Rel: 1/16/08

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2008-2009

1050532

James E. Laster, Jr., a minor who sues by and through his parents and next friends, James E. Laster, Sr., and Gloria Laster, et al.

v.

Norfolk Southern Railway Company, Inc., and the Alabama Great Railway Company

Appeal from Jefferson Circuit Court
(CV-02-4965)

On Application for Rehearing

SEE, Justice.

This Court's opinion of January 5, 2007, is withdrawn, and the following is substituted therefor.

James E. Laster, Jr., a minor ("James"), by and through his parents and next friends, James E. Laster, Sr., and Gloria Laster, and James E. Laster, Sr., and Gloria Laster, individually, appeal a summary judgment in favor of Norfolk Southern Railway Company, Inc., and the Alabama Great Railway Company. Because there are no genuine issues of material fact as to whether the railroads violated any duty to James, we affirm the summary judgment.

I. Factual and Procedural History

In August 2000, a train operated by Norfolk Southern Railway Company, Inc., and the Alabama Great Railway Company (collectively "Norfolk Southern") severed the right foot of 10-year-old James, on private property owned by Norfolk Southern in Birmingham. Earlier that day, James had left his parents' house to play with nine-year-old Raymond Smith. James and Raymond decided to walk to Woodward Park. However, instead of walking on McMillion Avenue, they decided to walk along the railroad right-of-way that runs parallel to McMillion Avenue. James's parents had warned him not to walk on the right-of-way without an adult present, and James admitted that he knew that it was dangerous to take that

route. However, he testified that he walked on the right-of-way because he was afraid of the fast cars, dogs, and "crazy people" on McMillion Avenue.

While James and Raymond were walking along the right-of-way, a train approached, and they moved as far from the tracks as the trees lining the tracks would allow. The train slowed and came to a stop in front of them. They turned around and began walking back toward James's house, because, James said, he was afraid that the train might start to move again. As James and Raymond passed an open hopper car, Raymond climbed the ladder to the top of the car. James had heard a whooshing sound of air from the brakes of the train, and, because he thought that the train might start moving, he called for Raymond to come down. Instead, Raymond replied, "Hold up." James decided to pull his friend down, and he stood with his right foot on the rail in order to reach Raymond. Raymond fell on top of James, and James felt a burning pain in his right foot. The train had started rolling, and it rolled over and severed James's right foot.

James, by and through his parents, and his parents individually (hereinafter referred to collectively as

"Laster") sued Norfolk Southern, asserting claims of negligence and wantonness, as well as the tort of outrage. Laster argues that Norfolk Southern should have known that children would trespass on its property and that they possibly would be injured by a train. Laster points out that the stretch of track on which James was injured has one of the highest incidences of pedestrian casualties and that, in the past, Norfolk Southern had used a trespasser-abatement program in the area, visiting schools and monitoring the tracks. Laster also argues that the engineer on the train failed to blow the horn before releasing the brakes and allowing the slack between the cars to work its way out. He contends that if the engineer had blown the horn before he released the brakes, then James and Raymond would have had time to get away from the railroad car before the train cars actually began to move. He further argues that the train should not have stopped in such a densely populated area, suggesting other workable locations for a stop that would have posed less of a risk to children. Following a hearing, the trial court granted Norfolk Southern's motion for a summary judgment,

issuing an order that did not include factual findings or legal analysis. Laster appeals.

Laster argues that the trial court erred in entering a summary judgment in favor of Norfolk Southern. Norfolk Southern's argument in support of its summary-judgment motion was that the only duty it owed James was a duty to exercise reasonable care after its train crew discovered the child in a position of peril from which he could not remove himself. Norfolk Southern also contended that James's and Raymond's own contributory negligence was the sole proximate cause of James's injuries. Finally, Norfolk Southern argued that even if the doctrine of attractive nuisance applied in this situation, Laster had not produced sufficient evidence indicating that the train was an attractive nuisance to survive a motion for a summary judgment.

II. Standard of Review

To grant a motion for a summary judgment, the trial court must determine that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. When the movant makes a prima facie showing that those two conditions are satisfied,

the burden then shifts to the nonmovant to present "substantial evidence" creating a genuine issue of material fact. Ex parte CSX Transp., Inc., 938 So. 2d 959, 961 (Ala. 2006); see Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); § 12-21-12(d), Ala. Code 1975.

In our review of a summary judgment, we apply the same standard as does the trial court on factual issues. Ex parte Lumpkin, 702 So. 2d 462, 465 (Ala. 1997). Our review is subject to the caveat that we must review the record in the light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. Ex parte CSX Transp., 938 So. 2d at 962; Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990). The trial court's ruling on questions of law carries no presumption of correctness, and this Court reviews de novo the trial court's conclusion as to

the appropriate legal standard to be applied. Ex parte Graham, 702 So. 2d 1215, 1221 (Ala. 1997).

III. Analysis

A. Duty of Care

Laster first argues that the trial court failed to apply the correct duty of care owed by the railroad. In its summary-judgment motion, Norfolk Southern argued that the conventional duty of care owed by a possessor of land to trespassers applies in this case. In general, "[a] railroad owes no duty to prevent injury to an undiscovered trespasser on its track. But when the railroad discovers the trespasser, it has the duty to exercise reasonable care to avoid injuring him or her." Beam v. Seaboard Sys. R.R., 536 So. 2d 927, 928 (Ala. 1988) (citation omitted). Because it is undisputed that James and Raymond were trespassers on its property, Norfolk Southern contends, it owed them a duty only to avoid wantonly or negligently injuring them after Norfolk Southern, through its agents, discovered that the boys were in a position of peril.

Although Norfolk Southern correctly states the conventional duty of care a possessor of land owes a

trespasser, this Court has long recognized exceptions to this limited duty where child trespassers are involved. First, this Court has recognized the doctrine of attractive nuisance, which we have defined as "a condition which is naturally attractive to children at that place and is likely to be dangerous to such a person in the ordinary course of events, all of which is known to the defendant and not to the injured person and not obviously dangerous in itself." City of Dothan v. Gulledge, 276 Ala. 433, 435, 163 So. 2d 217, 219 (1964). Next, this Court recognized a "straight-negligence" theory of liability, which "arguably developed as a reaction to the restrictive use of the attractive nuisance theory." Tolbert v. Gulsby, 333 So. 2d 129, 132-33 (Ala. 1976). Finally, this Court has adopted the 2 Restatement (Second) of Torts: Artificial Conditions Highly Dangerous to Trespassing Children § 339 (1965), replacing the earlier theories of attractive nuisance and straight-negligence the Court had previously applied. Tolbert, 333 So. 2d at 135.

Section 339 of the Restatement (Second) of Torts, like the doctrines of attractive nuisance and straight negligence, is an exception to the conventional duty of care in the case

of trespassing children, requiring property owners to exercise reasonable care in order "to give primacy to child safety rather than unrestricted property rights." Motes v. Matthews, 497 So. 2d 1121, 1122 (Ala. 1986). "A possessor of land owes a duty to exercise reasonable care to eliminate an artificial condition on land that poses a danger to children." Oden v. Pepsi Cola Bottling Co. of Decatur, Inc., 621 So. 2d 953, 961 n. 5 (Ala. 1993) (citing Fletcher v. Hale, 548 So. 2d 135 (Ala. 1989), and Lyle v. Bouler, 547 So. 2d 506 (Ala. 1989)).

Motes held that the conventional duty of care recited in Beam is "not applicable ... except where physical harm to a trespassing child is caused by a natural condition upon the property. ... In all other cases, the duty which an occupier of property owes to a trespassing child is set forth in § 339, Restatement (Second) of Torts." Motes, 497 So. 2d at 1122-23.

> "'Section 339 provides:
>
> "'"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."'"

Ricketts v. Norfolk Southern Ry., 686 So. 2d 1100, 1103 (Ala. 1996) (quoting Lyle, 547 So. 2d at 507).

The threshold issue, then, in deciding whether the conventional duty of care or the duty of care put forward in § 339 applies, is whether the condition that injured the trespassing child was a natural or an artificial one. Norfolk Southern argues that § 339 has no application to a train operating on active railroad tracks, whether moving or stopped temporarily. However, Norfolk Southern has put forward no viable theory under which this Court could hold that a train

is not an artificial condition. Norfolk Southern conflates the inquiry as to whether a train is a natural or an artificial condition upon the land with the analysis to be performed once § 339 is held to apply.

Norfolk Southern cites Holland v. Baltimore & Ohio R.R., 431 A.2d 597 (D.C. App. 1981), for the proposition that § 339 does not apply where children trespassers are injured by a moving train. The Holland court performed an "independent analysis" of § 339 and concluded that the Restatement test could not be met because element (c) -- that the child does not discover the condition or realize the risk -- could not be satisfied, reasoning that

> "'[n]othing could be more pregnant with warning of danger than the noise and appearance of a huge, rumbling string of railroad cars. It cannot be compared with the silent, deadly danger of high-power electricity, the inanimate attraction of stationary machines, traps or turntables, loose boards, unseen pitfalls, or the still, inviting depths of a swimming pool to a tiny child.'"

431 A.2d at 603 (quoting Herrara v. Southern Pacific Ry., 188 Cal. App. 2d 441, 449, 10 Cal. Rptr. 575, 580 (1961)). The fact that a train might be an obvious danger under subparagraph (c) of § 339, however, does not mean that it is a natural condition upon the land. Nor do the other cases

upon which Norfolk Southern relies hold that a train that is stopped temporarily is not an artificial condition upon the land; these cases were decided on various other grounds. Louisville & Nashville R.R. v. Spence's Adm'r, 282 S.W.2d 826, 829 (Ky. 1955), applied the conventional duty of care owed to trespassing children; it thus did not involve § 339. Alston v. Baltimore & Ohio R.R., 433 F. Supp. 553, 570 (D.D.C. 1977), concluded that "as the 'circumstances' of Myron's accident unquestionably include his full appreciation of the risk, the instant case does not meet the requirement of Restatement 339(c)." Alston dealt with a plaintiff who knew that hopping onto a freight train was dangerous; it does not stand for the proposition that a moving train is not an artificial condition. Finally, in Hughes v. Union Pacific R.R., 114 Idaho 466, 470, 757 P.2d 1185, 1189-90 (1988), the Supreme Court of Idaho stated that Restatement § 339 did not represent the law of Idaho. The court decided that, based upon the particular facts of the case, the plaintiff "'appreciate[d] the dangers created by certain artificial conditions.'" Hughes, 114 Idaho at 470, 757 P.2d at 1189 (quoting Guilfoyle v. Missouri, Kansas, & Texas R.R., 812 F.2d 1290, 1292 (10th

Cir. 1987)). We do note that although the Idaho court did not apply § 339, the quoted language suggests that that court considered a train to be an artificial condition. Thus, the cases Norfolk Southern cites simply do not hold that § 339 does not apply to a temporarily stopped train.

Alabama cases distinguish only between those conditions that are natural and those that are artificial; therefore, a train must fit in either the one category or the other. Alabama caselaw suggests that a train, whether stopped or moving, is an artificial condition upon the land. In Slaughter v. Moncrief, 758 So. 2d 1102, 1106 (Ala. Crim. App. 1999), the court held that a temporarily parked pickup truck on an inclined driveway was an artificial condition. Alabama courts have engaged in the § 339 analysis and found a number of conditions upon the land to be artificial: a railroad trestle, Ricketts, 686 So. 2d at 1103-07; an electrical transmission switching tower, Henderson v. Alabama Power Co., 627 So. 2d 878, 880 (Ala. 1993), abrogated on other grounds, Ex parte Apicella, 809 So. 2d 865 (Ala. 2001); a swimming pool, Fletcher v. Hale, 548 So. 2d 135 (Ala. 1989); a clay pit, Lyle, 547 So. 2d at 507; excavated land, Motes, 497 So.

2d at 1124; a trampoline positioned near the roof of a house, Kennedy v. Graham, 516 So. 2d 572 (Ala. 1987); an air rifle, Tolbert, 333 So. 2d at 135; and a house under construction, Tanner v. Lee, 725 So. 2d 988, 989 (Ala. Crim. App. 1998).[1]

A train is a machine made by human hands, and it more closely resembles a pickup truck or an air rifle than it does a natural condition such as a ravine or a tree. This Court held in Copeland v. Pike Liberal Arts School, 553 So. 2d 100, 103 (Ala. 1989), that a ravine was a natural condition and that the landowner in the case owed a trespassing child only the conventional duty of care. In concluding that § 339 did not apply, we noted that "[t]he ravine was not created by any action of the defendants, but, instead, was a natural condition of the land." 553 So. 2d at 102. Also, in Mullins v. Pannell, 289 Ala. 252, 255, 266 So. 2d 862, 864 (1972), this Court held that "[n]atural objects, such as a tree, are not regarded as constituting an attractive nuisance." Thus,

[1]In other cases, this Court engaged in the § 339 analysis while specifically declining to decide whether there was an "artificial condition" on the land. See Hollis v. Norfolk Southern Ry., 667 So. 2d 727, 731 (Ala. 1995) (a man-made cliff that closely resembled a natural cliff); Gentle v. Pine Valley Apartments, 631 So. 2d 928, 936 n. 3 (Ala. 1994) (a dog).

the defendant owed only the conventional duty of care to a child trespasser who fell from his tree. The fact that there was various artificial debris, such as planks and boards, under the tree did not affect the natural character of the tree. Id. The law of other jurisdictions also supports our determination that a train is an artificial condition. See Klein v. National R.R. Passenger Corp. (No. Civ.A. 04-955, March 31, 2006) (E.D. Pa. 2006) (not reported in F. Supp. 2d) ("In this case, the laddered freight car was an artificial condition upon the land that allowed the 21' high catenary wires to become dangerous."); Thunder Hawk v. Union Pacific R.R., 844 P.2d 1045, 1051 (Wyo. 1992) (reversing a summary judgment for a railroad where a child was injured when he jumped from a stopped train).

We decline to hold that a train is a natural condition upon the land. Thus, we apply the duty of care owed for artificial conditions as delineated by § 339.

B. The § 339 Elements

Having held that the duty of care set out in Restatement § 339, rather than the conventional duty of care, applies in this case, we turn to the elements of the Restatement test.

Because Laster has the burden at trial of establishing all the elements of § 339, Norfolk Southern need only demonstrate that there was no genuine issue of material fact regarding one of the five elements in order for a summary judgment to be proper. Motes v. Matthews, 497 So. 2d at 1123; see also Copeland v. Samford Univ., 686 So. 2d 190, 191 (Ala. 1996) ("'Once the moving party makes a prima facie showing that no genuine issue of material fact exists, then the burden of going forward with evidence shifts to the nonmovant -- who must demonstrate the existence of a genuine issue of material fact.'" (quoting Diamond v. Aronov, 621 So. 2d 263, 265 (Ala. 1993), citing Grider v. Grider, 555 So. 2d 104 (Ala. 1989)).

1. James's Appreciation of Danger

Norfolk Southern argues that there is no genuine issue of fact with regard to element § 339(c), which deals with the child's appreciation of the danger of the instrumentality. We agree.

The record supports a finding that James understood the risk involved in walking on the railroad right-of-way and that he appreciated the danger posed by a stopped train. James testified that he knew that trains were dangerous and that his

parents had repeatedly warned him not to walk on the railroad tracks without an adult. He stated that he had heard of a man who "got killed by, run over by a train." After the train came to a stop, James and Raymond turned around and walked back toward James's house. James testified: "We didn't want to get to the front of the train, like if it just started back and stuff. That would be kind of scary." When Norfolk Southern's attorney asked James if he turned around "because you knew if the train came to a stop there, it would probably start back up at some point?" James replied, "Yes, sir." Finally, James was aware, immediately before the accident, that the train was ready to move because, he testified, he heard the "whooshing" sound of the train's air brakes being released, and he was familiar enough with that sound to associate it with a train starting to move.

Norfolk Southern produced sufficient evidence indicating that James appreciated the danger of approaching the stopped train and that, therefore, he could not satisfy element (c) of § 339.[2] See Dennis v. Northcutt, 923 So. 2d 275, 281 (Ala.

[2]The dissent states that "[a] child between the ages of 7 and 14 is prima facie incapable of contributory negligence," ___ So. 2d at ___, and argues that this presumption should apply to the determination of James's and Raymond's

2005) ("'"If the burden of proof at trial is on the nonmovant, the movant may satisfy the Rule 56[, Ala. R. Civ. P.,] burden of production either by submitting affirmative evidence that negates an essential element in the nonmovant's claim or, assuming discovery has been completed, by demonstrating to the trial court that the nonmovant's evidence is insufficient to establish an essential element of the nonmovant's claim ...."'"). Norfolk Southern has thus met its burden of establishing that summary judgment was appropriate in this case.

In order to defeat a properly supported summary-judgment motion, Laster must present "substantial evidence" creating a genuine issue of material fact. Dennis, 923 So. 2d at 280. Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be

---

appreciation of the danger in this case. However, as discussed in note 4, infra, this Court has not recognized such a presumption in the context of § 339. Moreover, Laster did not argue that the presumption allegedly recognized in contributory-negligence cases should be applied in this context until his application for a rehearing, and then only implicitly. "New supporting arguments presented for the first time on rehearing generally will not be considered." Stover v. Alabama Farm Bureau Ins. Co., 467 So. 2d 251, 253 (Ala. 1985).

proved." West v. Founders Life, 547 So. 2d at 871. Laster, however, put forward no evidence indicating that James did not appreciate the danger of approaching the train after it had stopped. Indeed, Laster states in his brief that the accident occurred as James was attempting to leave the area of the train out of respect for the danger it posed. Laster's brief at 36. The evidence suggests that James understood that trains are dangerous. He understood that the train could begin to move again at anytime, yet he attempted to pull his friend from the train.

In Hollis v. Norfolk Southern Ry., 667 So. 2d 727 (Ala. 1995), this Court discussed whether § 339(c) applied to a 16-year-old who was injured as he walked along the edge of a man-made cliff at night. The Court, discussing whether the teenager appreciated the danger of this course of action, stated that "a landowner is not subject to liability when a child knows of a danger and appreciates the risk involved, but chooses to go forward and to encounter the danger out of 'recklessness or bravado.'" Hollis, 667 So. 2d at 732 (quoting Restatement (Second) Torts § 339 cmt. m.). Here, although James's motive in trying to help his friend is

commendable, he appreciated the danger posed by the train and nonetheless approached the train.

Laster argues that, given the stress of the emergency situation created when the train began to move, the boys should not be held to the same correctness of judgment and ability to recognize danger to which a child would be held in normal circumstances. See Interstate Eng'g, Inc. v. Burnette, 474 So. 2d 624, 628 (Ala. 1985) ("'[I]f a person without fault of his own is faced with a sudden emergency, he is not to be held to the same correctness of judgment or actions as if he had time to fully consider the situation ....'"). However, Laster presents no evidence indicating that James did not appreciate the danger of the situation, notwithstanding the stress of the moment.

2. The Rescue Doctrine

Laster argues that even if this Court holds that James appreciated the danger of a stopped train so as to preclude recovery under § 339 in James's own right, Laster may still be able to recover if § 339 applies to Raymond, James's nine-year-old companion. Because James attempted to come to Raymond's rescue, Laster argues, the "rescue doctrine"

applies. This Court has recognized the rescue doctrine as an exception to the doctrines of assumption of the risk and contributory negligence. Seaboard Air Line Ry. v. Johnson, 217 Ala. 251, 254, 115 So. 168, 170 (1927). The rescue doctrine operates to close a gap in the chain of causation. As we recognized in Dillard v. Pittway Corp., 719 So. 2d 188, 193 (Ala. 1998),

> "[e]ssentially, the rescue doctrine provides that it is always foreseeable that someone may attempt to rescue a person who has been placed in a dangerous position and that the rescuer may incur injuries in doing so. Thus, if the defendant has acted negligently toward the person being rescued, he has acted negligently toward the rescuer."

The rescue doctrine thus provides a mechanism by which a plaintiff can establish the element of causation in a negligence claim. See Lowery v. Illinois Cent. Gulf R.R., 891 F.2d 1187, 1194 (5th Cir. 1990) ("We note that the rescue doctrine is nothing more than a negligence doctrine addressing the problem of proximate causation.").

This Court has never decided whether the rescue doctrine applies to allow a plaintiff who otherwise appreciated the danger of an instrumentality nonetheless to recover under § 339 on the theory that the individual being rescued did not.

However, we have recognized the rescue doctrine in cases where a rescuer otherwise would have been barred from recovering damages by the doctrine of assumption of the risk. Dillard, 719 So. 2d at 193. Assumption of the risk and appreciation of danger are analogous concepts, and Norfolk Southern has not put forward any reason why the rescue doctrine should not apply in this case. Further, courts in other jurisdictions have applied the rescue doctrine to cases falling within § 339. See Bennett v. Stanley, 92 Ohio St. 3d 35, 43, 748 N.E.2d 41, 48-49 (2001) ("While the attractive nuisance doctrine is not ordinarily applicable to adults, it 'may be successfully invoked by an adult seeking damages for his or her own injury if the injury was suffered in an attempt to rescue a child from a danger created by the defendant's negligence.'"); Luck v. Baltimore & Ohio R.R., 510 F.2d 663, 667 (D.C. Cir. 1974) (applying the rescue doctrine in an attractive-nuisance case).

Absent the rescue doctrine, Laster cannot show that Norfolk Southern's negligence caused James's injuries. See Reeves v. North Broward Hosp. Dist., 821 So. 2d 319, 321 (Fla. Dist. Ct. App. 2002) ("The basic precept of the 'rescue

doctrine' is that the person who has created a situation of peril for another will be held in law to have caused peril not only to the victim, but also to his rescuer, and thereby to have caused any injury suffered by the rescuer in the rescue attempt."). Under the rescue doctrine, if James was injured in an attempt to rescue Raymond from Norfolk Southern's negligence, he could recover if Raymond, among other things, belonged to the class of children protected by § 339.

We have not previously addressed which party bears the burden of proving whether the child the plaintiff attempted to rescue belonged to the class of children protected under § 339. However, we have already noted that Laster has the burden at trial of establishing all the elements of § 339, and caselaw from Alabama and other jurisdictions leads us to conclude that Laster bore the burden of coming forward with evidence supporting the application of the rescue doctrine.

In Trapp v. Vess, 847 So. 2d 304, 307 (Ala. 2002), a summary-judgment case, this Court confronted the issue of "when a person qualifies as a rescuer under the rescue doctrine." In Trapp, Vess and his daughter were traveling in a car on icy roads when the car slid on the ice and skidded

into a ditch. Neither Vess nor his daughter was hurt. The plaintiff, Trapp, stopped to help, and Vess told him that the accident occurred as he was taking his daughter to the hospital for medical tests. Trapp and others helped remove the car from the ditch, but, in doing so, Trapp injured his arm. Trapp sued Vess, asserting, among other theories, the rescue doctrine. This Court held that, "[i]n order to claim the status of a rescuer, a party must establish that he had a reasonable belief that the person he was trying to rescue was in a dangerous position." Trapp, 847 So. 2d at 307. We also noted that the person being rescued does not need to be in actual peril so long as the rescuer has "'"a reasonable belief that some person is in imminent peril."'" Trapp, 847 So. 2d at 307 (quoting Ellmaker v. Goodyear Tire & Rubber Co., 372 S.W.2d 650, 658 (Mo. Ct. App. 1963)). Nonetheless, we concluded:

> "[T]he only fact that could have led Trapp to a 'reasonable belief that some person [was] in imminent peril' is Trapp's statement in his affidavit indicating that Vess told Trapp that he needed to get his daughter to the hospital to have medical tests performed. However, there is absolutely no other evidence that Vess indicated that he and his daughter were in peril or that he requested Trapp's assistance."

Trapp, 847 So. 2d at 307 (footnote omitted). We thus affirmed the summary judgment in favor of Vess because "Trapp did not present sufficient evidence to create a genuine issue of material fact as to whether Trapp was a rescuer under the rescue doctrine." 847 So. 2d at 307. Thus, Trapp bore the risk of failing to produce evidence regarding an element of the rescue doctrine.

Caselaw from other jurisdictions also suggests that the party claiming rescuer status bears the burden of establishing each of the elements of the rescue doctrine, including the defendant's negligence. In McCoy v. American Suzuki Motor Corp., 136 Wash. 2d 350, 355-56, 961 P.2d 952, 956 (1998), the Supreme Court of Washington held:

> "To achieve rescuer status one must demonstrate: (1) the defendant was negligent to the person rescued and such negligence caused the peril or appearance of peril to the person rescued; (2) the peril or appearance of peril was imminent; (3) a reasonably prudent person would have concluded such peril or appearance of peril existed; and (4) the rescuer acted with reasonable care in effectuating the rescue."

That is, the one asserting the rescue doctrine must prove each of the elements of it. Thus, "in order for the rescue doctrine to be applicable, the party relying upon it must

establish that some negligent act of someone created the peril with respect to which the rescue attempt was undertaken." Dubus v. Dresser Indus., 649 P.2d 198, 206 (Wyo. 1982). See also Lowery, 891 F.2d at 1193-94 ("Therefore, in order for Lowery to recover under Mississippi's rescue doctrine, Lowery must show: (1) The condition of the locked hand brake on the car resulted from defendant's negligence; (2) this negligence exposed the employer's property and unidentified third parties to danger; and (3) this emergency situation led to Lowery's rescue attempt and proximately caused his injuries."); Ashwood v. Clark County, 113 Nev. 80, 85, 930 P.2d 740, 743 n.1 (1997) ("In order for [the rescue] doctrine to apply, the defendants must first be liable for the injury to the victim being rescued."); Brazier v. Phoenix Group Mgmt., 280 Ga. App. 67, 72, 633 S.E.2d 354, 358 (2006) ("In order to hold a defendant liable for the death of a rescuer, ... a plaintiff must show that the defendant's negligence placed himself or another person in imminent distress, thereby requiring the rescue and making injury to the rescuer a foreseeable possibility.").

The case of Blackburn v. Broad Street Baptist Church, 305 N.J. Super 541, 702 A.2d 1331 (1997), appears to be directly

on point. In Blackburn, the plaintiff was injured when she slipped and fell while attempting to remove a three-year-old child from a "puddle-like pond" that had accumulated on property belonging to the church. The trial judge entered a summary judgment for the church after concluding that the plaintiff was not a rescuer but a trespasser to whom no duty was owed. The appellate division reversed. That court analyzed the case from the perspective of the infant trespasser, holding that if the danger to the child was created by an attractive nuisance, the "defendant may be liable ... because the intervention of a rescuer is reasonably foreseeable." Blackburn, 305 N.J. Super. at 546, 702 A.2d at 1334. In determining whether the rescue doctrine applied, the court examined whether the plaintiff had presented sufficient evidence to establish each element of the attractive-nuisance doctrine, holding that "[the] plaintiff must establish each of the five elements under [Restatement (Second) Torts] § 339 to prove a prima facie case." Blackburn, 305 N.J. Super at 547, 702 A.2d at 1334. Because there was sufficient evidence in the record to establish that the church had maintained an

attractive nuisance on its property, the court allowed the case to go forward.

The burden rests on the plaintiff to establish all the elements of the rescue doctrine, which include, in the case before us, showing that § 339 applies to Raymond. For Laster's claim to survive Norfolk Southern's summary-judgment motion, he must have put forward substantial evidence indicating that Norfolk Southern owed a duty to Raymond and that Norfolk Southern's breach of that duty created the need for James to attempt to rescue Raymond. For Norfolk Southern to have owed a duty to Raymond, Raymond must have been within the class of children, as identified by § 339(c), the Restatement protects. See Ricketts v. Norfolk Southern Ry., 686 So. 2d at 1105 ("'In adopting § 339, this Court recognized the special duty owing to a class of plaintiffs, defined in § 339(c), whose natural proclivity for wonder and adventure exceeds their sense of impending danger.'" (quoting Henderson v. Alabama Power Co., 627 So. 2d 878, 881 (Ala. 1993))). The protections of § 339 are not unlimited; under § 339, a possessor of land owes a duty of reasonable care to protect a child from a dangerous condition on the land if it is

foreseeable that children will trespass and the possessor should know that the condition poses an unreasonable risk of harm, outweighing the usefulness of the condition, that trespassing children could not be expected to appreciate and avoid.[3] Restatement (Second) Torts § 339. However, Laster, who asserts the rescue doctrine in order to establish Norfolk Southern's negligence, has failed to demonstrate that its application allows him to recover.

---

[3]Comment i. to Restatement § 339 explains:

> "The duty of the possessor, therefore, is only to exercise reasonable care to keep the part of the land upon which he should recognize the likelihood of children's trespassing free from those conditions which, though observable by adults, are likely not to be observed by children, or which contain the risks the full extent of which an adult would realize but which are beyond the imperfect realization of children. It does not extend to those conditions the existence of which is obvious even to children and the risk of which should be fully realized by them."

See also 1 Dan B. Dobbs, The Law of Torts § 236, at 609 (2001) ("If the landowner ... could foresee that children might enter and be harmed because, given their age and experience, they might fail to appreciate the danger, and if the landowner could have avoided such serious risks with a relatively small expense, courts today generally recognize a duty of care to the child and liability for negligence."); 5 Fowler B. Harper et al., Harper, James and Gray Torts § 27.5, at 186 (3d ed. 2008) ("The requirements of the more modern Restatement view that the plaintiff must satisfy center on unreasonable probability of harm.").

A summary judgment is appropriate when "it appears from the combined evidentiary showings before the court at the hearing that there is no genuine issue of fact to be resolved." Jerome A. Hoffman, Alabama Civil Procedure § 10.3 (2d ed. 2001). Rule 56(c)(3), Ala. R. Civ. P., states:

> "[A summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Thus, if the record does not demonstrate a genuine issue of material fact regarding Raymond's appreciation of the danger of playing on a stopped train, then the summary judgment was appropriate.

There is little evidence in the record regarding Raymond and his appreciation of danger. Neither party deposed Raymond or had him execute an affidavit. As Laster himself admits, "[i]t is unknown whether nine year old Raymond had any realization of any risk involved with climbing on the ladder of the parked rail car, in that no testimony of Raymond was presented to the trial court." Laster's brief at 16. "Such an explicit admission in a brief is binding on the party

making it." Ford v. Carylon Corp., 937 So. 2d 491, 502 (Ala. 2006). The only evidence regarding Raymond's awareness of the danger of a temporarily stopped train is the fact that Raymond was nine years old at the time of the accident.

This Court has recognized that age is a factor in deciding whether a child can appreciate a hazard on another's property. Lyle v. Bouler, 547 So. 2d at 508. The Court in Lyle set forth a nonexhaustive list of factors that "merit examination":

> "(1) the intelligence of the child; (2) the capacity of the child to understand the potential danger of the hazard; (3) the child's actual knowledge of the danger; (4) the child's ability to exercise discretion; (5) the education level of the child; (6) the maturity of the child; and (7) the age of the child."

547 So. 2d at 508.[4] Laster could have attempted to meet his burden of showing that Raymond did not appreciate the danger

[4]Lyle overruled Central of Georgia R.R. v. Robins, 209 Ala. 6, 7, 95 So. 367, 368 (1923). See Lyle, 547 So. 2d at 508 ("By rejecting the age limitation imposed in Central of Georgia, this Court now embraces § 339 as the only authority for determining whether a child may recover. This is not to say that age should not be a factor at all. The comment to § 339 clearly states that recovery will be less likely as the age of the child increases. Age may be an important factor in determining liability, but it is one of many factors that must be examined. ... Central of Georgia, and those cases relying on that case, are hereby overruled to the extent that they are inconsistent with our holding today ....").

of climbing onto a railroad car by putting forward evidence based on some or all the listed factors. The Court in Lyle did not state that any factor -- age included -- was sufficient, by itself, to meet that burden. Laster did not present any evidence as to any factor other than age.

Laster states, instead, that he relies on "the presumption of no negligence (appreciation of danger)" as establishing a genuine issue of material fact. However, our caselaw does not recognize any such presumption in this context.

The dissent states that "[a] child between the ages of 7 and 14 is prima facie incapable of contributory negligence," ___ So. 2d at ___, and argues that this presumption should apply in determining James's and Raymond's appreciation of the danger in this case. However, this Court established in Lyle that, in § 339 cases, determining appreciation of the danger depends on a factor-based analysis. 547 So. 2d at 508 ("[T]his Court now embraces § 339 as the only authority for determining whether a child may recover. ... Age may be an important factor in determining liability, but it is one of many factors that must be examined. Elements that merit examination are:

(1) the intelligence of the child; (2) the capacity of the child to understand the potential danger of the hazard; (3) the child's actual knowledge of the danger; (4) the child's ability to exercise discretion; (5) the education level of the child; (6) the maturity of the child; and (7) the age of the child."). The dissent points to these factors from Lyle but concludes: "Thus, the respective ages of James and Raymond constituted substantial evidence that each of them was incapable of appreciating the risk at issue in this case in the same manner as an adult, thereby creating a genuine issue of material fact and making the summary judgment inappropriate." ___ So. 2d at ___. However, our decision in Lyle emphasizes that "[a]ge may be an important factor in determining liability, but it is one of many factors that must be examined." There is no indication in Lyle that age, or any other factor, is, by itself, dispositive or, as applied in this case, that any one factor, by itself, constitutes substantial evidence of a child's appreciation of the danger under § 339. We decline to adopt that reading of Lyle in this case.

Moreover, as noted previously, Laster did not argue on original submission that the so-called tender-years doctrine should apply in the § 339 context. He mentioned the age-based presumption in support of his argument that James could not be contributorily negligent, but it was not until his application for a rehearing that he implied that the presumption ought to apply to the determination of James's or Raymond's appreciation of the danger in this case. Therefore, we need not address this argument. See Stover v. Alabama Farm Bureau Ins. Co., 467 So. 2d 251 (Ala. 1985).

James testified that Raymond continued to climb on the railroad car, notwithstanding James's warning that the train would start moving soon. "[A] landowner is not subject to liability when a child knows of a danger and appreciates the risk involved, but chooses to go forward and to encounter the danger out of 'recklessness or bravado.'" Hollis, 667 So. 2d at 732 (quoting Restatement (Second) Torts § 339 cmt. m.). "Section 339(c) is very specific with regard to the lack of knowledge that must be proven before a landowner will be held liable for injuries to a child trespasser caused by an artificial condition." Hollis, 667 So. 2d at 731. Given the

lack of evidence in the record indicating whether Raymond appreciated the danger involved in climbing on the train car,[5] we cannot conclude that the summary judgment entered in this case was erroneous.

Because discovery had been completed, Norfolk Southern's burden under Rule 56 could be met by demonstrating to the trial court that Laster's evidence was insufficient to establish an essential element of his claim. Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala. 1999) ("[A] moving party 'need not prove a negative in order to prevail on a motion for a summary judgment.'" (quoting Lawson State Cmty. Coll. v. First Cont'l Leasing Corp., 529 So. 2d 926, 935 (Ala. 1988)). Laster then could have "'defeat[ed] a motion for summary judgment ... by directing the trial court's attention

---

[5]There is scant testimony as to Raymond's state of mind, but James's testimony suggests some awareness of danger:

> "Q. Now, then you said something about, I think, you heard a train coming?
>
> "A. So we said -- it was like coming, so we were like -- we got scared. So we just came back."

James also explained why he and Raymond decided to turn around and walk away from the front of the train. He testified: "We didn't want to get to the front of the train, like if it just started back and stuff. That would be kind of scary."

to evidence of that essential element already in the record, that was ignored or overlooked by [Norfolk Southern], or [could] submit an affidavit requesting additional time for discovery ....'" Id. (quoting Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989) (Houston, J., concurring specially)).[6] However, Laster did not provide any additional evidence regarding Raymond's appreciation of danger, and a summary judgment was proper as to Laster's negligence claim founded on the rescue doctrine.[7] See Rule 56(e), Ala. R. Civ. P.

[6]Instead, on original submission and in his application for a rehearing, Laster has assumed, incorrectly, that only by Norfolk Southern's putting forward affirmative evidence that Raymond did appreciate the danger posed by the train could Norfolk Southern establish a prima facie case that it was entitled to a summary judgment.

[7]The dissent also argues that this case is analogous to Ricketts v. Norfolk Southern Ry., supra. However, the Court in Ricketts noted that, in addition to the injured child's age,

> "Eric's mother testified that Eric [the injured child] was an average 14-year-old boy who made average grades and who at the time of his injury had just begun the 9th grade. Eric's mother described him as 'all boy' who 'did what he had to do to get by.' There is no evidence that Eric knew that anyone had ever been injured from being on the trestle. In fact, there was evidence that he knew that persons had ridden across the trestle with apparent impunity. There was testimony that Eric knew that an uncle of his had ridden a motorcycle across the trestle."

(stating that a party "may not rest on mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"); Ronald L. Carlson, Successful Techniques for Civil Trials § 8:26 (2d ed. 1992) ("The mere possibility that a fact issue may exist is not enough to defeat summary judgment, and the litigant opposing summary judgment may not rest upon mere conclusory allegations or denials as a vehicle for obtaining trial."). For these reasons, we cannot hold that the trial court erred in entering a summary judgment for Norfolk Southern on the basis that James was injured during an attempt to rescue his friend.[8]

---

686 So. 2d at 1104.

[8]Laster argues that if the trial court entered a summary judgment based on Norfolk Southern's argument that James was contributorily negligent, then the judgment should be reversed. However, because we hold that Norfolk Southern breached no duty owed to James or to Raymond, we may affirm the trial court's judgment on that ground, and we need not address Laster's contributory-negligence argument. See Premiere Chevrolet, Inc. v. Headrick, 748 So. 2d 891, 893 (Ala. 1999) ("The appellate courts will affirm the ruling of the trial court if it is right for any reason, even one not presented to or considered by the trial judge."); Smith v. Equifax Servs., Inc., 537 So. 2d 463, 465 (Ala. 1988) ("An appellee can defend the trial court's ruling with an argument not raised below, for this Court 'will affirm the judgment

IV. Conclusion

Laster has failed to meet his burden of producing substantial evidence showing that James did not appreciate the danger of approaching a stopped train so that a summary judgment would be improper. Also, Laster has failed to produce substantial evidence indicating that Raymond did not appreciate the danger of climbing on a stopped train; thus, Laster is unable to demonstrate that the rescue doctrine would allow him to recover for James's injuries on the basis of Norfolk Southern's breach of a duty of care owed to Raymond. Therefore, the trial court did not err in entering a summary judgment for Norfolk Southern.

APPLICATION OVERRULED; OPINION OF JANUARY 5, 2007, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Lyons, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

Cobb, C.J., and Murdock, J., dissent.

---

appealed from if supported on any valid legal ground.'" (quoting Tucker v. Nichols, 431 So. 2d 1263, 1265 (Ala. 1983))).

MURDOCK, Justice (dissenting).

Respectfully, I must dissent. I cannot agree that this case was proper for resolution by summary judgment on the issue of the children's appreciation of the risk presented. Regardless of which party has the burden of coming forward with evidence or the ultimate burden of proof as to elements of Restatement (Second) of Torts § 339(c), the fact of James's and Raymond's ages, 10 and 9, respectively, is at least substantial evidence creating a genuine issue as to a material fact, i.e., whether they appreciated the risk of intermeddling with a stopped train. Indeed, the children's ages, standing alone, give rise to what our cases have referred to as a prima facie case of a child's inability to appreciate that risk in the same manner as would an adult. Accordingly, our precedents also make it clear that it is the unusual case in which the issue whether a child was capable of appreciating, and did appreciate, a particular risk is not a question for the jury.

I. Substantial Evidence of Incapacity to Appreciate the Risk, Based on the Children's Ages

The railroads' position before the trial court and on appeal is that the record does not contain substantial evidence from which jurors could find that James and Raymond did not appreciate the danger of approaching and climbing up on the train. An issue thus presented is whether the fact that a child is only 9 or 10 years old can itself be substantial evidence indicating that the child did not appreciate the risk of climbing on a ladder on the side of a boxcar of a stopped train. In answering a question of this nature, neither this Court nor jurors are required to leave common sense and life experiences at the door of the courtroom.

It is fundamental that a jury is to weigh the evidence before it "in the light of common sense, common reason, and the common experience of men, in connection with all the facts and circumstances in the case." Metropolitan Life Ins. Co. v. Shaw, 22 Ala. App. 54, 55, 112 So. 179, 180 (1927). "The jury, in the discharge of its duty, is called upon to exercise [its] common sense, observation, and every day experience" in assessing the facts and circumstances developed and in

determining "such inferences as should be accorded" those facts. Brown v. State, 31 Ala. App. 54, 58, 11 So. 2d 874, 877 (1943). See also United Sec. Life Ins. Co. v. St. Clair, 41 Ala. App. 243, 251, 130 So. 2d 213, 219 (1961) ("Surely the jury, by common sense and by common knowledge, must have known that Mr. St. Clair had suffered pain during this experience."); Thomas v. State, 37 Ala. App. 179, 181, 66 So. 2d 189, 190 (1953) ("The jury was privileged to apply its common sense and every-day experiences and observations ...."); and Louisville & N.R.R. v. Gray, 199 Ala. 114, 120, 74 So. 228, 230 (1916) (holding that a jury should not assess the facts presented "without regard to the teachings of common sense and experience"). "It is presumed that jurors do not leave their common sense at the courthouse door." Ex parte Rieber, 663 So. 2d 999, 1006 (Ala. 1995) (quoted with approval in Ex parte Walker, 972 So. 2d 737, 747 (Ala. 2007)).

Common sense and life experience tell us, without fear of contradiction, that, as to a given risk, there must be some point at which a child's age, standing alone, constitutes evidence from which a jury reasonably could infer an incapacity to understand that risk. If not age 9 or 10,

perhaps age 6? If not 6, what about age 4, or age 3? If this is so, then the logical underpinning of the railroads' position as to the substantial-evidence issue is removed, and the only question remaining is -- at what age?[9]

The reasonableness of a jury's finding that a child cannot appreciate certain dangers, based solely on the fact that the child is only 9 or 10 years of age, is borne out by a review of decisions by this Court both before and since Lyle v. Bouler, 547 So. 2d 506 (Ala. 1989), discussed by the main opinion. As this Court noted in Lyle, "[f]or over 50 years, this Court continued to use the age of 14 as the demarcation line in determining whether a child would be liable for his actions." 547 So. 2d at 507. In the pre-Lyle case of Central of Georgia R.R. v. Robins, 209 Ala. 6, 7, 95 So. 367, 368 (1923), a case involving a child who was injured while playing upon a railroad turntable, this Court quoted with approval 20 R.C.L. 87, § 77:

> "'The truth of the matter seems to be that the turntable doctrine furnishes justification for a recovery by children who have gotten old enough to

[9]The viability of this question inevitably returns us to, and reinforces the viability of, the long-established presumptions in our law as to children of tender years. See Part II, infra.

> go about unattended but are yet unaware of the perils embodied by machinery and other instrumentalities of an artificial nature -- the period between the ages of five and ten.'"

(Emphasis added.) In the same opinion, the Court noted:

> "The cases seem to fully sustain the statements of the text above quoted, and in practically every statement of the rule of liability it is grounded upon the duty owed to children of 'tender years,' whose imprudences are usually due to the play of childish instincts, unenlightened by experience, and unrestrained by reason. See note to Barnes v. Shreveport City R.R. Co., 49 Am. St. Rep. 417, 418. In his note to Westbrook v. Mobile, etc., R. Co. (Miss.) 14 Am. St. Rep. 595, Judge Freeman remarks that the rule of the 'turntable cases' has been applied by the courts in many of the states 'to children from five to twelve years of age.'"

209 Ala. at 7-8, 95 So. at 368 (emphasis added).[10]

Even if the children in this case had been over 14 years of age, which they were not, Lyle makes clear that their ages would still be important facts to be considered by the jury:

> "By rejecting the age limitation imposed in Central of Georgia [R.R. v. Robins, 209 Ala. 6, 95

[10]See also Birmingham & Atlantic Ry. v. Mattison, 166 Ala. 602, 609, 52 So. 49, 51 (1909) (noting that "there are ... ages, usually 7, after reaching which, it becomes a prima facie presumption only, and may then be rebutted by evidence of unusual natural capacity, physical condition, training, habits of life, experience, surroundings, and the like" that the child is not capable of appreciating risks and danger in the same manner as an adult).

> So. 367 (1923),[11]] this Court now embraces § 339 as the only authority for determining whether a child may recover. This is not to say that age should not be a factor at all. The comment to § 339 clearly states that recovery will be less likely as the age of the child increases. Age may be an important factor in determining liability, but it is one of many factors that must be examined."

Lyle, 547 So. 2d at 508 (emphasis added). The Court then proceeded to identify seven factors that merited examination, the age of the child being one of them. In addition, the age of a child obviously can be a fact from which a jury can draw inferences as to many of the other factors identified in Lyle, those factors being

> "(1) the intelligence of the child; (2) the capacity of the child to understand the potential danger of the hazard; (3) the child's actual knowledge of the danger; (4) the child's ability to exercise discretion; (5) the education level of the child; (6) the maturity of the child; and (7) the age of the child."

547 So. 2d at 508. Thus, the respective ages of James and Raymond constituted substantial evidence that each of them was incapable of appreciating the risk at issue in this case in

---

[11]The "age limitation" imposed in Central of Georgia was the age after which children would be presumed to be capable of appreciating risk and exercising judgment and discretion: "In [Central of Georgia] this Court ruled that a child of 'tender years' could not be over 14 and that those over 14 are 'presumed to be capable of the exercise of judgment and discretion.'" Lyle, 547 So. 2d at 507 (emphasis added).

the same manner as an adult, thereby creating a genuine issue of material fact and making the summary judgment inappropriate. This is so despite the presence of countervailing evidence in the case of James.

Further, even if the record allowed us to conclude as a matter of law that James personally appreciated the risk he assumed in approaching the stopped train as he did and therefore that the railroads had no direct duty to him in this case, the "rescue doctrine" nonetheless would extend to James the duty the railroads owed Raymond as a result of Raymond's lack of appreciation of the risks at issue. As to Raymond, there is little, if any, countervailing evidence.

Raymond's age is a proven fact for purposes of this case. That fact is direct evidence of what Raymond himself did or did not appreciate in terms of the risks presented the children. It is not necessary that jurors be provided expert witness testimony or treatises explaining what nine-year-olds are and are not capable of appreciating. As noted, jurors are not required to check their common sense, life experience, and basic understanding of human development and human nature at the courthouse door.

II. Further Comments on the Significance of the Children's Ages on Lyle and on § 339[12]

The issue in Lyle was merely "whether the landowner may owe a duty of care to a trespassing minor over the age of 14." 547 So. 2d at 506-07 (emphasis added). Relying on Central of Georgia, supra, the trial court in Lyle had ruled that, as a matter of law, the landowner had no duty to a trespassing minor over the age of 14 because of the principle that children "over 14 are 'presumed to be capable of the exercise of judgment and discretion.'" Lyle, 547 So. 2d at 507 (quoting Central of Georgia, 209 Ala. at 8, 95 So. at 368). See also Justice Maddox's dissent in Lyle, 547 So. 2d at 509 (criticizing the rationale employed by the majority in Lyle to reverse the trial court's judgment, namely that "Tolbert [v. Gulsby, 333 So. 2d 129 (Ala. 1976),] had the effect of overruling the principle ... that a child over the age of 14

[12]Laster argues in his initial brief to this Court the significance of the fact that James and Raymond were children who did not fully appreciate the nature of the risk they confronted and on the effect of the application of § 339 of the Restatement. Although the main opinion asserts otherwise, see ___ So. 2d at ___ n.2, the principles discussed in Part II, including the prima facie effect of the children's ages, are essential to a proper exposition of the law in this regard, to establishing the proper view of the evidence of record in this case, and to a proper understanding of the operation of § 339.

is 'presumed to be capable of the exercise of judgment and discretion'").

What Lyle did was to make clear that Alabama law, in fact, no longer presumed that children over 14 years of age are capable of exercising judgment and discretion. In place of that presumption, the Court held that the determination of whether a child over 14 years will be responsible for his or her own actions in the context of § 339(c) would depend upon the age of the child and other elements as articulated therein:

> "In entering summary judgment, the Circuit Court of Mobile County held that no duty was owed minors over the age of 14. The circuit court ruled that this issue was settled in Central of Georgia R.R. v. Robins, 209 Ala. 6, 95 So. 367 (1923). In that case, this Court ruled that a child of 'tender years' could not be over 14 and that those over 14 are 'presumed to be capable of the exercise of judgment and discretion.' Central of Georgia, 209 Ala. at 8, 95 So. 367.
>
> "For over 50 years, this Court continued to use the age of 14 as the demarcation line in determining whether a child would be liable for his actions. In 1976, however, this Court ruled that 'for clarity and certainty's sake now and in the future,' § 339 of the Restatement (Second) of Torts (1965) would be the law. Tolbert v. Gulsby, 333 So. 2d 129, 135 (Ala. 1976).
>
> "Justice Houston, writing for the Court in Motes v. Matthews, 497 So. 2d 1121, 1122 (Ala. 1986),

> reiterated our adoption of § 339, regardless of whether the child was a trespasser or a licensee. Because the Court has never reconciled § 339 with Central of Georgia, the two standards continue to be applied, although they are clearly contradictory. In order to prevent further confusion, we reject the 14-year age limitation imposed in Central of Georgia and reassert our adherence to § 339, Restatement (Second) of Torts (1965).
>
> "....
>
> "It is clear that § 339 recognized the irrationality of assigning arbitrary age limits to determine a time when a child must assume total responsibility for his actions."

Lyle, 547 So. 2d at 507-08 (emphasis added).

What Lyle did not do was eliminate -- indeed, Lyle did not even address -- the presumption in Alabama law that a child under 14 years of age, or a child of "tender years," is incapable of exercising the same judgment and discretion as an adult. This Court has specifically explained, since Lyle, that "we apply a different standard to children below the age of 14. A child between the ages of 7 and 14 is prima facie incapable of contributory negligence. Superskate, Inc. v. Nolen, 641 So. 2d 231, 236 (Ala. 1994); Savage Indus., Inc. v. Duke, 598 So. 2d 856, 858 (Ala. 1992)." Aplin v. Tew, 839 So. 2d 635, 639 (Ala. 2002).

There is no difference between a child's ability to appreciate risks for the purpose of being contributorily negligent and his ability to appreciate danger for the purpose of satisfying § 339(c). The very foundation upon which the law presumes that a child between the ages of 7 and 14 is not legally responsible for purposes of contributory negligence is the fact that such an age constitutes prima facie evidence that a child is not capable of appreciating certain dangers.

Section 339(c), by its terms, applies to children who "because of their youth," i.e., their age, do not realize the risk involved in intermeddling with the artificial condition with which they are presented. Moreover, the synonymous nature of the issue whether a child is capable of contributory negligence and the issue whether a child can appreciate risk sufficiently to satisfy § 339(c) is self-evident. The law cannot embrace one rule in the former case and another in the latter without producing illogical and conflicting results.

In Tolbert v. Gulsby, 333 So. 2d 129, 135 (Ala. 1976), the Court noted "the similarity between Alabama cases using the straight negligence doctrine in relationship to trespassing children," which obviously implicates the doctrine

of contributory negligence, "and Section 339, Restatement of Torts 2d." It was for "clarity and certainty's sake ... regardless of whether the children are licensees or trespassers" that the Court adopted § 339 as the framework for analyzing landowner-liability cases involving children. 333 So. 2d at 135.

Moreover, in Central of Georgia, the issue before the Court was not an issue of contributory negligence itself, but rather whether the landowner owed a duty to the injured child. The Court's opinion made clear that it considered the age-based presumption for purposes of contributory negligence and the age-based presumption for purposes of landowner liability to be synonymous. After quoting the observation in an earlier case that no age had previously been determined to be, as a matter of law, an age at which a landowner no longer owed a duty to a trespassing minor, the Court stated:

> "'It must, however, in any case, be the age at which the child is capable of contributory negligence.' ...
>
> "We think this is the correct view of the matter, deducible from the nature of the duty prescribed, and from the necessities of the class for whose benefit the law has raised the duty. Certainly it is in accord with the general consensus of judicial opinion ...."

209 Ala. at 8, 95 So. at 369 (some emphasis added).[13]

Lyle makes it clear that § 339 replaced the doctrines of attractive nuisance and strict negligence as the legal framework, or theory, within which courts are to analyze a landowner's liability to trespassing children. Regardless of

---

[13]The Court in Central of Georgia continued:

> "In Cedar Creek [Store] Co. v. Stedham, [187 Ala. 622, 625, 65 So. 984, 985 (1914)], speaking of children under 14 years of age, it was said:
>
> > "'Such a child may not, however -- and he is rebuttably presumed by the law not to -- possess that maturity of discretion which dictates those precautions against the dangers of fire that are conclusively presumed by the law to belong to normal children who are 14 years of age. ... If such a child, a child between 7 and 14 years of age and not possessing that discretion and maturity of judgment which the law conclusively presumes a normal child of 14 years of age to possess, is injured through the actionable negligence of another, such a child is entitled to recover, although his own carelessness proximately contributed to his injury.'
>
> "On the foregoing considerations and authorities, we hold that, as a matter of law, the plaintiff in this case was not within the class to whom defendant owed the duty invoked, and therefore is not entitled to recover as for a violation of that duty."

209 Ala. at 8-9, 95 So. at 369.

which legal framework is used, however, at some point in the analysis it becomes necessary to assess the ability of the child to appreciate the danger at issue. (Under the framework provided by § 339, that point is described in § 339(c).) It is at that point that the use of the age-based presumption becomes applicable. Nothing in Lyle (which had as its focus whether the presumption against a child's being able to appreciate a danger continued to apply to children over the age of 14) or in the cases decided since Lyle eliminates that presumption from our law.

In Superskate, Inc. v. Nolen, 641 So. 2d 231 (Ala. 1994), and other cases decided since Lyle, this Court has repeatedly intermingled its discussion of the prima facie inability of children between the ages of 7 and 14 to appreciate risks sufficiently to be contributorily negligent and the inability of children to appreciate risks for the purpose of satisfying the elements required for landowner liability. In Superskate, for example, the Court specifically applied the factors identified in Lyle to be determinative of whether a child appreciates risks sufficiently to establish a duty on the part of a landowner under § 339(c) as the factors to be used in

determining whether a child between the ages of 7 and 14 is capable of contributory negligence:

> "'A child between the ages of 7 and 14 is prima facie deemed incapable of contributory negligence. King v. South, 352 So. 2d 1346 (Ala. 1977), citing Alabama Power Co. v. Taylor, 293 Ala. 484, 306 So. 2d 236 (1975). However, a child between the ages of 7 and 14 may be shown by evidence to be capable of contributory negligence by evidence that he possesses that discretion, intelligence, and sensitivity to danger that the ordinary 14-year-old possesses. Fletcher v. Hale, 548 So. 2d 135 (Ala. 1989).
>
> > "'"... To apply [contributory negligence] to a child, the Court must examine the following elements: (1) the intelligence of the child; (2) the capacity of the child to understand the potential danger of the hazard; (3) the child's actual knowledge of the danger; (4) the child's ability to exercise discretion; (5) the educational level of the child; (6) the maturity of the child; and (7) the age of the child. See, Lyle v. Bouler, 547 So. 2d 506 (Ala. 1989)."'"

641 So. 2d at 236-37 (quoting Works v. Allstate Indem. Co., 594 So. 2d 60, 63 (Ala. 1992), quoting in turn Jones v. Power Cleaning Contractors, 551 So. 2d 996, 999 (Ala. 1989)).

In Aplin, supra, this Court again addressed the prima facie inability of a child between the ages of 7 and 14 to be capable of contributory negligence by citing Lyle and concluding that we should not hold such a child to the same

standard to which we would hold an adult. 839 So. 2d at 639. The Court made clear that a child's "conscious appreciation of the danger" was the issue in regard to whether the child was "capable of contributory negligence." Id.

Similarly, Superskate made clear that the application of the doctrine of assumption of the risk to a child is dependent upon a showing "that the child subjectively appreciated the danger and voluntarily undertook it." 641 So. 2d at 237. In reference to a child between the ages of 7 and 14, the Court stated that "[w]here the defendants have not made such a showing, the trial court properly would not submit the question to the jury." 641 So. 2d at 237.

Thus, while it may be that the plaintiff has the burden of proving the elements of § 339, including § 339(c), the plaintiff is aided in that effort by the fact that our law has long recognized the inability of children between the ages of 7 and 14, as a general rule, to appreciate risks and dangers in the same manner as do adults. This inability to appreciate risk logically must apply both to the issue whether a child is incapable of appreciating a risk so that the law must in all fairness deem the child incapable of contributory negligence

(or assumption of the risk) and thus leave responsibility for protecting the child from that risk solely on the party responsible for creating it, and to the corollary issue whether a child is incapable of appreciating a risk such that the law must in all fairness impose a duty on the landowner to protect the child from an artificially created condition on his or her land. In short, the age-based presumptions of incapacity found in the law of contributory negligence are the same as the presumptions of incapacity that inform the rules of landowner liability.

III. Application of the Foregoing Principles

Under the above-discussed principles, the summary judgment was inappropriate in this case. First, the evidence reflects that James was only 10 years of age. Under our caselaw, this fact alone creates a prima facie case that James was not capable of appreciating the risk presented by the stopped train. Even if this were not true, however, the fact would remain that James's age is itself one of the seven Lyle factors. Furthermore, it is a fact from which the jury could make inferences as to many of the other six factors.

The main opinion recites countervailing evidence as to James's appreciation of the risk, and that evidence certainly is sufficient to create a genuine issue of material fact. It does not, however, negate the evidentiary value of, and the presumption resulting from, James's age -- it merely creates a genuine issue of fact.

It also is worth emphasizing that at the time Raymond "intermeddled" with the railroad cars and James intervened to "rescue" Raymond, the railroad cars were not "rumbling" down the track, but had been stationary for some period. Further, the danger that James articulated in respect to the start-up of the train while Raymond remained on the boxcar ladder was simply that Raymond might be "taken off" by the train if it started to move:

> "I pulled Raymond down. I told him it was going to start up, because I didn't want it to just take him off. I thought it was going to zoom off with him on the ladder and stuff like that, so I tried to grab him off. I had my foot on, not on the wheel, but had it on the rail thingy, had it on the rail. Like I tried to pull him off. It started up, like started moving. It was like boom, like lurched forward, I guess. It got my foot. I pulled him off, though."

This testimony itself corroborates the view that, because of his age, James did not appreciate the danger of placing his

foot on the rail during his effort to remove Raymond from the stationary train.

Indeed, given the foregoing testimony by James and the fact that the artificial condition presented was a stationary train, the opinion in Engel v. Chicago & North Western Transp. Co., 186 Ill. App. 3d 522, 542 N.E.2d 729, 134 Ill. Dec. 383 (1989), is noteworthy. Engel involved an injury to a 12-year-old boy resulting from what was known as "flipping," or "[t]he practice of grabbing a short ride on slow-moving freight trains." 186 Ill. App. 3d at 525, 542 N.E.2d at 730-31, 134 Ill. Dec. at 384-85. The court found a sufficient basis to submit the case to the jury, explaining that

> "[t]he 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 inherit 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."

186 Ill. App. 3d at 530-31, 542 N.E.2d at 734, 134 Ill. Dec. at 388.

This case compares favorably to Ricketts v. Norfolk Southern Ry., 686 So. 2d 1100 (Ala. 1996). The only evidence in Ricketts tending to support the conclusion that the injured

child should be treated differently from a similarly situated adult in regard to whether he appreciated the danger involved in his activity (driving an all-terrain vehicle across an elevated railroad trestle) was the fact of the child's age -- 14 -- and the fact that he made average grades for a 14-year-old. 686 So. 2d at 1104. Countervailing evidence —- i.e., evidence tending to prove that the child did appreciate the risk — was presented in Ricketts in the form of comments by the injured child that "if he fell off [the trestle], the helmet would not help him." 686 So. 2d at 1105. Despite this countervailing evidence of the child's appreciation of the risk, this Court concluded that it could not say as a matter of law that the child appreciated the risk so as to bar recovery:

> "Norfolk Southern emphasizes this statement as proof that Eric Ricketts fully understood and appreciated the risk of going onto the trestle. As Dean Prosser said in his article, Trespassing Children, 47 Cal. L.Rev. 427 (1959), '"appreciation" of the danger is what is required to bar recovery, rather than mere knowledge of the existence of the condition, or of some possible risk.' Id. at 462. The question of a child's appreciation of danger is ordinarily one for the jury and not for the court. Patterson v. Palley Mfg. Co., 360 Pa. 259, 267, 61 A.2d 861, 865 (1948). As this Court has said:

> "'In adopting § 339, this Court recognized the special duty owing to a class of plaintiffs, defined in § 339(c), whose natural proclivity for wonder and adventure often exceeds their sense of impending danger. See Motes v. Matthews, 497 So. 2d 1121 (Ala. 1986). Whether a particular plaintiff falls within this class will ordinarily present a jury question. See Lyle v. Bouler, 547 So. 2d 506 (Ala. 1989).'
>
> "Henderson v. Alabama Power Co., 627 So. 2d 878, 881 (Ala. 1993)[(involving a claim on behalf of a 12-year-old boy)]. Thus, the question whether the criterion of § 339(c) was met was for the jury's determination."

686 So. 2d at 1105 (emphasis added).

The present case is a stronger candidate for a jury's consideration than was Ricketts. Here, James was only 10 years old, rather than 14. He testified that he acted to pull Raymond off the ladder by putting his foot "on the rail thingy," and there is no evidence indicating that James specifically appreciated the risk that would be associated with stepping onto such a rail. It is true that he testified that he did appreciate the general danger of moving trains. This, however, simply constitutes countervailing evidence. Despite comparable countervailing evidence in Ricketts (also in the form of the injured child's testimony indicating an

appreciation of the risks), this Court held that the issue was not appropriate for a decision as a matter of law but was "for the jury's determination."

If the question of James's appreciation of the danger is one for the jury, the question of Raymond's appreciation of that danger is, a fortiori, also for the jury. Consequently, the question of the application of the "rescue doctrine," which is explained in the main opinion, should have been put to the jury.

Unlike James, there is no countervailing evidence as to Raymond. All we have is the evidentiary value of the fact that Raymond was only 9 years of age, the inferences that can be drawn from that fact in relation to the other Lyle factors, and the presumption generated by that fact under our law, as well as the fact that Raymond did, in fact, proceed to engage in an activity that a more mature person would have seen as risky. That was exactly the situation in Motes v. Matthews, 497 So. 2d 1121 (Ala. 1986).

All we know from the reported opinion in Motes is that the injured child was 12 years old and that he did in fact engage in an activity that a more mature person would have

seen as risky (digging tunnels in excavated mounds of dirt at a construction site). With nothing other than these facts to draw upon, this Court (1) quoted the elements of § 339; (2) noted that

> "[i]f there is any evidence tending to establish each element of the cause of action, then summary judgment would be inappropriate. In determining whether there is evidence to support each element -- to raise a genuine question of material fact as to whether that element exists, Rule 56(c) -- this Court must review the record in a light most favorable to the plaintiff and resolve all reasonable doubts against the defendants."

497 So. 2d at 1123 (emphasis added); and then (3) stated that "there is evidence from which the trier of fact could find that [the child] did not appreciate the risk of intermeddling with the embankment," which collapsed on him, causing his death. 497 So. 2d at 1124.

The railroads argue that the release of the air brakes and James's admonition to Raymond to come down from the side of the boxcar constitute countervailing evidence as to Raymond's appreciation of the risk. The appropriate response to that argument is twofold: (1) By the time those events occurred, Raymond already was in harm's way, with little time to extricate himself from the danger in which he then found

himself. (Indeed, Laster argues that one of several ways in which the railroads breached their duty of due care was in not sounding a warning with the horn, which would have given reasonable advance notice that the train was about to move.) (2) Even if the release of the air brakes and James's admonition to Raymond constituted countervailing evidence, those facts still would be only that -- countervailing evidence, i.e., evidence countervailing against the prima facie showing resulting from the child's age and the inferences that can be drawn from it.

IV. Conclusion

To say that this case should not go to a jury based on the record before us is, in my view, inconsistent with our law and with the premise that juries are capable of appreciating, without any additional evidence, the significance of what it means to be only 9 or 10 years of age. I, therefore, respectfully dissent.

Cobb, C.J., concurs.