SHOULD BE DECIDED BY THE JUDGE, NOT THE JURY

To properly state a cause of action for negligence, a plaintiff must plead: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; and (3) the breach proximately caused the plaintiff's injuries. *Thompson v. County of Cook*, 154 Ill. 2d 374, 382 (1993). A duty is "an obligation to conform to a certain standard of conduct for the protection of another against an unreasonable risk of harm." *Mt. Zion State Bank*, 169 Ill. 2d at 116. Critically, for purposes of this case, "[w]hether such a duty exists is a question of law, the determination of which *must be resolved by the court*." *Id.* (emphasis added).

The central legal question in this case is whether Defendants owed Choate a duty to protect him from his own reckless desire to trespass on Defendants' property and jump on a moving freight train. The answer to that question requires an examination of whether the moving freight trains constitute a "dangerous condition" and whether individuals of Choate's age are likely to be hurt by the freight trains "because they are incapable, because of age and maturity, of appreciating the risk involved" in jumping on a moving freight train. *Id*. at 117. Accordingly, each of those issues should have been decided by the trial court in connection with its determination of whether Defendants owed a duty of care to Choate.

Instead, the trial court held that it was up to the jury to decide whether Defendants owed a duty of care to Choate by virtue of the "dangerous condition" exception to the no-duty-to-trespassing-children rule. That holding was erroneous. The Illinois Supreme

Court has routinely determined as a matter of law the issue of whether a landowner owed a duty of care to trespassing children under the "dangerous condition" exception. *See, e.g., Mt. Zion State Bank*, 169 Ill. 2d at 121 (utility pedestal next to a fence did not create a dangerous condition); *Cope v. Doe*, 102 Ill. 2d 278, 287 (1984) (partially frozen retention pond posed a danger that was obvious to children and thus landowner owed no duty to protect children from the pond); *Logan v. Old Enterprises Farms, Ltd.*, 139 Ill. 2d 229, 241 (1990) (danger of falling out of a tree was obvious to children and thus landowner owed no duty to protect children from such falls); *Corcoran*, 73 Ill. 2d at 328 (danger of falling into a ditch was obvious to children and thus landowner owed no duty to protect children from such falls). Numerous appellate decisions involving injury to children have similarly held that the "duty" issue is a question of law to be determined by the court, often at the summary judgment stage. *See, e.g., Harlin v. Sears Roebuck and Co.,* 369 Ill. App. 3d 27, 32 (1st Dist. 2006); *Jakubowski v. Alden-Bennett Constr. Corp.*, 327 Ill. App. 3d 627, 632 (1st Dist. 2002); *Barrett v. Forest Preserve Dist.*, 228 Ill. App. 3d 975, 980 (1992); *Hansen v. Goodyear Tire and Rubber Co*., 194 Ill. App. 3d 351, 354 (3d Dist. 1990); *Salinas*, 189 Ill. App. 3d at 60; *Fuller*, 117 Ill. App. 3d at 942.

At trial, Choate conceded, "As a general rule, the issue of duty is a question of law." Pl. Post-Trial Br. at 6, R. C2743-C2773.. He contended, however, that the general rule does not apply "if the issue of duty hinges on whether a condition presents an open and obvious danger. That issue is a question of fact." *Id.* The two cases cited by Choate in support of that proposition are inapposite, because both involved invitees, not trespassers. *See Qureshi v. Ahmed*, 394 Ill. App. 3d 883 (1st Dist. 2009); *Diebert v.*

Bauer Bros. Constr. Co., 141 Ill. 2d 430 (1990). Thus, neither case addressed the "dangerous condition" exception and whether a child trespasser's full awareness of risks precludes him from invoking that exception. Indeed, the analysis of tort liability in cases involving invitees, such as *Qureshi* and *Diebert*, is fundamentally different from the analysis in child trespasser cases. Landowners owe a duty of care to all invitees, *see* Restatement (Second) of Torts § 343, but generally owe no duty of care to trespassers. Liability issues in cases involving invitees generally turn on questions of whether the landowner has breached his duty of care to the invitee – and such questions have long been deemed questions of fact for the jury. Neither case indicates that issues related to whether a landowner owes a duty to someone coming onto his land are issues of fact to be determined by the jury. *Qureshi* overturned a grant of summary judgment to a landowner, and remanded the case to the trial court, because the trial court had failed to articulate what danger was posed by a child's use of a treadmill and whether that specific danger was obvious; it did *not* suggest that obviousness of the danger was an issue of fact that should only be decided by a jury. 394 Ill. App. 3d at 890-91.

Qureshi observed that it was very difficult to determine whether a typical child fully appreciates the risks of operating a treadmill because there are so few reported cases involving treadmill injuries. In sharp contrast, there have been hundreds of cases over the past two centuries involving children who were injured while attempting the jump onto moving trains. As the number of cases increases, it becomes easier over time to determine whether a typical child recognizes the risks of such activity. Under those circumstances, it makes little sense to turn over to jurors the responsibility for

determining the issue – and thereby decreasing the possibility of nationwide uniformity in answering a question (whether the typical child at a given age appreciates the dangers of jumping on moving trains) that ought to have but a single answer.

III. THE FORSEEABILITY THAT CHILDREN WILL JUMP ONTO MOVING TRAINS DOES NOT BY ITSELF CREATE A DUTY TO PROTECT AGAINST IT

Choate argued in the trial court that even if a typical child fully understood the risks of flipping trains because the danger is open and obvious, Defendants nonetheless owed a duty of care to trespassing children because (based on past experience) it was foreseeable to Defendants that children would continue to jump on moving freight trains. Pl. Post-Trial Br. 8-9, R. C2743-C2773. Choate argued, "The cornerstone of liability for an open and obvious danger is whether injury is reasonably foreseeable." *Id.* at 9.

Choate's argument is without merit and is based on a misunderstanding of the Illinois Supreme Court's use of the word "foreseeable." The Court has stated that *Kahn* "established the foreseeability of harm to children as the cornerstone of liability." *Corcoran*, 73 Ill. 2d at 326. But it has made clear that it uses the word "foreseeable" in narrow sense. For example, in *Cope* the Court provided the following explanation regarding why a landowner owes no duty to child trespassers to remedy dangerous conditions whose dangerousness is obvious:

> 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. App. At 286.

The quoted language makes clear that the Court is using the word "foreseeable" in a narrow sense. In other contexts, the word is often used far more broadly such that a risk is deemed "foreseeable" if it is at least plausible that the feared danger will come to pass. Because it is well acknowledged that children routinely engage in highly dangerous activities even when (or perhaps precisely because) the danger is obvious, it is highly "foreseeable" (using the word in its broader sense) that trespassing children will be injured because they will choose to meddle with some feature of the land whose dangerousness is obvious. But the Illinois Supreme Court in *Cope* made clear that it is using the word "foreseeable" in a far narrower sense. It is defining the word so as to exclude any harms that might arise when children fail to avoid obvious dangers. Thus, when the Court says that "foreseeability of harm to the child is the test for assessing liability," it means that landowners may only be held liable to trespassing children injured on their property as a result of contact with *nonobvious* dangerous conditions.[5]

Choate is thus wrong to suggest that landowners can be held liable to trespassers for injury caused by open and obvious dangers, provided only that such injuries are foreseeable. Indeed, such a rule would be directly contrary to § 339, Comment *m* of the Restatement (Second) of Torts ("the possessor [of land] is not subject to liability to a child who in fact discovers the condition and appreciates the full risk") as well as the numerous Illinois Supreme Court decisions discussed above.

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[5] The Illinois Supreme Court has readily acknowledged that there is "an ever-present possibility" that children will injure themselves when they come upon conditions whose danger is "obvious." *Corcoran*, 73 Ill. 2d at 326. But an owner or occupier is not required to protect against that possibility, even if he "knows that children frequent his premises." *Id.*

IV. THERE ARE GOOD POLICY REASONS TO EXTEND NARROWER PROTECTION TO INJURED TRESPASSERS THAN TO INJURED INVITEES AND LICENSEES

The "dangerous condition" test articulated in *Kahn* applies equally to all who have suffered personal injury while on the property of another, regardless of the injured party's status as an invitee, licensee, or trespasser. Choate is wrong, however, to suggest that Illinois law has abolished all distinctions between invitees and trespassers when the injured party is a child. For example, an injured invitee may well be able to recover from the landowner under the provisions set forth in § 443 of the Restatement (Second) of Torts. The only option available to a trespassing child, on the other hand, is recovery under the "dangerous condition" exception to the "no duty" rule.

Amici respectfully submit that the Court should resist all calls to do away with the distinctions between invitees and trespassers. Those distinctions serve important societal functions. In particular, they serve to protect property rights by preventing trespassers from forcing themselves on nonconsenting landowners. As one commenter has argued, "A landowner cannot have a duty to someone who has no right. To say otherwise would be to give wrongdoers a veto over the use of land by the owner and thus harm his right to own, possess and use real estate." Robert S. Driscoll, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future*, 82 NOTRE DAME L. REV. 881, 898 (Dec. 2006).[6]

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[6] Driscoll notes that while a handful of states (not including Illinois) took steps in the 1960s and 1970s to abolish all distinctions among invitees, licensees, and trespassers, that trend in the law has long since ceased, and some state have reintroduced distinctions among those groups that had previously been eliminated. *Id*. at 890. *See also Alexander v. Med. Assocs. Clinic*, 646 N.W.2d 74, 78 (Iowa

Judge Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, has written passionately about the importance of a tort system that avoids rewarding bad behavior:

> [J]ust as imposition of liability tends to discourage undesirable behavior, the payment of a subsidy tends to encourage it. When we pay damages to a plaintiff who bears substantial responsibility for the harm he suffered, we send a message to him and to others like him that taking care of your safety is not your responsibility but someone else's.

Alex Kozinski, *The Toytota Principle*, 56 WASH. & LEE L. REV. 923, 925-26 (1999).

Choate and his family undoubtedly have substantial medical bills to pay, but *amici* respectfully suggest that is something he should have thought about before he decided to jump on a moving freight train to impress his girlfriend. If his multi-million dollar judgment is upheld, we will have succeeded in taxing society as a whole in order to provide him extremely generous compensation for his loss, while relieving his parents of responsibility for supervising his activities. *See Salinas,* 189 Ill. App. 3d at 188. As Judge Kozinski stated:

> As a society, we suffer grievously when individuals fail to live up to their potential because they have a sense that there is not much they can do to affect their destiny. When we allow our courtrooms to be crowded with individuals who seek to escape the consequences of their own folly, we foster the notion that somebody out there is to blame for whatever goes wrong in our lives and that it is someone else's duty to look out for us . . . If you got hurt because of your own irresponsible or destructive actions, you are stuck with the consequences, and we will not go looking for some deep pocket to pay the price for your folly.

Kozinski, 56 WASH. & LEE L. REV. at 930.

2002) ("Given the fact that only one court in the past twenty-seven years has abandoned the common law trespasser rule, the so-called 'trend' to adopt a universal standard of care for premises liability has clearly lost momentum.").

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment of the circuit court and render judgment in favor of Defendants. At a minimum, the Court should order a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a)(and (b). The length of this brief, excluding the pages containing 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 21 pages.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on this 15th day of September, 2010, he caused three copies of the foregoing Brief of Illinois Civil Justice League, et al., to be placed into the U.S. Postal Service, First Class postage prepaid, addressed as follows:

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