No. 127603

IN THE SUPREME COURT OF ILLINOIS

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

Plaintiff-Appellee,

vs.

CHICAGO TRANSIT AUTHORITY,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois
First Judicial District, No. 1-20-0181
There heard on appeal from the Circuit Court of Cook County,
County Department, Law Division, No. 10344
The Honorable Brendan A. O'Brien, Judge Presiding.

ILLINOIS TRIAL LAWYERS ASSOCIATION'S *AMICUS* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

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Summary of Argument

Defendant's argument boils down to this: CTA train operators should have the unfettered right, as a matter of law, to strike impaired individuals who are on the train tracks. After all, anyone can see a train. The danger of trains is open and obvious.

The Appellate Court rejected this argument. This Court should do the same. Defendant's position is inconsistent with settled Illinois law.

The issue here is whether defendant owed Ricardo Quiroz, a trespasser, a duty of care where plaintiff alleged that two CTA train operators saw Ricardo, who had been sleeping in the wall pocket of the tunnel prior to his falling onto the tracks, and did absolutely nothing about it.

Resolution of the issue turns on Section 337 of the Restatement (Second) of Torts § 337 (1965). Illinois adopted this section of the Restatement as an *exception* to the rule that landowners generally owe no duty to trespassers in *Lee v. CTA*, 152 Ill.2d 432, 446 (1992). That section, titled "Artificial Conditions Highly Dangerous to Known Trespassers," provides the duty owed to trespassers by landowners:

> A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if
>
> (a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and
>
> (b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved. Restatement (Second) of Torts § 337 (1965).

This section of the Restatement applies directly to Ricardo Quiroz.

The record in this case shows that plaintiff adequately pleaded that defendant owed a duty to Ricardo Quiroz, where he has alleged that Ricardo was a discovered trespasser in a position of peril, which he did not recognize and from which could not remove himself. The Appellate Court's ruling on this issue should be affirmed.

Nothing in the statute or the case law states, infers or implies that condition at issue must be latent.

Defendant's extensive reliance on this Court's decision in *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, is misplaced. This Court stated, in *Choate*, that "a moving train is an obvious danger that any child allowed at large should realize the risk of coming within the area made dangerous by it." *Id.* at ¶ 35. Plaintiff concedes that point. Consequently, defendant's lengthy discussion of *Choate* and the cases following it (Def. Br. at 16-24), is unnecessary.

Likewise, defendant's discussion of the "deliberate encounter" and "distraction" exceptions to the "open and obvious" rule (Def. Br. at 24-26) is completely irrelevant as is the discussion of the four traditional factors for deciding whether a duty exists. Further still, defendant sets up a strawman – that Ricardo had no "special relationship" with defendant – and knocks it down. (Def. Br. at 14 *et seq.*) Plaintiff never claimed a "special relationship." The rest of defendant's arguments fare no better.

As a secondary matter, this Court should reject defendant's cavalier argument that it should take judicial notice of a surveillance videotape that it produced in the trial court. (Def. Br. at 5.) Although a court may take judicial notice of adjudicative facts, whether requested or not (Ill. R. Ev. 201), this one videotape presents a highly stilted view of the

case. It does not tell the whole story of what happened. Viewing it in isolation is unduly prejudicial in this instance and insufficiently probative.

Argument

I.

The Second Amended Complaint should not have been dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure.

A. Relevant legal principles and standard of review.

In its Rule 23 Order, the Appellate Court re-stated the well-known rules for deciding and reviewing a motion to dismiss brought under Section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615):

> [A] motion to dismiss brought pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint by alleging defects on its face. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 735, 910 N.E.2d 1134, 331 Ill. Dec. 378 (2009). While a plaintiff is not required to prove his case at the pleading stage, he must allege sufficient facts to state all the elements which are necessary to sustain the cause of action. *Visvardis v. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724, 873 N.E.2d 436, 313 Ill. Dec. 812 (2007). A trial court should dismiss a complaint under section 2-615 only if it is readily apparent from the pleadings that there is no possible set of facts that would entitle the plaintiff to the requested relief. *Quinn v. Board of Education of the City of Chicago*, 2018 IL App (1st) 170834, 1157, 423 Ill. Dec. 301, 105 N.E.3d 106. "In reviewing the sufficiency of a complaint, a court must accept *as true* all well-pleaded facts and all reasonable inferences that may be drawn from those facts." (Emphasis added.) *Heastie v. Roberts*, 226 Ill. 2d 515, 531, 877 N.E.2d 1064, 315 Ill. Dec. 735 (2007). Additionally, the complaint's allegations must be construed in the light most favorable to the plaintiff. *Id.* We review *de novo*, the trial court's dismissal of a complaint pursuant to section 2-615. Wagner, 391 Ill. App. 3d at 735.

Quiroz v. Chicago Transit Authority, 2021 IL App (1st) 200181-U, ¶ 18.

The Court also stated the applicable principles for determining whether defendant owed Ricardo a duty:

> Section 337 of the Restatement, entitled "Artificial Conditions Highly Dangerous to Known Trespassers," provides the duty owed to trespassers by landowners:
>
> "A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if
>
> (a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and
>
> (b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved." Restatement (Second) of Torts § 337 (1965).

Quiroz v. Chicago Transit Authority, 2021 IL App (1st) 200181-U, ¶ 20. Application of these standards leads to the conclusion that plaintiff properly stated a cause of action against the defendant, Chicago Transit Authority (CTA).

B. Plaintiff stated a duty under Section 337 of the Restatement (Second) of Torts

The Appellate Court characterized the facts as alleged in the Second Amended Complaint as follows:

> On April 15, 2018, at approximately 3:43 a.m., the decedent, Ricardo Quiroz, [footnote omitted] entered a CTA train tunnel between the Grand Avenue and Chicago Avenue stations on the red line. He walked along the catwalk inside the train tunnel and eventually climbed into a recessed area of the tunnel wall. Ricardo remained inside the recessed wall pocket for two and a half hours, but then he fell out. He landed between the catwalk and the train tracks. Ricardo continued to lay on the ground, parallel to the tracks.
>
> Two trains passed by Ricardo without incident. However, he apparently moved his body and placed his hand on the rail. When the next train passed by, it struck Ricardo, and his body became entangled with the train. The train dragged Ricardo to a different spot inside the tunnel. Seven more trains passed through the tunnel. Then a train conductor noticed something on the track, which he thought was garbage. After stopping the train at the

> station, the train operator walked back into the tunnel with a flashlight and discovered Ricardo's body.

Quiroz v. Chicago Transit Authority, 2021 IL App (1st) 200181-U, ¶¶ 4-5.

Additionally, the Second Amended Complaint expressly alleged that CTA knew that trespassers frequented the tunnel from time to time (there was graffitti in the tunnel) and that while Ricardo was on the tracks he was: (1) in the direct line of vision of the two train operators who passed over him without incident; (2) he was "clearly visible" to those two train operators; (3) he was actually seen by those two train operators and (4) the two train officers made no attempt to prevent an accident with Ricardo despite knowing that he was in a position of peril. (C121-123.) Alternatively, plaintiff alleged that none of the train operators who passed over Ricardo was even watching the tracks even though Ricardo was "clearly visible" and would have been seen had they been looking at where they were going and that none of them bothered to notify anyone of Ricardo's presence in the wall pocket or track. (C125.)

Based on these allegations, which must be taken as true when reviewing a dismissal pursuant to Section 2-615, the Appellate Court held that plaintiff had stated a duty under the discovered trespasser exception to the no liability rule. The Court explained its analysis:

> Our analysis turns on Mr. Quiroz's allegation that Ricardo was a discovered trespasser in a position of peril which he either did not realize or could not discover. Specifically, as outlined in subsection (a) of section 337, that the CTA knew or had reason to know of Ricardo's presence in the tunnel, and as outlined in subsection (b) of section 337, that Ricardo either did not or could not recognize the danger and remove himself from harm. In *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 446, 605 N.E.2d 493, 178 Ill. Dec. 699 (1992), our supreme court made clear that a landowner must use ordinary care to avoid injury to a trespasser who has been discovered in a place of danger. Mr. Quiroz's second amended

> complaint specifically alleged that the CTA discovered Ricardo in a place of danger. The second amended complaint alleged: that Ricardo was "injured, unable to remove himself from the tracks, and was obviously and clearly in a position of peril," that he was "clearly visible" to the train operators and security cameras "as he lay on the tracks," and that the CTA's failure to remove him from the tracks caused his injuries and death. In other words, the second amended complaint invited the inference that the train operators saw Ricardo but nevertheless did not stop the trains.
>
> No matter how incredulous or far-fetched these allegations and the material inferences that flow from them may seem, once well-pleaded, we must accept them as true under Illinois law pursuant to section 2-615 of the Code. *See Henderson Square Condo Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 78, 399 Ill. Dec. 387, 46 N.E.3d 706 (when ruling on a section 2-615 motion to dismiss, a court must accept as true, all well-pleaded facts, as well as any reasonable inferences that may arise from them). This is particularly so considering that we must interpret the allegations of the second amended complaint in the light most favorable to Mr. Quiroz. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86, 672 N.E.2d 1207, 220 Ill. Dec. 195 (1996).
>
> Guided in our analysis by *Lee*, we focus on Mr. Quiroz's allegations that Ricardo was "clearly visible" to the train operators and security cameras, and that he was "injured, [and] unable to remove himself from the tracks." Under these facts, accepted as true (as we must at this stage in the proceedings), the CTA had a duty, pursuant to section 337 of the Restatement, to exercise reasonable care to prevent injury to Ricardo since the second amended complaint alleged that he was unable to remove himself from danger. *See Lee*, 152 Ill. 2d at 448 (adopting Restatement (Second) of Torts § 337 (1965)). On that assertion, Mr. Quiroz placed his pleadings within the parameters of section 337 of the Restatement and our supreme court's reasoning in *Lee*. Accordingly, we reverse the trial court's judgment and remand the case to the trial court for further proceedings.

Quiroz v. Chicago Transit Authority, 2021 IL App (1st) 200181-U, ¶¶ 21-23.

This analysis is on point and accurate.

C. Defendant's arguments are unavailing.

Defendant's argument that the dangerous condition on the land must be a latent condition that must be considered from the landowner's objective viewpoint (Def. Br. at 32-33.), is concocted from nothing. It is unsupported by the case law and the Restatement

itself. *Lee v. CTA, supra*, on which defendant relies, says no such thing. Indeed, defendant fails to cite any part of *Lee* for this argument. Nor does it cite any section of the Restatement in support of this argument.

Instead, defendant returns to *Choate*, which did not concern Section 337 of the Restatement. The issue in *Choate* was whether the common law exception to the "no duty to trespassers rule" as stated in *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 625 (1955), applied to a boy who was jumping on and off a slowly moving freight train in an attempt to impress a girl. In *Kahn*, which involved an attractive nuisance of a lumber pile to a child, this Court stated the *common law* rule applied in such a case:

> It is generally true, as defendant contends, that an owner or one in possession and control of premises is under no duty to keep them in any particular state or condition to promote the safety of trespassers or others who come upon them without any invitation, either express or implied. [Citations omitted.] It is also established that infants, as a general rule, have no greater rights to go upon the land of others than adults, and that their minority of itself imposes no duty upon the occupier of land to expect them or prepare for their safety. [Citations omitted.] *It is recognized, however, that an exception exists where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a defective structure or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children.* In such cases there is a duty upon the owner or other person in possession and control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it. [Citations omitted.] The element of attraction is significant only in so far as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of harm to the child.

Kahn v. James Burton Co., 5 Ill. 2d 614, 625 (1955) (Emphasis added.)

In *Choate*, this Court considered the issue under a traditional duty analysis, as the Court did in *Kahn*, and held that the exception did not apply to the facts of the case.

The *Choate* Court never considered Section 337 of the Restatement (Second) of Torts at all.

The case at bar does not involve a child or an attractive nuisance. It does not implicate Restatement (Second) of Torts Section 339, which was referenced in *Choate*. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 28.

It involves an impaired adult who was hit by a train. It defies all logic to accept defendant's position. It would allow CTA train operators to hit trespassers at will. That is contrary to Section 337 and the social policy stated in *Lee*:

> We recognize that our holding today represents a slight departure from the traditional rule regarding the duty owed to trespassers. However, "[i]n the choice of competing considerations of societal policy, the need for protection against the reasonably foreseeable risk of death or severe personal injury outweighs the freedom of action that would otherwise characterize the relation of the possessor of land to a trespasser." (*Imre v. Riegel Paper Corp.* (1957), 24 N.J. 438, 448-49, 132 A.2d 505, 510.) Our determination of the existence of a duty here, we believe, is properly reflective of the prevailing social policies.

Lee v. Chicago Transit Authority, 152 Ill. 2d 432, 452 (1992).

For all of these reasons, defendant's argument that the "discovered trespasser" exception to the "no duty" rule cannot exist post-*Choate* (Def. Br. at 40-42.), is illogical and wrong. *Choate*, and other decisions that are *not* based on discovered trespassers in peril simply do not control this case. (Additionally, both *Bruns v. City of Centralia*, 2014 IL 116998, which concerned the "distraction exception," and *Bucheleres v. Chicago Park District*, 171 Ill.2d 435 (1996), which concerned a drowning in Lake Michigan, were decided on summary judgment, with a full evidentiary records, not on motions to dismiss.)

Defendant contends that § 337 creates a "loophole" to the "open and obvious" rule. (Def. Br. at 42.) Plaintiff contends § 337 is a recognition of an unusual factual situation that values human life over running the trains on time.

Defendant's argument that the Appellate Court's ruling leads to absurd results, because it is contrary to Section 343A of the Restatement (Second) of Torts (Def. Br. at 34.), is likewise unconvincing. Section 343A states applies to *invitees*, not trespassers:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement (Second) of Torts § 343A (1965).

For this reason alone, Section 343A is not applicable here.

Moreover, Section 343A is general, not specific like §337 and does not concern artificial conditions which involve "a risk of death or serious bodily harm to persons coming in contact with it." Nor does it involve situations where the landowner "has reason to believe that the trespasser will not discover it or realize the risk involved." Restatement (Second) of Torts § 337 (1965).

The fact that this Court has rarely applied the discovered trespasser exception to the no duty rule is not a basis for rejecting it here. (Def. Br. at 35.) Likewise, defendant's reliance on *Robertson v. New York Cent. R. Co.*, 388 Ill 580 (1944), for the proposition that "'the public should be held to a recognition of [the railroad's] right' to the uninhibited use of the tracks, 'in order to facilitate rapid operation of both freight and

passenger trains'" (Def. Br at 36), is misplaced. We all like the trains to run on time, but that interest is not greater than the public interest in saving lives. It is not a valid reason for ignoring the mandate of §337 and the public policy of the state.

Defendant's citation to *Chicago Terminal Transfer Co. v. Kotoski*, 199 Ill. 383 (1902), *Illinois Central R. Co. v. Noble*, 142 Ill. 578 (1892) and the other "discovered trespasser" cases (Def. Br. at 37-38.), is peculiar. Both *Kotoski* and *Noble* support plaintiff, not defendant. They both hold that where a train operator actually sees a trespasser on the tracks ahead of the train in time to avoid collisions, the railroad companies may be held liable. Those cases are analogous to what plaintiff has alleged here. Mr. Quiroz has affirmatively pleaded that two train operators saw Ricardo in the tunnel, that they could tell he was in a position of peril, and that they made no effort to report the danger or otherwise assist in preventing a death. Plaintiff's complaint falls squarely in line with the cases cited.

Similarly, defendant's reliance on *Joy v. Chicago, B & Q R. Co.*, 263 Ill. 465, 468 (1914) (Def. Br. at 37-38.) is misplaced. This is not a case where plaintiff has alleged that a "train engineer was negligent in failing to stop the train to investigate whether an object he saw near the track was a human being." (*Id.* at 38.) This is a case where two train operators actually saw Ricardo lying near the tracks in the tunnel, in a condition of peril, and passed him by, without taking any action whatsoever. In any case, the *Joy* Court held there was no duty upon the railroad to keep a lookout for trespassers on its own track in the open country, remote from public crossings, cities, and towns. *Joy v. Chicago, B. & Q. R. Co.*, 263 Ill. 465, 466 (1914). The tunnel near Grand Avenue, in

downtown Chicago, is not in the open country, remote from public crossings, cities, and towns.

Defendant's argument that application of the "discovered trespasser" exception makes it impossible for courts to decide a legal duty as a matter of law (Def. Br. at 42-44), is a non-starter. So is its assertion that "in all cases involving a train vs. person collision, it would be the jury deciding whether or not defendants owed a legal duty to the plaintiffs." (Def. Br. at 43.) This Court has long-since recognized that "[i]t is highly commendable to dispose of litigation with celerity and dispatch; however, more important is that justice be done." *Greer v. Checker Taxi Co.*, 10 Ill. App. 3d 814, 817 (1973), cited approvingly in *In re Estate of Garbalinski*, 120 Ill. App. 3d 767, 773 (1st Dist. 1983).

Moreover, it is undisputable that "[w]hether a duty exists in a particular case is a question of law for the court to decide." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006); *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 14.

Defendant's argument that application of the "discovered trespasser" exception will lead to a "lack of uniformity in case dispositions" (Dep. Br. at 44.) This argument contravenes defendant's earlier argument that the "discovered trespasser" exception "has been narrowly construed," and that the "exception [is] applied only rarely." (Def. Br. at 37, 39.) Defendant cannot have it both ways. Where defendant found only one case, "decided 120 years ago, in which this Court applied the 'discovered trespasser' exception to hold a railroad liable for an injury caused by a moving train" (Def. Br. at 39.), defendant's fear of lack of uniformity is hollow.

Finally, this Court should reject defendant's argument that plaintiff's Second Amended Complaint was properly dismissed because the allegations that other train

operators "saw" Ricardo lying near the tracks, and because plaintiff never alleged that the operator who struck Ricardo could have done anything different (Def. Br. at 46 *et seq.*) There is nothing conclusory about plaintiff's allegations. As the Court stated in *Cooper v. Martin Luther King Jr. Boys & Girls Club of Chicago*, 2021 IL (1st) 192618, ¶ 37, a plaintiff is not required to plead evidentiary facts. She must only plead facts "necessary for the plaintiff to recover." (quoting *Board of Education of the Kankakee School District No. III v. Kankakee Federation of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47 (1970)). Plaintiff has met this burden. Further, the thrust of plaintiff's complaint is that the train operators of the prior trains should have taken action to prevent Ricardo's death. They were in the best position to do so.

II.

This Court should not take judicial notice of the surveillance video provided.

As noted in the Summary of Argument, this Court should reject defendant's cavalier argument that it should take judicial notice of a surveillance videotape that it produced in the trial court. (Def. Br. at 5.) This videotape presents a highly stilted view of the case. It does not tell the whole story of what happened in this case. Viewing it in isolation is unduly prejudicial in this instance and insufficiently probative. *See, e.g. People v. Illgen*, 145 Ill. 2d 353, 365 (1991) ("relevant other-crimes evidence may be excluded if its prejudicial effect substantially outweighs its probative value.")

The court ordered defendant to produce all relevant videotapes. (C69.) Defendant only produced clips from the surveillance videotape from the tunnel, which showed Ricardo's position in the tunnel before he was killed by the train. (C79, 95, 98.)

As defendant admits, it never produced the videotapes that it had from the front of each train, which plaintiff requested. (C127-28.) (Def. Br. at 43.) Those videotapes presumably show what the train operators in the two trains that passed Ricardo could see from their vantage point in the lead car, *i.e.* whether the operators of those trains saw Ricardo lying in the wall pocket before he fell onto the right of way. (C108-09, 127.)

If defendant had produced all requested videotapes, perhaps judicial notice might be appropriate. But where defendant did not do so, the Court should not accept its one-sided presentation of the operative facts.

Conclusion

For all of the reasons stated above, *amicus* Illinois Trial Lawyers Association asks this Court to affirm the Appellate Court's Rule 23 Order in this case and remand the matter to the circuit court for proceedings consistent with such an affirmance.

Respectfully submitted,

By: /s/ Leslie J. Rosen

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13 pages.

By: /s/ Leslie J. Rosen