No. 127603

IN THE
SUPREME COURT OF ILLINOIS

ALEJANDRO QUIROZ, as Administrator
of the Estate of RICARDO QUIROZ,
Deceased

Plaintiff-Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
a municipal corporation

Defendant-Appellant.

On Appeal from the Illinois Appellate Court,
First Judicial District, No. 20-0181

There Heard on Appeal from the Circuit Court of Cook County, Illinois
County Department, Law Division, No. 18 L 10344
The Honorable Brendan A. O'Brien, Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT CHICAGO TRANSIT AUTHORITY

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POINTS AND AUTHORITIES

INTRODUCTION

Ten years ago, this Court held in *Choate v. Indiana Harbor Belt R.R. Co*., 2012 IL 112948, ¶ 35, that a moving train constitutes an open and obvious danger as a matter of law, which even children are expected to appreciate and avoid "coming within the area made dangerous by it." Consequently, a rail company had no duty to protect a trespasser on its right-of-way from the open and obvious risk of injury by a moving train. In 2013, this Court issued a supervisory order in *McDonald v. Northeast Illinois Regional Commuter R.R. Corp.*, -- a case involving a pedestrian injured by a train at a pedestrian crosswalk – which directed the appellate court to reconsider its decision in light of this Court's ruling in *Choate*. No. 112971, 992 N.E. 2d 1232 (Mem). Upon reconsideration, the appellate court ruled that Metra had no duty to protect a pedestrian from the risk of injury by a moving train because the moving train and the tracks in front of it constituted open and obvious dangers, and "the decedent should have realized the risk of entering that area and attempting to hurry across the tracks in advance of the train's arrival." 2013 IL App (1st) 102766-B, ¶ 25. Since then, the appellate court consistently applied this Court's holding in *Choate* to rule, in well-reasoned decisions, that train companies owed no legal duty to protect pedestrians on their right-of-way from the risk of injury by a moving train. *See Pryor v. Chicago Transit Auth.*, 2022 IL App (1st) 200895, *Tahir v. Chicago Transit Auth.*, 2015 IL App. (1st) 142066-U, *Escobar v. Chicago Transit Auth.*, 2014 IL App (1st) 132056-U, *Park v. Northeast Ill. Regional*

Commuter R.R. Corp., 2011 IL (1st) 101283.

In the instant case, the appellate court has disregarded this Court's holding in *Choate* and the well-established appellate precedent and held that the CTA had a legal duty to protect a trespasser on its right-of-way inside a train tunnel from a risk of injury by a moving train. A. 39. The court made this ruling based on its erroneous construction of section 337(b) of the Restatement (Second) of Torts, which focuses on the objective nature of the dangerous condition – here, a moving train and the tracks in front of it – *not* on the subjective circumstances of the trespasser, contrary to the appellate court's ruling.

In his response, plaintiff does not defend the appellate court's neglect of *Choate* and its progeny; rather, he argues that they are distinguishable because, there, plaintiffs allegedly "fully understood and voluntarily proceeded to encounter" the open and obvious risk, Quiroz Br. at 25-28, while the decedent here was "in a position of peril which, in his condition, he did not recognize and from which he could not remove himself," id. at 29. But the decedent's subjective lack of appreciation for the obvious risks posed by entering the CTA's train tunnel – where rapid transit trains travel non-stop between stations – and lying next to the train tracks, in the immediate vicinity of moving trains, are not relevant to the legal duty analysis. These factors may be relevant to plaintiff's comparative negligence, but not to the threshold question of defendant's legal duty. As this Court explained, "The issue in cases involving obvious danger, . . . is not whether the child does in fact understand, but rather what the landowner may reasonably

expect of him. The test is an objective one . . . ." *Choate*, 2012 IL 112948, ¶ 38 (internal cites omitted). Here, the decedent's injury was not reasonably foreseeable to the CTA because a moving train constitutes an open and obvious danger as a matter of law. Plus, as the CTA and its amici explained, the burdens of requiring train companies to protect trespassers on their right-of-way from the risk of injury by a moving train would be significant and also unjustified. CTA Br. at 27-31; AAR Br. at 14-20; Metra Br. at 5-6. Trespassers are in the best position to avoid the injury by refraining from entering "the area made dangerous by" moving trains.

Additionally, requiring the CTA to protect trespassers on its right-of-way would completely skew the CTA's operational priorities, *e.g.*, providing reliable, on-time transportation to the public-at-large, which is the CTA's "legislatively recognized function," *Bilyk v. Chicago Transit Auth.*, 125 Ill. 2d 230, 243 (1988), and ensuring the safety of passengers on board its trains, to whom the CTA owes "the highest degree of care," *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 225 (2010). The importance of these functions is reflected in the Illinois Constitution, which declares "public transportation [to be] an essential public purpose." Ill. Const. art. XIII, § 7. Hence, in accordance with the established precedent, this Court should reverse the appellate court ruling and affirm the circuit court judgment dismissing the plaintiff's complaint with prejudice for failure to plead a cognizable legal duty.

ARGUMENT

I. THIS COURT SHOULD DISREGARD PLAINTIFF'S ARGUMENTS BASED ON "NEWSPAPER CLIPPINGS, POLICE REPORTS, AND OTHER NON-EVIDENTIARY SOURCES."

As an initial matter, this Court should disregard the arguments plaintiff makes on pages 8-12, 14, 41-45 of his response brief. By his own account, they are based on "newspaper clippings, police reports, and other non-evidentiary sources" that have nothing to do with the facts of this case. Quiroz Br. at 8. It is black letter law that, in ruling on a section 2-615 dismissal motion, "only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Mount Zion State Bank & Tr. v. Consol. Communications, Inc.*, 169 Ill. 2d 110, 115 (1995). Plaintiff acknowledges that his discussion of his prior litigation experience and newspaper accounts of other incidents goes well "beyond pleadings and reasonable inferences therefrom." Quiroz Br. at 8. It is of no import that those materials are included in the record on appeal. What matters is that they cannot be considered on a section 2-615 motion.

With respect to the CTA security camera footage, which captured this incident, the plaintiff and his amicus dispute only its completeness. Quiroz Br. at 46; ITLA Br. at 12-13. They make no challenge to the video's authenticity or accuracy. Consequently, the video is a proper subject of judicial notice. That said, nothing in the CTA's argument depends on the video or the truth of its contents.

II. PLAINTIFF AND HIS AMICUS FAIL TO REBUT THAT THE OPEN AND OBVIOUS DANGER DOCTRINE GOVERNS THIS CASE.

In its opening brief, the CTA explained that the decedent's injury was not reasonably foreseeable to the CTA because a moving train and the tracks in front of it constitute open and obvious dangers as a matter of law, which people are expected to appreciate and avoid. CTA Br. at 24-26. In response, plaintiff and the ITLA take different positions. ITLA claims that *Choate* and the open and obvious danger doctrine are "completely irrelevant" to this case. ITLA Br. at 2. Plaintiff, on the other hand, seeks to distinguish *Choate* and claims that the circumstances of this case fall into an exception to the open and obvious danger doctrine. Quiroz Br. at 25-28, 31-33. Neither argument has merit.

ITLA claims that *Choate* does not control because it involved trespassing children, not a trespassing adult who was allegedly impaired. ITLA Br. at 7-8. But while the trespassers' particular circumstances might differ from case to case, *the nature of the risk* they faced is identical – it is a risk of "coming within the area made dangerous by [a moving train]." This Court has held that, in assessing the reasonable foreseeability of an injury, the focus is on what a landowner can reasonably expect. *Choate*, 2012 IL 112948, ¶ 38; *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (2002). Consequently, here, the open and obvious danger doctrine and *Choate* are, at a minimum, relevant to determining the question of legal duty, if not altogether dispositive.

Unlike ITLA, plaintiff does not dispute the relevancy of the open and obvious danger doctrine, but argues that the danger here was not obvious to the decedent. Quiroz Br. at 29 ("He was unable to recognize the danger of laying next

to the train tracks"), 34 ("This may be the case where the hazard is simply not open and obvious"). However, the fact that the decedent subjectively did not appreciate the danger of entering the train tunnel and lying next to moving trains is not pertinent because whether a danger is obvious is judged by an objective, reasonable person standard. *Choate*, 2012 IL 112948, ¶ 38. Further, in *Choate*, this Court held that a moving train is an open and obvious danger as a matter of law. *Id.*, ¶ 35.

Plaintiff next argues that the circumstances of this case fall into an exception to the open and obvious danger doctrine. Quiroz Br. at 31-33. In doing so, he disagrees with this Court's holding that "Illinois law recognizes *two such exceptions*: the 'distraction exception,' and the 'deliberate encounter exception.'" *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 20 (emphasis added), accord *Sollami,* 201 Ill. 2d at 15. Rather, plaintiff claims that there is a total of "four articulated exceptions," and his case falls into "the third exception" for people who "fail to protect himself [sic] against [the obvious hazard]." Quiroz Br. at 31-32. Relying on a 36-year-old hornbook (which does not constitute a restatement of Illinois law), plaintiff argues that this third exception applies to situations "where the plaintiff slips, or is pushed into danger by a crowd, or is precipitated into it by the fright of his horse; or by the skidding of his automobile." Id. at 28 (citing 5 Harper, James & Gray, THE LAW OF TORTS § 27.13 n. 25 (2nd ed. 1986).[1] In other words, plaintiff claims that the third exception applies to involuntary exposure to an obvious

[1] None of the cases, on which these examples are based, is from Illinois.

hazard. Id. This is also the main basis on which he seeks to distinguish *Choate* and its progeny, *e.g.*, that in those cases, plaintiffs voluntarily encountered moving trains, while the decedent here "was unable to recognize the danger of lying next to the train tracks" and "unable to remove himself from that danger." Id. at 29.

As an initial matter, nowhere in his complaint does plaintiff allege that the CTA or its personnel had anything to do with the decedent entering the CTA's train tunnel, where rapid transit trains travel non-stop, at high speeds, between stations. Hence, whatever caused the decedent's eventual fall onto the CTA's right-of-way, there is no doubt that he had voluntarily "come into the area made dangerous" by moving trains.

More importantly, there is no "third exception" to the open and obvious danger doctrine. Quiroz Br. at 32. Indeed, the language which plaintiff quotes in support of "the third exception" is, in actuality, a part of the "distraction exception." As this Court explained in *Bruns*, "The distraction exception applies 'where the possessor [of land] has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.' " 2014 IL 116998, ¶ 20. As we explained in our opening brief, the distraction exception does not apply here because it does not cover "self-created distractions," which are "solely within the plaintiff's own creation," such as a lack of attention as to where one is going. CTA Br. at 24-26 (quoting *Bruns*, 2014 IL 116998, ¶ 31).

Indeed, the distinction that plaintiff makes – between voluntary vs. involuntary exposure to obvious dangers – while potentially relevant to plaintiff's comparative negligence, does not factor into the determination of defendant's duty. In performing the duty analysis, the focus is on whether the incident was reasonably foreseeable to a landowner. As this Court explained in *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 148 (1990), "[t]he scope of defendant's duty is not defined by reference to plaintiff's negligence or lack thereof. The focus must be on defendant." If the incident is not reasonably foreseeable to the defendant, then the precise way in which it happened is of no import. For instance, in *Bruns*, the city owed no duty to protect a pedestrian from the risk of tripping and falling on an obvious sidewalk defect – even though the pedestrian fell accidentally; she did not "voluntarily" encounter the hazard. 2014 IL 116998, ¶ 4. For the same reason, the plaintiff's hypotheticals on page 33 of his brief fail – if it is not reasonably foreseeable to the CTA that trespassers would be entering its train tunnels and lying on its right-of-way in proximity to moving trains, there would be no duty, no matter the trespasser's identity.

In the cases plaintiff cites, the distraction was an external circumstance, which was reasonably foreseeable to the landowners. For instance, in *American National Bank & Trust Co. v. National Advertising Co.*, 149 Ill. 2d 14 (1992), it was reasonably foreseeable that a billboard painter would fail to notice an overhead power line because his attention would be distracted by having to watch where to place his feet. Likewise, in *Ward*, 136 Ill. 2d at 152, it was reasonably foreseeable

that a customer exiting defendant's store with a large bundle would fail to notice a post immediately outside the door. Accord *Diebert v. Bauer Bros. Constr. Co*., 141 Ill. 2d 430, 439 (1990) (a construction worker exiting a portable bathroom "could not look both places: up, to check for the possibility of flying construction materials, and down, to protect himself from tripping in a rut"); *Allgauer v. Le Bastille, Inc*., 101 Ill. App. 3d 978 (1981) (a customer failed to notice the lack of landing on a staircase because a door blocked the staircase entrance). In contrast, here, there was no external circumstance that distracted the decedent's attention from moving rapid transit trains. The distraction, if any, was entirely "self-created," and thus the distraction exception does not apply.

Plaintiff's reliance on *LaFever v. Kemlite Co*., 185 Ill. 2d 380 (1998), which involved the deliberate encounter exception, is likewise mistaken. Quiroz Br. at 24-25, 31-32. In *LaFever*, plaintiff had to walk over slippery fiberglass trim on the way to collect debris from a container, to fulfill his job duties. 185 Ill. at 384-86. This Court ruled that a landowner could have reasonably foreseen that a person in the plaintiff's position would choose to encounter the obvious risk of walking on a slippery surface in order to keep his job. *Id.* at 395-96. This case is nothing like *LaFever* – it is not alleged that, to a reasonable person in the decedent's position, the advantages of entering the train tunnel and lying next to the rapid transit trains outweighed the obvious risks of doing so.

Plaintiff next claims that decedent's injury was reasonably foreseeable to the CTA once a train operator actually saw Quiroz lying near the tracks inside the

tunnel. Quiroz Br. at 31. Plaintiff, however, acknowledges that it was the decedent's "*presence in a CTA tunnel* . . . which subjected him to the risk of a train collision," *not* the negligent operation of CTA trains. Quiroz Br. at 29 (emphasis added). Hence, the proper inquiry is – whether the decedent's presence in the train tunnel, in the immediate proximity to moving rapid transit trains, was reasonably foreseeable to the CTA. The answer is no. Applying the objective, reasonable person standard, it was not reasonably foreseeable to the CTA that a person, exercising due care for his own safety, would enter the subway tunnel where rapid transit trains travel non-stop between stations and come to rest in the immediate proximity to moving trains.

This answer does not change in the face of plaintiff's allegations that there was "graffiti on the walls and debris on the ground outside the boarding area of the tunnels." C. 121-22. Courts have found "that the landowner owes a duty of ordinary care to those who are frequent trespassers in a limited area where the landowner knows or should know of their constant intrusion." *Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 446–47 (1992). There is no allegation here that someone's random graffiti on the wall and a piece of debris blown into a tunnel put the CTA on notice that pedestrians *constantly* intrude on the *limited area* inside the tunnel where the decedent came to rest.

For the same reason, plaintiff's arguments regarding the limited burden he seeks to impose on the CTA, have no merit. Specifically, plaintiff argues that "[t]he burden is not to look out for people on the track. The burden is to react to the

presence of people discovered helpless and in a state of peril by picking up whatever communication devices might exist and shutting down trains until help can be provided to recover the individual from harm's way." Quiroz Br. at 30. But this is inconsistent with his complaint's allegations, which seek to impose on the CTA much broader duties, including the duty to "watch[ ] for objects and people who might be situated" inside the tunnel, to "keep a proper and sufficient lookout" for "objects or people in the area where the trains [are] traveling," and to monitor security cameras "to determine whether people in the areas being monitored [are] endangered." C. 126, A. 12. As the CTA and its amici explained in their briefs, requiring a train operator to be on a lookout not only for people, but also for objects, in places where they are not reasonably expected to be, would impose significant burdens. CTA Br. at 27-31; AAR Br. at 14-20; Metra Br. at 5-6. These burdens include slowing down the speed of trains, illuminating tunnels, shutting down train service every time an object is seen near the tracks, and hiring additional personnel to monitor security cameras and to determine whether the persons being monitored are endangered. This also would expose the CTA to additional liability for failure to adequately monitor its premises or for mistakes in judgment as to whether or not an object seen near the tracks was likely a human being, or whether a given person was "endangered."

III. THIS COURT SHOULD REJECT PLAINTIFF'S INVITATION TO APPLY SECTION 336 OF THE RESTATEMENT (SECOND) OF TORTS, AND SHOULD REAFFIRM THAT SECTION 337(b) FOCUSES ON THE OBJECTIVE NATURE OF THE DANGEROUS CONDITION.

In its opening brief, the CTA also explained that a finding of no duty here would be consistent with the approach in Section 337 of the Restatement (Second) of Torts, which governs landowners' liability to known trespassers for dangerous artificial conditions on their land. CTA Br. at 31-35. Specifically, the CTA explained that, pursuant to section 337, even if the landowner knows about the trespasser's presence in proximity to a dangerous condition, there is no duty to protect the trespasser if "the condition is of such a nature" that the landowner has no reason "to believe that the trespasser will not discover it or realize the risk involved." Restat. (2nd) of Torts, § 337(b). Because a moving train is an open and obvious danger as a matter of law, the CTA had no reason to believe that the decedent would not discover it or realize the risk involved in "coming within the area made dangerous by it." *Choate*, 2012 IL 112948, ¶ 35.

In response, plaintiff and its amicus once again take different positions. ITLA agrees that section 337 applies, but argues that liability under that section is not limited to latent/hidden conditions. ITLA Br. at 6-7. Plaintiff, in contrast, urges this Court to apply a different section of the Restatement, *e.g.*, section 336, which has not been adopted in Illinois. Quiroz Br. at 17, 22. Neither argument has merit.

Section 337. ITLA argues that liability under section 337 is not limited to latent/hidden conditions and faults the CTA for failing "to cite any part of *Lee [v. Chicago Transit Auth.*, 152 Ill. 2d 432 (1992)] for this argument," or "any section of

the Restatement." ITLA Br. at 7. This is inaccurate. The CTA cited to the portion of *Lee* describing the dangerous condition at issue there – an electrified third rail – as not visibly distinct from other rails, with the Court pointing out that "there was nothing which indicated either the existence or the location of the third rail, or that the electric current was carried in a rail," and "there were no markings on the third rail itself." CTA Br. at 32-33 (quoting *Lee*, 152 Ill. 2d at 452). In other words, *Lee* held that the CTA could have anticipated a risk of injury by an electrified third rail because the danger it presented was hidden. Here, in contrast, the dangerous conditions at issue – a moving train and the track in front of it – are obvious.

The CTA also cited *Choate* and section 343A of the Restatement (Second) of Torts for the proposition that the nature of a dangerous condition is judged by an objective, reasonable person standard. CTA Br. at 33-34. In response, ITLA seeks to distinguish *Choate* on the basis that it involved section 339, governing duties to trespassing children, not section 337, governing duties to trespassing adults. ITLA Br. at 8. ITLA also argues that section 343A is irrelevant because it applies to invitees, not trespassers. Id. at 9. But the distinctions ITLA makes are superficial. ITLA ignores that the *nature of the dangerous condition* does not change depending on who encounters it -- children or adults, invitees or trespassers. Indeed, this Court has consistently held that whether or not a dangerous condition is "obvious" is judged by an objective, reasonable person standard. *Bruns*, 2014 IL 116998, ¶ 16; *Choate*, 2012 IL 112948, ¶ 38; *Sollami*, 201 Ill. 2d at 17.

Section 336. Unlike his amicus, plaintiff contends that this case should be governed by a different Restatement section, *e.g.*, section 336, governing landowner's liability to trespassers for dangerous activities, as opposed to artificial conditions. Quiroz Br. at 17, 22.[2] Plaintiff, however, does not cite any case, in which this Court adopted section 336. Unless this Court adopts a Restatement section, it is not the statement of Illinois law. *In re Est. of Lieberman*, 391 Ill. App. 3d 882, 890 (2nd Dist. 2009). Indeed, it appears that only a minority of states have adopted section 336. See Case Citations to Restat. (Second) of Torts, § 336.

Moreover, there is no support for plaintiff's contention that landowner's liability to trespassers depends on "whether the danger [was] caused by actions or by conditions." Quiroz Br. at 21. Plaintiff cites Introductory Notes to Illinois Pattern Jury Instructions (IPI) 120.00, but neglects to mention that the actual pattern jury instructions do not distinguish between landowners' liability for dangerous activities vs. dangerous conditions. The only distinction the IPI make is between landowners' liability to adults and children lawfully on the property (IPI 120.02, IPI 120.04) and to those trespassing on the property (IPI 120.03, IPI

[2] Section 336 provides: "A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety." RESTAT. (SECOND) OF TORTS, § 336. Notably, this rule is even broader than plaintiff's own theory of the case. Plaintiff claims that the CTA owed the decedent a duty of care because he was a known trespasser in a position of peril, C. 122-24, -- while section 336 does not require a landowner to know of a trespasser's perilous position, only that the trespasser is present on the premises.

120.05). *See also Kun Mook Lee v. Young Rok Lee*, 2019 IL App (2d) 180923, ¶ 26 (open and obvious danger doctrine applies to ordinary-negligence and premises-liability cases alike).

Further, plaintiff does not deny, nor can he, that section 343A governing landowners' duties to invitees applies to activities and conditions alike. Restat. (2nd) of Torts, § 343A. If no distinction is made for the invitees – to whom a landowner owes more duties – it is unclear why the distinction would be made for trespassers. Finally, in *Choate*, the injury was caused by a moving train – the same instrumentality at issue in this case – and this Court applied the Restatement section dealing with "artificial conditions" on landowner's premises. 2012 IL 112948, ¶ 35 (citing Restat. (2nd) of Torts, § 339, titled "Artificial Conditions Highly Dangerous to Trespassing Children"). Therefore, this Court should reject plaintiff's invitation to adopt section 336 in this case.

IV. PLAINTIFF'S COMPLAINT DOES NOT SATISFY THE "DISCOVERED TRESPASSER" EXCEPTION.

A. Resolving This Case Based On the "Discovered Trespasser" Exception Would Have Negative Consequences.

Additionally, the CTA explained that deciding this case based on the "discovered trespasser" exception, rather than the open and obvious danger doctrine, would have negative consequences. CTA Br. at 40-46. First, because the exception turns on the issue of fact -- whether a train operator actually observed a decedent in a position of peril -- the existence of the legal duty could no longer be determined on a dismissal motion as a matter of law by the court. Rather, cases

involving injuries by moving trains would proceed to discovery and potentially jury trial, with the juries -- not courts -- deciding whether a train operator *saw or should have been able to see* the decedent.

In response, plaintiff agrees that the legal duty in cases, such as this one, would be determined, at the earliest, upon the close of discovery on summary judgment, and even then, only if there are no disputed issues of fact. Quiroz Br. at 38. ITLA claims that such an outcome would serve the interests of justice. ITLA Br. at 11. However, the cases on which the ITLA relies -- *Greer v. Checker Taxi Co*., 10 Ill. App. 3d 814, 817 (1st Dist. 1973) and *In re Estate of Garbalinski*, 120 Ill. App. 3d 767, 769 (1st Dist. 1983) -- did not involve questions of legal duty. Rather, both cases concerned motions to reconsider grants of summary judgment based on belatedly submitted evidence.

The CTA also pointed out that in every pedestrian vs. train collision case, the pedestrian by definition would be positioned in the immediate vicinity of a moving train, and thus allegedly in a train operator's "direct line of vision." C. 121, ¶ 7. If such an allegation is sufficient for a finding of legal duty, then the discovered trespasser exception would swallow the open and obvious danger rule, which generally bars recovery for injuries caused by open and obvious dangers. Plaintiff calls such a result "unnerving," but offers nothing substantive to counter it. Quiroz Br. at 37.

B. Plaintiff Failed To Plead the "Discovered Trespasser" Exception.

Further, the CTA explained that, even if this Court applies the "discovered trespasser" exception, the plaintiff's complaint still fails because its allegations are insufficient to come within the exception. CTA Br. at 46 – 50. To begin with, plaintiff's allegation that the CTA had discovered Quiroz prior to his fatal injury is conclusory. C. 123, ¶ 20. Granted, plaintiff did not have to come forward with evidence. See ITLA Br. at 12. But he was required to set forth "specific factual allegations" sufficient to bring his claim within a legally recognized cause of action. *Simpkins v. CSX Transp., Inc.,* 2012 IL 110662, ¶ 26. Plaintiff's allegation that train operators "saw Plaintiff's Decedent as he lay next to the tracks," C. 122-23, ¶ 17, does not pass muster. *See Simpkins v. CSX Transp., Inc.,* 2012 IL 110662, ¶¶ 26-27 (allegation that defendant "knew or should have known" of the risk was conclusory); *Tyrka v. Glenview Ridge Condo. Ass'n*, 2014 IL App (1st) 132762, ¶ 63 (same). Specifically, nowhere does plaintiff allege that, upon observing the decedent, the train operators identified him as a human being in time to avoid the injury. Yet, this is what is required for the "discovered trespasser" exception to apply.

Plaintiff argues, relying on *Martin v. Chicago & N.W. Ry. Co.*, 194 Ill. 138 (1901), that a legal duty arises when a train operator sees *an object* near the tracks that might, upon closer examination, turn out to be a human being. Quiroz Br. at 16. Plaintiff's reliance on *Martin* is mistaken. In a subsequent case, *Joy v. Chicago, B. & Q.R. Co.*, 263 Ill. 465, 469 (1914), this Court limited *Martin* to its facts and held that "the great weight of [authorities] is that, where an accident occurs at a place

where the railroad company is under no duty to look out for trespassers, the question is not whether the engineer could see the object, but is whether he did see it and discover it to be a human being in time to stop his train and avoid the injury." This Court continued: "The duty to exercise care does not arise at the moment an object is discovered, but arises at the moment it is discovered to be a human being and to be in a helpless or perilous position." *Id.* at 469-70.

Here, the incident happened in a train tunnel where pedestrians are not expected to be and where, by plaintiff's own admission, there was "no duty to keep a lookout for the trespasser." Quiroz Br. at 31. In other words, the incident occurred in a place, where an object seen near the tracks would not raise any suspicion. Consequently, to bring this case within the "discovered trespasser" exception, it was incumbent on plaintiff to allege not only that the train operators "saw" the decedent, but also that they had identified him as *a human being* unable to remove himself from danger, in time to avoid the collision. There are no such allegations in the plaintiff's complaint.[3]

Indeed, plaintiff never alleges that the operator of the train that came into contact with the decedent, had seen him in time to avoid the collision. Rather, the

[3] Notably, in arguing that the duty arose once a train operator saw an object near the tracks, plaintiff relies on illustration 1 to comment (b), section 336 of the Restatement (Second) of Torts, which is based on a single Pennsylvania case from 1940. *Frederick v. Pennsylvania Rapid Transit Co.*, 337 Pa. 136 (1940), is readily distinguishable on its facts. There, a passenger fell under the train at a passenger platform, and, when the train stopped, another customer warned the conductor that "there [was] a man down under there." *Id.* at 138. Despite this warning, the train resumed its travel, inflicting fatal injuries to the decedent.

thrust of the plaintiff's allegations concerns the operators of two trains that had passed the decedent without injuring him. C. 122, ¶¶ 11-12; C. 123, ¶ 19. Plaintiff claims that, upon seeing the decedent, the two train operators had a legal duty to call for help or "notify *other* CTA personnel in order to stop or delay *other* rapid transit trains . . . from operating in the area where the [decedent] was situated . . . ." C. 123, ¶19 (emphasis added). See also Quiroz Br. at 35 ("not one, but two different trains ran past Ricardo within the operator calling for help"); ITLA Br. at 10 (same). Plaintiff also alleges that the CTA personnel who "were monitoring the security cameras in the area where [the decedent] fell" had a duty "to stop train service until [the decedent] could be safely removed from the ground near the train tracks." C. 123, ¶¶18, 21.

But as ITLA concedes, the decedent had no "special relationship" with the CTA. ITLA Br. at 2 ("plaintiff never claimed a 'special relationship'"). Thus, in relation to the CTA (as a landowner), the decedent was a complete stranger. In *Rhodes v. Illinois Central Gulf RR Co.*, 172 Ill. 2d 213, 232-33 (1996), on which plaintiff relies, Quiroz Br. 20, 36, this Court unequivocally held that, in the absence of any special relationship, landowners do not have a duty to rescue an injured stranger who came to rest, for whatever reason, on their property. This Court explained: "Our law recognizes that, while persons may owe a *moral* duty to take affirmative action to help a fellow human being in distress, legal liability for failing to do so should not be imposed." *Id.* at 234. The Court continued: "principles of morality may dictate that a landowner take steps to rescue a trespasser found injured on his

premises, but legal liability should not flow from the failure to do so." *Id.* Accord *Iseberg v. Gross*, 227 Ill. 2d 78, 98-101 (2007) (in the absence of special relationship, no affirmative duty to protect another from harm); Restat. (Second) of Torts, § 314.

Consequently, plaintiff's contention that the operators of two trains that had passed the decedent without incident and the CTA personnel who allegedly monitored security cameras, had an affirmative duty to remove him from the tunnel, is tantamount to imposing on the CTA an affirmative duty to rescue a stranger -- the duty that does not exist in Illinois.

Finally, none of the cases plaintiff cites in support of applying the "discovered trespasser" exception involved circumstances similar to the ones present here. In *Magna Bank of McLean County v. Ogilvie*, 235 Ill. App. 3d 318, 320 (1st Dist. 1992), the accident took place at a pedestrian crossing, where pedestrians were expected to be. In *Bremer v. Lake Erie & Western RR Co.*, 318 Ill. 11, 13 (1925), the decedent was not a trespasser – he was a passenger onboard a train when he sustained injuries in a two-train collision. And *Miller v. General Motors Corp.*, 207 Ill. App. 3d 148, 152-53 (4th Dist. 1991), did not involve a train collision at all – there, a trespasser was injured by a high-voltage wire when he climbed into a pumphouse.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, this Court should reverse the appellate court's ruling and affirm the circuit court judgment dismissing the plaintiff's complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this opening brief conforms to the requirements of Rule 341(a) & (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 and the certificate of service, is 5,711 words.

s/Irina Y. Dmitrieva
IRINA Y. DMITRIEVA, Attorney

CERTIFICATE OF SERVICE

I, Irina Dmitrieva, an attorney, certify that on **May 10, 2022**, I caused the attached **Reply Brief of Defendant-Appellant Chicago Transit Authority** to be filed with the Clerk of the Supreme Court of Illinois, First Judicial District via the Court's Odyssey eFileIL system, with true and correct copies of the same served on the counsel listed below via the Odyssey eFileIL system:

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VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements in this instrument are true and correct.

Dated: May 10, 2022

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