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.

**PLAINTIFF-APPELLEE, ALEJANDRO QUIROZ'S
RESPONSE BRIEF**

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INTRODUCTION

In cases involving the alleged wrongful death of a son or daughter, the moving force behind the lawsuit, typically, is to find out exactly what happened. If what happened was wrong, the focus of the suit shifts to doing whatever can be done in order to prevent the same thing from happening to another family. More often than not, the answers to "what happened" can be provided only during the course of court-supervised discovery. Before we could obtain information we requested from the CTA in this case, the case was dismissed. Because the dismissal was based upon §2-615 of the Code of Civil Procedure, a Supreme Court Rule 191(b) affidavit could not even be filed.

As we explain below, many of the questions we have could have been answered if the CTA had provided in-cab video of the three (or more) train cabs that encountered Ricardo while he was on the tracks. Instead, the CTA sought to avoid having to engage in discovery. Rather than provide all the videos of this incident, the CTA produced a single source video that raises more questions than it answers.

The Appellate Court looked at the "facts" of our case as it was obliged to: with a bias in favor of Plaintiff, given the fact that the dismissal was based upon a 2-615 motion (legal theory) rather than a motion for summary judgment (question of fact). The Appellate Court correctly followed decades of Illinois caselaw and properly held that a railroad does not have *carte blanche* in how it chooses to operate its trains. It cannot injure a clearly visible person, trespasser or otherwise, who is unfortunate enough to find himself in a position of peril in the path of an oncoming train. That ruling follows existing caselaw, common sense, and the CTA's own practice regarding maintaining a lookout for people on the tracks. For over a century, it has been the law of Illinois that

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"when those operating the [train] engine do know that a trespasser is upon the track and in a position of peril, it is their duty to use reasonable care to avoid injury to him." *Martin v. C & NW Ry. Co.*, 194 Ill. 138 (1901), at 147 - 48.

In this Response, we make four main points: 1) As has been set forth in Illinois jurisprudence for many years, the interest in human safety for all people, trespassers included, is greater than, among other things, the interest in having trains running on time; 2) The open-and-obvious hazard exception to the ordinary care duty analysis in premises cases does not negate the duty to exercise reasonable care, particularly if a discovered trespasser is imperiled or otherwise unable to protect himself; 3) The Trial Court erred in not applying an appropriate §2-615 analysis of our facts; and 4) Although more discovery will be required, our wilful and wanton pleadings were sufficiently pled.

STATEMENT OF FACTS

Generally. Our case is before this Court after dismissal pursuant to §2-615 of the Code. It was *not* pursuant to a §2-619 motion or a motion for summary judgment. A §2-615 motion challenges only the legal sufficiency of a complaint. In ruling on a §2-615 motion, a court:

1. Must accept as true all well-pleaded facts in the complaint;
2. Must accept as true any reasonable inferences that may arise from those facts;
3. Must construe the allegations and any reasonable inferences from them with a specific bias: in the light most favorable to the plaintiff; and
4. Must not dismiss the case pursuant to §2-615 unless it is *clearly* apparent that *no set of facts* can be proved that would entitle a plaintiff to recover.

Ferris, Thompson & Zweig, Ltd. v. Esposito, 2017 IL 121297, ¶5, 90 N.E.3d 400,

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401-02 (2017).

Pleaded Facts. After our First Amended Complaint at Law was dismissed with leave to re-plead, we looked at all of the information that was available, such as it was. We then pled, in essence, three causes of action, pled in the alternative, in five counts. See 735 ILCS §5/2-613(b). C120 - 129. The common allegations of Plaintiff's Second Amended Complaint are that on or about April 15, 2018, Ricardo Quiroz fell from the catwalk onto the ground near the southbound tracks just north of the CTA's Grand Avenue platform. (¶3) C-120. He landed on the side opposite from the energized "third rail" side of the tracks. (¶4) C-121. Because of the circumstances, Ricardo was injured, unable to remove himself from the tracks, and was "obviously and clearly" in a position of the peril of injury or great bodily harm in the event he were to be struck by a CTA train. (¶5) C-121. The train operators employed by the CTA were positioned on that same side, *i.e.*, the side farthest away from the third rail. As the trains passed over him, Ricardo was directly in the train operators' line of vision (¶¶6 - 7) C-121. The area where Ricardo fell was lighted, and the trains themselves had operating headlights, which lights illuminated the area where Ricardo fell. (¶¶8 - 9) C-121. The CTA was aware of the fact that people, from time to time, were in the area where Ricardo fell, due to the presence of graffiti and other debris. C-121-22. The CTA was also aware of the fact that people, from time to time, were on the tracks, either from falling, being pushed, or for other reasons. (¶10) C-121-22.

On the date of the occurrence, at least two CTA trains passed over Ricardo. (¶11) C-122. He was clearly visible to each of the two operators as the trains passed over

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Ricardo. (¶12) C-122. Ricardo was also clearly visible to the security cameras which covered the area where Ricardo fell and was lying. (¶13) C-122. A third CTA train came into the area and collided with Ricardo, fatally injuring him. (¶14) C-122. All of the CTA operators acted within the course and scope of their employment. (¶15) C-122. The train operators all were aware that avoiding collisions with people on the tracks could be a matter of life and death. C-122.

Counts I and II pled a theory of Negligence Regarding a Discovered Trespasser in a Position of Peril. C-122-126. The negligent act or acts allegedly resulted in the Wrongful Death and damages under the Survival Act, respectively. We alleged that each and every one of the train operators who passed over Ricardo actually saw Ricardo as he lay in the area directly in front of their respective trains. (¶17) C-122. The security personnel saw Ricardo as he was lying on the ground. (¶18) C-122. Despite the fact that Ricardo was seen to be in a position of peril, none of the individuals made an effort to avoid a collision between Ricardo and other CTA train or trains or to notify the CTA to notify and stop other CTA trains which were coming into the area from passing over and colliding with Ricardo. (¶19) C-122. Specifically, the train operators and security personnel owed a duty of due care to Ricardo as a person discovered to be in a position of peril. (¶20) See Plaintiff's Second Amended Complaint at C120-C129.

Counts III and IV pled willful misconduct in the alternative to the allegations of Counts I and II. C-124-127. There was a series of actions which led to the non-discovery of Ricardo as he lay in the path of the trains. The train operators were not looking where they should have been, even though their trains passed directly over Ricardo as he was

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lying on the ground, even though the area was well-lighted, and even though he was plainly visible. C-124. Nor did the security people look and react to Ricardo's presence. (¶18) C-125. As a consequence, no attempt was made by those CTA personnel to avoid a collision with the subsequent trains. C-125. One of the subsequent trains eventually struck Ricardo, causing his death. C-126. That course of conduct was responsible for the collision. (¶21) C-125 and C120-C129, generally.

Count V alleges spoliation, in that there were video surveillance cameras in operation on the trains in question. Notwithstanding the fact that there was a fatality and likely civil proceedings, the CTA failed to keep and maintain that video. C-127 - 29. At the hearing on the Motion, we did not dispute (nor did we agree) that Ricardo was technically trespassing at the time of the occurrence. C-334.

Purported Judicial Notice. The CTA has submitted a video. It claims the video: a) was the proper subject of judicial notice; and b) was properly considered in the context of a §2-615 motion. We here have no particular quarrel with this or any other court considering the video in the context of a §2-615 motion, but not as established fact. Far from it. Our quarrel is with the fact that this was a *partial* and only a *partial* disclosure. See our email, below, at page 7. The substantive facts from the video can be considered, in the context of a §2-615 motion, *only* as they relate to a "set *of facts* [that] can be proved that would entitle a plaintiff to recover." See our Brief below, at 45 - 46.

The video shows the following. Ricardo arrives at the station and is on the platform, waiting for a train. 3:34:38. Four minutes later he returns to the ticket agent and

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discusses something. 3:38:38. He then goes back downstairs and only then goes past the "No Trespassing" gate. He is seen going off camera at 3:44:56.

A couple of hours later, Ricardo can be seen leaving the area outside the area depicted in the video provided by the CTA. He is not jumping onto the tracks. There is nothing the least bit voluntary about his being on the tracks. He is either being pushed or is falling onto the tracks. (6:04:50) In the course of falling, he literally somersaults onto the tracks. Again, there is *absolutely* no indication that Ricardo voluntarily entered into the train ("tunnel") area. At 6:05:28, a first train passes Ricardo without making contact. At 6:20:11, a second train passes without making contact. At 6:33:48, a third train hits Ricardo.

The Ruling Below. In our Response to the original Motion to Dismiss, we made clear that our case was *not* about a failure to warn; it was a failure to stop the trains and get Ricardo off the tracks. C338 The Trial Court granted the CTA's motion and denied our Motion to Reconsider. The ruling was premised on the facts that Ricardo was a trespasser who was injured as a result of contact with an open-and-obvious hazard, *viz.,* a moving train. R5 The Court ruled that because the train was an open-and-obvious hazard as a matter of law and because Ricardo was a trespasser, there was no duty owed by the CTA. Without a duty, there could be no valid cause of action. R6 C334 - 336. After denying the Motion to Reconsider, the Trial Court told plaintiff's counsel he could and should take this appeal. R6

Requested Discovery, Generally. This was a ruling on a §2-615 motion. We advised both counsel for the CTA and the trial court that at the very least, discovery –

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depositions, document requests, interrogatories – should be allowed to take place in order to determine the facts which led to Ricardo's death. C237 Why? "We simply do not know what happened to Ricardo. Discovery is required to get to it." C236 We made clear to counsel and in the trial court that we wanted actual discovery to proceed in this case. We sent an email to CTA counsel, prior to its §2-615 motion to dismiss the Second Amended Complaint, which summarized our position fairly well:

> I believe our amended complaint at law is sufficient to withstand any follow-up motions to dismiss, but I am writing for a different reason.
>
> The parents of the young man who died in this case are wondering how no fewer than two trains could have run over their son without seeing him. If they had seen him, the parents are wondering why at least one of them would not have reported his presence to people in charge of stopping other trains in the event of an emergency, prior to the arrival of the train which ultimately struck him. Mr. Quiroz's parents, like the parents of every child who died whose estates I have represented through 40+ years of doing this, want to know what happened to their child, why it happened, and, if what happened was wrong, to do whatever it takes to ensure that it does not happen to some other family.
>
> Toward that end, I believe that producing the video footage from the two previous trains would address the compelling issue these parents continue to face on a daily basis, *viz.,* how it was that the two or more prior trains could not have seen their son. The reports in the newspapers were to the effect that there was video available from the train which struck Mr. Quiroz. If the video from the two prior trains is not available, your identifying and then producing for depositions the people who were presumably responsible for the production of that video would be helpful.
>
> Again, we can go through another round of motions and responses in the case, but I believe that in the interest of conflict resolution, the steps I have outlined above would be in the best interests of all of the parties in this case. C196

See also our identical argument in the trial court, at R5 - 6; and C185, ¶1.

No Rule 191(b) Affidavit. Ordinarily, in response to a Motion for Summary Judgment or a §2-619 Motion to Dismiss, we would have submitted an affidavit pursuant

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to Illinois Supreme Court Rule 191(b) in order to obtain discovery on the missing facts. Those additional facts would have served to establish in part the sorts of facts which are missing in the analysis of the pleadings in this case. This case was dismissed pursuant to §2-615, so such an affidavit could not be filed.

Other Facts that Could Be Proved "That Would Entitle Plaintiff to Recover." A court must not dismiss a case pursuant to §2-615 unless it is *clearly* apparent that *no set of facts* can be proved that would entitle a plaintiff to recover. *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2017 IL 121297, ¶5, 90 N.E.3d 400, 401 - 02 (Ill. 2017).

The facts that follow are beyond pleadings and reasonable inferences therefrom. We looked to these facts in order to draft our amended complaint. Among other things, we looked at newspaper clippings, police reports, and other non-evidentiary sources for information. The information we found was made a part of the court record (excluding the O'Hare crash), no less, since the information was part of our response to the CTA's Motion for Sanctions. We submitted them there to rebut the notion that our pleadings were baseless. We do so here because those facts may also serve to demonstrate other facts that might "be proved that would entitle a plaintiff to recover." Those additional facts are worthwhile considering here – in the context of a §2-615 motion – as to what set of facts we might / possibly / could be able to prove which would entitle the Quirozes to a recovery.

Additional Fact: For Years, the CTA Had Notice of a Problem with Distracted Driving. It was well known that the CTA had a longstanding problem with CTA drivers who drive while on their phones – with no repercussions from the CTA. See *The Chicago*

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Sun-Times article with this descriptive headline: "Despite 'Zero-tolerance' Crackdown, CTA Drivers Crash While on Phones, Keep Jobs." *CST,* July 27, 2018. C207-C213.

In the series, the *Sun-Times* stated: "Despite vowing 'zero tolerance' on the job, CTA drivers and L operators keep yammering away on their phones. And they seldom are fired when they're caught – even in cases where they've crashed while talking on a cellphone." C207 The problem went back at least ten years. In 2009, the CTA stated – publicly, at least – that it was instating a zero tolerance policy toward cellphone use while driving. A CTA official declared: "If an employee is using a personal cellphone while on duty, they will be discharged." C208 The *Sun-Times* series concluded that the officials' talk was just that.

Additional Fact: O'Hare Crash and Fatigue. We submit the facts of another wreck in connection with a set of facts that "demonstrate plaintiff is entitled to a recovery." The other incident was the subject of an NTSB investigation. The driver in that case was headed into O'Hare Airport. She could be seen on the video, asleep, as her train crashed into the O'Hare terminal. The NTSB, not the CTA, interviewed the motorwoman. She admitted being asleep at the time. She had also fallen asleep, a month earlier. At that time, her train overshot the Belmont Street exit of the Blue line. The NTSB investigated the matter by studying the complete video from the O'Hare episode. "Chicago Transit Authority Train Collides with Bumping Post and Escalator at O'Hare Station, Chicago, Illinois, March 24, 2014" (PDF). (Available for download at "National Transportation Safety Board. April 28, 2015. NTSB/RAR-15-01.") The NTSB concluded that the motorwoman's failure to stop was "due to falling asleep as a result of fatigue ...."

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The operator could have better managed her time, but in "... addition, CTA failed to effectively manage the operator's work schedule to mitigate the risk of fatigue." Report, at 36.

Additional Fact: the CTA's Own Policies and Procedures as to What ***Should*** *Take Place in the Cab of a CTA Train.* In June, 2019, a woman named Felon Smith stepped down onto the tracks in order to retrieve her own cellphone. To be clear, in doing so, Ms. Smith was trespassing on CTA property. She was struck and killed by a CTA train. In-cab video was acquired by the Chicago newspapers which showed the driver to be looking away from the tracks, laughing and talking to someone else shortly before his train struck Ms. Smith. (C203) In a discussion with the CTA's spokesperson, Brian Steele, the behavior of the train operator who was looking away from where the train was headed – captured on video – was described as "unacceptable and *in violation of the CTA's policy and procedures.*" (Emphasis supplied.) C-203-204. In fact, an employee can be fired for "failure to devote attention to duty and ensuring safe train operations." *Id.* According to Mr. Steele, operators are supposed to be focused on the track ahead. *Id.* The incident involving a train which struck Ms. Smith was no small matter. *Id.* According to Mr. Steele, the CTA takes instances like this very seriously; the Smith incident will be used to remind operators to stay focused on the right-of-way. C203-205.

Additional Fact: Video Never Produced. The video which the CTA actually produced in our case was not "in-cab" from the train; it was from the area where Ricardo was situated prior to falling into the tunnel. The video showed two or more trains going past Ricardo Quiroz prior to his being struck by a third train. What has never been

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produced is in-cab video of the two other El operators who passed Ricardo as he lay on the tracks. We would expect that such video, like the in-cab video seen in the Felon Smith case (at C203), would have shown what was taking place within the cabs of the drivers of the trains which ran by or past Ricardo.

A month later, on July 27, 2019, *The Chicago Tribune* went to press with a story related to the *complete* video of the Felon Smith episode. C203-204. The actual video is available at https://www. chicagotribune. com/business/transportation/ct-biz-cta-69th-street-woman- dies-on-tracks- 20190726-75nwc5gdejearffutfwqqgcury-story.html. See C203-C205. To the point (and to our surprise): the video establishes that the CTA had a method in place which allowed one to see exactly what the operator of the train was doing within the cab of a CTA train. C-203-204. Presumably, that same video method was engaged within the cabs of the two trains that passed over Ricardo Quiroz, including what the operators were doing. In the Smith case, the video demonstrates that the operator clearly was not paying attention. C-203-204. The operator can be seen staring out the window, looking away from the tracks and to the side, and laughing at someone or something as the CTA train he was operating collided with Ms. Smith. C-203-204.

How Zealously Does the CTA Guard In-Cab Video? We noted above that the CTA had a problem with distracted driving. It was criticized for providing light punishment for drivers operating CTA equipment while on cellphones.

During the pendency of this case, *The Chicago Sun Times,* on June 27, 2019, also reported on the collision with Felon Smith. C-202-203. In the article, the CTA made quite clear that the in-cab video of the driver in Felon Smith's case was "leaked." And

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the CTA stated that the video was "*inappropriately* recorded from CTA video systems by what appears to be a cellphone camera." C-202. (Emphasis supplied.) The penalty for leaking? Discharge from employment. But that wasn't all. CTA spokesman Brian Steele stated that, regarding whoever had leaked the video, in addition to discharge, "[T]he CTA will pursue all applicable *criminal* penalties." (Emphasis supplied.) C202

Police Reports and Surveillance Cameras. Based upon police reporting, we believe there should have been video of what the train operators could see. The police report noted that the "Surveillance camera *on the front of SB train run* #___ [we could not make this number out] was in operation during time of incident." (C201) No video from any train surveillance cameras was produced. The police also noted that the train operator who discovered Ricardo's body "saw what he thought to be garbage on the tracks but then, as he got closer [*not* as he passed it, "as he got closer"], he realized that it might be a person." C-201.

Additional Discovery We Sought. In our case, we submitted to the Trial Court facts we wished to take discovery on. During the hearing on the Motion to Reconsider, we advised the Court that we were unable to plead our case with the benefit of input from our most important witness, Ricardo Quiroz. We relied upon *all* sources of information that were available to us. During the hearing and before, we advised the trial court that what we needed in this case was discovery. Specifically, we were looking to find out what the two CTA drivers were doing when they drove past Ricardo. (C182; C185; C188 - 89; R16 - 17.) We expect that information obtained during discovery will allow us to amend our complaint further. © 190)

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Did the CTA Really Produce All of the Video? The CTA, in its Statement of Facts, maintains that it already produced the video. The CTA advises this Court that the Trial Court ordered it to provide all footage, and tells the Court that it complied with that order. Brief, at 5. The CTA tells this Court that Plaintiff did not challenge the video footage and relied on it. See also C182. That much is true. What is missing from the CTA statement is the fact that we have pointed out the video we are missing, *i.e.* in-cab video, **demonstrating what was going on within the cabs of the at-least two trains which ran** over Ricardo before he was struck. That video would have shown what was taking place in the cab as well as what was taking place outside the cabs by way of the referenced "surveillance video" as they ran past Ricardo.

And as for Plaintiff stipulating that the CTA's production was complete? As we advised the trial court: "The fact that a Defendant says that something is so or is not so should not be accepted by the Court as the final word. Discovery in this case based upon the pleadings we are able to submit (as we explain below) is warranted.") C182; C185, ¶1

No duty, no discovery. The Trial Court, though, could not see how anything produced in discovery could result in the recognition of a duty owed to a trespasser when there was an open-and-obvious danger posed by a moving train. (R16 - 17) The Trial Court believed that this Court's ruling in *Choate v. Ind. Harbor Belt R.R. Co.*, 2012 IL 112948 precluded the imposition of a duty here. (R5) For that reason, we were not allowed to pursue the discovery on these points, discovery that we specifically had requested from the trial court.

Other Questions, Other Theories. We advised the Trial Court that this case

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continues to have many more unanswered questions. We set many of those below, at page 40.

The answers to that discovery might result in alternative theories. With only the information we were able to obtain from all sources, including in particular information we came across as we drafted our response to the CTA's Motion for Sanctions, we could add three additional theories (as we advised the Trial Court, C190). One might be predicated upon CTA policies as to looking away from where a train is headed. A second one might relate to a duty undertaken by the CTA to look where its trains are headed. A third theory might have alleged that the behavior of the operator of a CTA train who was looking away from where the train is headed is unacceptable and in violation of the CTA's policy and procedures; and that the CTA employees in this case failed to devote appropriate attention to duty and in ensuring safe train operations.

The Important Role of Discovery in Other Wrongful Death Cases. We understand that a particular theory of liability might at first blush appear to be "far-fetched." However, our firm's experience in other Wrongful Death cases, as we set forth in the trial court, has been that facts will come out during the course of discovery, particularly in a case where our most important witness, the decedent, is unavailable to provide evidence. Those facts may prove to be more surprising than anything we, as lawyers, might have even suspected to be the case. Our law firm has had a number of cases which actually went to verdict or to the appellate court involving the deaths of adult males. We discuss those below but included a fuller discussion in the trial court, at C-179 - 180. In each of these cases, it was only during the course of discovery that we were able

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to answer the compelling question posed by our clients: how did my son or daughter come to die?

ARGUMENT

The Appellate Court got it right. In our argument, we make four essential points: 1) There *is* and for many years has been a recognized duty of due care to a trespasser discovered to be in peril; 2) The open-and-obvious hazard rule does not trump the discovered trespasser rule; 3) A Motion to Dismiss pursuant to §2-615 requires that the facts be viewed with a bias in favor of the plaintiff; and 4) Although more discovery will be required, our pleadings are sufficient to state a cause of action for wilful misconduct.

I. IN ILLINOIS, FOR WELL OVER A CENTURY, A LANDOWNER HAS OWED A DUTY OF ORDINARY CARE TO A TRESPASSER DISCOVERED TO BE HELPLESS AND IN A POSITION OF PERIL, PARTICULARLY IN RAILROAD CASES.

For more than 100 years, this Court, consistent with the jurisprudence of almost every other state as well as with the Restatements Second and Third of Torts, has applied a duty of ordinary care to trespassers discovered to be helpless and in a position of peril. As we advised the Appellate Court (Reply Brief, at 11), the Illinois Supreme Court decided a case remarkably similar to our case at the turn of the last century. The Appellate Court appropriately followed that (and other) precedent in reversing the trial court dismissal.

The Rule. In *Martin v. C & NW Ry. Co.*, 194 Ill. 138 (1901), the Plaintiff's decedent was an acknowledged trespasser. He was "either thrown or fell upon one of the tracks, and was rendered helpless, and continued to lie upon" railroad tracks located in the City of Chicago. He was rendered unconscious prior to coming into contact with the

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train. The reason why the decedent fell was never explained. At the time of the occurrence, there was a city ordinance that made it a penal offense for anyone to go on the tracks where the decedent fell. Plaintiff alleged that the defendant railroad discovered the decedent on the tracks in a position of peril in sufficient time, by the exercise of reasonable care, to avoid the injury. (194 Ill., at 140 - 141).

In reversing directed verdicts by both the trial and the appellate courts, the Supreme Court explained: "[T]he decedent was a trespasser upon the right of way of defendant, and [the defendant railroad] owed him no duty until aware of his presence there, and of the fact that he was in peril." 194 Ill. 138, at 146 - 47. See also *Peirce v. Walters*, 164 Ill. 560 (1897).

When Duty of Care Begins. Specifically, the *Martin* Court ruled that it was the duty of the fireman, when he saw an object in an unusual place, to at least call it to the attention of the engineer rather than wait to see whether it might be an animate object. *Martin v. Chicago & N.W. Ry. Co.*, 194 Ill. 138, 147 (Ill. 1901).

Trespassers. In the *Martin* case, the Court acknowledged that the decedent, in deciding to walk on the tracks, was in violation of a city ordinance. Even so, it remained the duty of the train's fireman, who saw an object and only later realized it was a human, to call its presence to the attention of the engineer. 194 Ill., at 147. The Court acknowledged that while there is no duty for a railroad to maintain a lookout for trespassers, "**[W]e have also uniformly held that, when those operating the engine do know that a trespasser is upon the track and in a position of peril, it is their duty to use reasonable care to avoid injury to him.**" [Citations omitted, including to three

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other Supreme Court cases.] 194 Ill., at 147 - 48. (Emphasis supplied).

Restatement and Trespassers. Under the Restatement, the fact that the injured party was a trespasser made no difference as to the duty of ordinary care owed. See the Restatement (Second) of Torts, §336, comment c, discussed below. [1]

Beyond Martin. Another case, this one acknowledged by the CTA, was decided a couple of years later. In *Chicago Terminal Transfer Co. v. Kotoski*, 199 Ill. 383, 65 N.E. 350 (Ill. 1902), the plaintiff was injured while trying to cross a bridge. The trainman was on the rear of the train and had a clear view "of the perilous situation of the plaintiff" and actually saw the danger. The brakeman claimed he was unable to tell the engineer of the presence of the two. The trainman called to the plaintiff to run but made no effort to stop the train or give an alarm. There was no room for the two to get out of the way of the train, which proceeded to strike and injure them. The Supreme Court said that although there was no duty to maintain a lookout for the two, "we do hold that when they [the trainmen] knew that persons were there they had no right to *willfully* run them down and inflict injury upon them." *Chicago Terminal Transfer Co. v. Kotoski*, 199 Ill. 383, at 388, 65 N.E. 350 (Ill. 1902) (emphasis supplied).

The Joy Case. The CTA cites the case case of *Joy v. Chicago, B & Q. R. Co.,* 263 Ill. 465, 469 (1914), for the proposition that there is no duty to even attempt to determine that an object is a human being. *Joy* is distinguishable. In *Joy,* the plaintiff, relying on

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[1] *Flagrant Trespassers.* The Restatement Third of Torts, §52, goes so far as to differentiate between "flagrant" trespassers (in essence, miscreants) and those who are more like Ricardo – "technical" trespassers. Either way, *i.e.*, even if the trespasser is up to no good, once the trespasser is discovered and discovered to be in peril or insensible, the railroad has a duty of ordinary care for the safety of the individual.

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Martin v. C&NW, supra, contended that after an engineer saw an object on the track it became his duty to exercise reasonable care to determine what the object was. The plaintiff also argued that if the engineer had exercised such reasonable care, he could have discovered that the object was a man in time to have stopped his train before striking him. The Court distinguished *Martin* on the basis that the fireman, rather than the train's engineer, first saw the object 1400 feet away but did not identify it as being human until the object was only 360 - 380 feet away. The testimony was that the train could have stopped if the brakes had been applied within 100-125 feet. Furthermore, the "object" was within the City rather than in open country in a rural area. The Court concluded that "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." The Court cited a Utah case in support of that proposition. *Joy v. Chicago, B.&Q.R. Co.*, 263 Ill. 465, 469 - 70 (Ill. 1914).

Martin remains the controlling caselaw. The vast majority of jurisdictions *do* in fact follow the *Martin* rationale. The Restatement Second, §336, Comment b, illus. 1, makes the point. The illustration might sound familiar to the Court. The engineer of X & Y RR Co. sees lying upon the tracks a pile of clothing such as would give a reasonable man cause to suspect that it *might* contain a human being. (*Cf.* the police report in our case.) "[If true] ... the engineer is not entitled to assume that it is a human being but is required to keep the engine under control until he is certain that it is not."

Helpless or in Peril. Why would a court impose a duty of due care when there is a concomitant duty on the part of the plaintiff to steer clear of a train headed toward the

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plaintiff? The Court in *Miller v. General Motors Corporation* (4th Dist. 1991), 207 Ill. App. 3d 148, 158, in *dicta,* explained the difference. "It is only when it becomes apparent that he [the plaintiff] is insensible or helpless, or that the warning has not been heard, that something more than a whistle is required." Citing *Chicago Terminal Transfer R.R. Co. v. Kotoski* (1902), 199 Ill. 383, 65 N.E. 350; and W. Keeton, *Prosser & Keeton* on Torts § 58, at 399 (5th ed. 1984).

In *Kotoski,* cited above, the Supreme Court sustained the verdict for the plaintiff on the basis that the trainman, knowing of the hazard in which the plaintiff found himself, was duty-bound to notify the engineer to stop the train. *Chicago Terminal Transfer Co. v. Kotoski*, 199 Ill. 383, 65 N.E. 350, 385 - 86 (Ill. 1902).

Making the point even clearer: the Reporter's Notes for §336 include this observation: "When the defendant discovers that the trespasser is insensible or otherwise helpless, or that the warning has not been heard, something more than the warning is required." Section 336 has not been officially adopted in Illinois, but there is little doubt that it tracks Illinois law. Illustration 4 from §336 "is based on *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill.383, 65 N.E. 350 (1902)." Restatement Second of Torts, §336, Reporter's Notes.

Continued Vitality. The rulings in *Martin* and *Kotoski* remain good law. Thus: "This court has long recognized that a landowner must use ordinary care to avoid injury to the trespasser who has been discovered in a place of danger on the premises." *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 446 (Ill. 1992). See also *Magna Bank of McLean County v. Ogilvie*, 235 Ill.App.3d 318, 601 N.E.2d 1091, 176 Ill.Dec. 393 (Ill.

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App. 1992): "While a traveler generally must yield the right of way to a train, if it becomes clear that the pedestrian does not hear the warning, will not heed the signal or is unable to escape, then it is the duty of the crew to attempt to stop the train."

Place of Danger. The Supreme Court in *Rhodes v. Illinois Central Gulf R.R. Co.* (1996), 172 Ill.2d 213, 229, 665 N.E.2d 1260, 1268 also reiterated the validity of the *Martin* rule. There, though, the Court ruled against the plaintiff in a case where the injury was not brought on by activity of the railroad but instead by an ongoing, uninterrupted aggravation of closed-head trauma (bleeding within the skull, *i.e.*, a subdural hematoma). That injury could not be tied to the "place of danger." "A place of danger ... denotes a place which, by reason of a condition *or activity* on the premises, risks harm to anyone ...." (Emphasis supplied.) But the Court also made clear: "[A] trespasser discovered by a railroad on the tracks in the path of the railroad's moving train would properly be considered to be in a place of danger such that the railroad owed him a duty of ordinary care to avoid injury to him." *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill.2d 213, 230, 665 N.E.2d 1260, 1269 (Ill. 1996). Our case falls into the second category. Our case, as pled, involved "[A] trespasser discovered by a railroad on the tracks in the path of the railroad's moving train."

Public Policy in Support of the Rulings. The best explanation we have seen for the policy reasons behind the discovered trespasser rule came in *dicta* in a case out of the Fourth District. Again, in *Miller v. General Motors Corporation* (4th Dist. 1991), 207 Ill. App. 3d 148, 153 - 60, the Court cited the earlier railroad case of *Bremer v. Lake Erie & Western R.R. Co.* (1925), 318 Ill. 11, 148 N.E. 862 (which was cited later with

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approval in *Rhodes v. Illinois Central Gulf R.R. Co.* (1996), 172 Ill.2d 213, 230, 665 N.E.2d 1260, 1269) (C231-33):

> From the general rule of nonliability of a landowner to a trespasser, the rest of the law regarding trespassers is a list of exceptions. These exceptions have developed because of the concern that *human safety ought to be more important than the landowner's interest in unrestricted freedom to use his own land as he sees fit.* This view is especially prevalent in cases in which the burden on the landowner and the expense in taking precautions to prevent harm are not great. [Citing] *Ward v. K Mart Corp.,* 136 Ill.2d at 142-43. If that burden is very slight, and if the risk of harm to the trespasser is correspondingly very great, some commentators have found good reason to hold the landowner liable for injuries sustained on his land by the trespasser.

Miller v. General Motors Corp., 207 Ill.App.3d 148, 155, 565 N.E.2d 687, 690 - 91 (4th Dist. 1990) (emphasis supplied).

The Appellate Court in this case relied upon the Supreme Court case of *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 446, 605 N.E.2d 493, 178 Ill.Dec. 699 (Ill. 1992). In *Lee,* the Court repeated long-held Illinois law on the subject: "This court has long recognized that a landowner must use ordinary care to avoid injury to the trespasser who has been discovered in a place of danger on the premises." (Citations omitted.)

Spelling Out the Duty: Landowner's Activities vs. Conditions. Under Illinois law, what exactly is required of a landowner where the trespasser is discovered in a position of danger? The requirements depend, at least in part, upon the source of the danger – depending upon whether the danger is caused by actions or by conditions. See the Introductory Notes to IPI, §120.00:

> If, however, the property owner knew or should have known that **an artificial condition on his property** presented a risk of death or serious bodily injury, and if the owner knew of, or had reason to anticipate, the presence of trespassers in dangerous proximity to the hazard, then the property owner had a duty to exercise ordinary care to warn of the condition. [Citing] *Lee v. CTA*, 152

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> Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992) (applying the Restatement (Second) of Torts §337). (Emphasis supplied.)

But the IPI analysis of the duty owed a trespasser discovered in a position of peril does not stop with negligently created conditions:

> In addition, if the owner knew or should have known that the trespasser was in a position where the owner's **activities** could endanger the trespasser, then the owner has a duty of ordinary care to avoid injuring others from those **activities**.

Restatement Sections 336 and 337. In *Lee v. CTA*, the Supreme Court adopted §337 of the Restatement Second of Torts. *Lee v. CTA*, 152 Ill.2d 432, 447 - 48, 605 N.E.2d 493, (1992) As we argued in the trial court and in the appellate court, we believe §336, "*Activities* Dangerous to Known Trespassers.," applies to our case. C348, *et seq.* Section 336, "Activities Dangerous Known to Trespassers," 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.

Appellate Court's §337 Analysis Was Correct. Under the analysis of *either* section, a duty of due care applied to the CTA under the facts of our case. Assuming §337 is the section of the Restatement that applies, the Appellate Court analysis was correct. The CTA argues that the Appellate Court incorrectly applied Subsection b. The reason? Since the hazard of a moving train is open and obvious, as a matter of law, CTA could not *objectively* discern / foresee that Ricardo Quiroz was unable to appreciate the risk posed by the CTA trains.

The Appellate Court pointed out the obvious fallacy in that argument. In ¶¶21 - 23, the Court focused on the facts that our Second Amended Complaint specifically

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alleged that the CTA discovered Ricardo in a place of danger; that he 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. Those allegations invited the inference that the train operators saw Ricardo but nevertheless did not stop the trains. ¶¶21 - 23.

To be clear: the CTA's argument, in this respect, invites this Court to ignore reality and reach the absurd conclusion that although the CTA had *actual* notice of Ricardo, in a position of peril, it was nevertheless not *objectively* foreseeable to the CTA – again, who *actually* saw Ricardo – that Richard might be there and in harm's way.

II. THE OPEN-AND-OBVIOUS RULE DOES NOT CARVE OUT AN EXCEPTION TO THE DISCOVERED TRESPASSER RULE OF ORDINARY CARE.

History. The open-and-obvious hazard analysis has been in use for decades. The first and perhaps most comprehensive analysis was in the case of *Ward v. Kmart Corp.*, 136 Ill.2d 132 (1990). There, the court discussed and adopted Comment f of the Restatement Second of Torts.

Limitations on the Open-and-Obvious Rule. The *Ward* Court also warned of the possible inappropriate interest in expeditiously disposing of cases by virtue of the simple fact that a hazard might be construed as open and obvious. "Attempting to dispose of litigation by merely invoking such relative and imprecise characterizations as 'known' or 'obvious' is certainly no adequate substitute for assessing the scope of the defendant's duty under the circumstances ...." (Citation omitted.) 136 Ill.2d, at 147-48.

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The *Ward* Court also cited 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 27.13, at 244-47 (2d ed. 1986). The very next page, 248, footnote 25, third paragraph, includes references to situations / cases where a plaintiff's knowledge of an open-and-obvious hazard did not negate the duty of due care. Those situations include: 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. "These situations will have a bearing on contributory negligence, but they will also bear directly on the reasonableness of defendant's precautions."

Warning of a Hazard May Not Be Enough. Both the 2nd and 3rd editions of the Harper James text (again, §27.13) point out that there are situations where a warning is not enough, because the probability of harm in spite of such a precaution is still unreasonably great. "And the books are full of cases in which defendants, owing such a duty, are held liable for creating or maintaining a perfectly obvious danger of which plaintiffs are fully aware." The 3rd edition, at note 28, cites the Illinois Supreme Court case of *LaFever v. Kemlite,* 185 Ill.2d 380 (1998) in support of that proposition. Harper, James and Gray on Torts, Third Edition (2009), at 277.

Foreseeability of the Landowner, not the Land Entrant. LaFever clarified the notion that foreseeability was to be based upon the reasonableness of the landowner's actions rather than the entrant's. "The Restatement directs that with regard to open and obvious hazards, liability stems from the knowledge of the possessor of the premises, and what the possessor 'ha[d] reason to expect' the invitee would do in the face of the hazard."

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Circumstances of a Particular Case Matter. The *LeFever* Court also pointed out that, as is the case here, in some circumstances, what might be a typical open-and-obvious hazard situation may not be dispositive, depending on if, *under the circumstances,* the defendant in the exercise of reasonable care should anticipate that the plaintiff will fail to see the hazard. Citing *Allgauer v. Le Bastille, Inc.* (1981), 101 Ill.App.3d 978, 57 Ill.Dec. 466, 428 N.E.2d 1146. In that regard, see also *American National Bank & Trust Co. v. National Advertising Co.*, 149 Ill.2d 14, 26, 171 Ill.Dec. 461, 594 N.E.2d 313 (1992). There, a billboard painter was electrocuted when he came into contact with a high-voltage power line that hung only 4 ½ to 5 feet above a walkrail that ran the length of a billboard. The Supreme Court concluded that although the power line constituted an open and obvious danger (*American National Bank,* 149 Ill.2d at 28, 171 Ill.Dec. 461, 594 N.E.2d 313), the distraction exception applied (*id.* at 29, 171 Ill.Dec. 461, 594 N.E.2d 313). How so? It was reasonably foreseeable that a worker would become distracted by having to watch where to place his feet on the walkrail. The worker "could not simultaneously look down at his feet and up at the overhead power line."

Choate. The Supreme Court ruling in *Choate v. Ind. Harbor Belt R.R. Co.*, 2012 IL 112948 was the basis for the trial court's ruling in our case: because the danger of a moving train is one which is open and obvious, as a matter of law, there simply could never be a legally recognizable duty of care in our case.

Five Points of Distinction. The *Choate* case and the others cited by the CTA and *Amici* are readily distinguished from our case. In *Choate* and the other cases cited by the

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Defendant, an individual *chose*, for whatever reason, to expose himself or herself to the danger by stepping in front of or onto the path of a moving train. In *Choate*, there was no indication that the engineer, conductor, or any other train personnel were aware of his existence. In *Choate*, there was no indication that the plaintiff was in a helpless or perilous condition. In *Choate,* there was no indication that the magnitude of the burden on the railroad would have been a simple matter of either bringing train traffic to a halt or to call to notify other trains of the existence of the plaintiff on the tracks, and in a helpless or perilous state. In *Choate*, there was no indication that additional fencing would have made a difference.

We respectfully suggest that the trial court misapplied the breadth of the ruling in *Choate.* The fact that the hazard posed by a moving train is one which typically is open and obvious – and one that was ruled to be open and obvious "as a matter of law" in *Choate* and in other cases – does not mean that it is the single, dispositive fact in *all* cases involving train-pedestrian collisions. The fact that a hazard is open an obvious in some instances does not mean that its existence is unforeseeable to all, as a matter of law.

In *Choate,* a twelve-year-old boy was injured when he tried to jump onto a moving freight train multiple times in an attempt to impress his friends. *Choate,* at ¶¶ 7-8. The *Choate* Court held that the risk of being hit by a moving train while trying to jump on it was an open-and-obvious danger to the twelve-year-old, thereby obviating any duty owed by the defendant train company. *Id.,* at 38 - 39. The evidence produced in *Choate* demonstrated that the plaintiff fully understood and voluntarily proceeded to encounter the known risk of trying to jump onto a moving train multiple times. *Id.* at * 7 - 9.

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"As a Matter of Law." In our case, the trial court focused on the fact that the Supreme Court in *Choate* had ruled that the danger of a moving train was open and obvious "as a matter of law." (Discussion in *Choate*, at ¶¶34, 42, 44 - 45.) While that much is true, we here point out that in *every* duty analysis, the ruling to be made regarding duty is one which is made "as a matter of law." But that is *not* to say that in every case involving a pedestrian - moving train collision that the hazard presented to the plaintiff is one which is open and obvious – and therefore *always* negates any duty of care – "as a matter of law." See*, e.g.,* the discussion in this brief regarding *American National Bank & Trust Co. v. National Advertising Co., supra,* at 24 - 25.

Voluntary Exposure. In *Choate*, the Court stated, "It has never been part of our law that a landowner may be liable to a trespasser who proceeds to wantonly expose himself to unmistakable danger in total disregard of a fully understood risk, simply for the thrill of the venture." ¶39

By way of contrast, in our case, Ricardo did not voluntarily proceed to encounter a known risk. We alleged that he *fell* onto the tracks as he either fell or was pushed from the platform and somersaulted onto the tracks. This was *not* a situation, for example, where Ricardo encountered a construction site hazard in a roped-off area, or hopped down to the tracks to take a nap, or where he was trying to jump onto or in front of a moving train. In our case, the hazard came about as a result of Ricardo's presence on the tracks - one that was involuntary and one that he could do nothing about - which subjected him to the risk of a train collision. At this point in this case, we still do not know why Ricardo jumped? was pushed? onto the tracks.

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McDonald and Similar Cases. In *McDonald v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 2013 IL App (1st) 102766-B * 3; 988 N.E.2d 1078 and in other cases cited by the CTA, there is a common denominator: the injured party *chose* to encounter the risk. That was not true in our case. Moreover, in our case, the injured party was in obvious peril and helpless. The rationale in deciding the cases cited by the CTA simply do not apply to the facts of our case.

Involuntary Exposure. This case was more like the second set of cases mentioned above, Brief, at 24, and cited in 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 27.13, at 248, note 25 (2d ed. 1986). That note includes references to situations where a plaintiff's knowledge of an open-and-obvious hazard does not negate the duty of due care: 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.

In our case, a duty of due care exists because Ricardo was an individual discovered to be in an obvious position of peril. To the point, there was *nothing* about this situation where Ricardo, if only he had been warned, would have been able to avoid the hazard of being struck by a train. By all accounts, Ricardo's encounter with the train tracks was involuntary and had nothing to do with an absence of appropriate warning.

§343A, Comment e. Why should a plaintiff's voluntary vs. involuntary encounter with a hazard make a difference? Comment e to §343A provides an answer: An invitee [here, a trespasser] is entitled only to knowledge equal to the owner's of hazards he/she may encounter. And if he is aware of those hazards, "he is free **to make an intelligent choice** as to whether the advantage to be gained is sufficient to justify him in incurring

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the risk by entering or remaining on the land." (Emphasis supplied.)

Discovery of the Trespasser. Another qualitative difference in our case, as opposed to *Choate,* is the fact that the young man hopping the train in *Choate* was not seen by an engineer or conductor. *Choate* did not involve a discovered trespasser. The CTA referred to Justice Kilbride's dissent where Justice Kilbride discussed the fact that the *Choate* railroad had actual knowledge of child trespassers. But the argument fails to mention that there was *no* evidence in *Choate* to the effect that train personnel had actual knowledge of the presence of the plaintiff in the case, specifically, let alone that the plaintiff was discovered to be in peril or in a helpless state.

Position of Peril. Ricardo was discovered by the CTA in a position of peril which, in his condition, he did not recognize and from which he could not remove himself. The danger involved here was not one brought on by a danger of the premises. It was from his presence in a CTA tunnel – one that he could do nothing about – which subjected him to the risk of a train collision. We know he was there and that for whatever reason was unable to get up and move from the position of peril. He was unable to recognize the danger of laying next to the train tracks; he was also unable to remove himself from that danger. C 121-122. Ricardo's being in a position of peril while in a CTA tunnel is comparable to the peril posed to the plaintiff in *Chicago Terminal Transfer Co. v. Kotoski,* 199 Ill. 383, 386, 65 N.E. 350 (Ill. 1902). In that case, the plaintiff was aware of the presence of the train, but he was on a railroad bridge with no avenue of escape.

Magnitude of the Burden. The *Choate* Court also took into consideration the magnitude of fencing huge areas. ¶43 - 44 The focus of expert testimony during the trial

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was on the extent to which fencing was required to prevent this sort of event. ¶41 The Supreme Court addressed the magnitude of imposing such a duty. In the event it ruled that a duty to fence was required every place where an accident occurred, the railroad "would likewise be subject to the duty of fencing the innumerable places along its many miles of tracks frequented by trespassing children." ¶43

The CTA and *Amici* argue that it would be very difficult to require trains to maintain a lookout for trespassers, given the number of miles of track that exist in the State of Illinois. That is *not* the situation being addressed in our negligence counts. The 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 remove the individual from harm's way.

Foreseeability. Much of the difference in this case, compared to *Choate*, is elated to foreseeability of harm. As the Court pointed out in *LeFever,* foreseeability in cases like this are to be determined from the landowner's perspective. (Whatever harm might have been foreseen by the plaintiff would be a matter for an assumption-of-risk defense.) So what is foreseeable to a train operator who sees a person in a position like Ricardo's? In our case, Ricardo was directly in the path of the operators of the two CTA trains as they ran past him. He was "injured." He was "unable to remove himself from the tracks." He was in a position of peril. But was that position of peril apparent to the CTA? "Obviously." "Clearly." The peril in question? "Injury or great bodily harm." From what? "In the event he were to be struck by a CTA train." The area was lighted and the

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trains had headlights. The operators "saw" Ricardo. (Second Amended Complaint, ¶¶5 - 19) C121 - 23

Whether the CTA knew that trespassers were in the area where Ricardo was, from time to time, is certainly relevant, but knowing that people *might* be in an area because they have been there in the past is not the same as *actually* seeing and *actually* knowing that a person was there and in a position of peril – presently. Foreseeable harm in the first instance is a matter of possible / likely / probable; in the latter it is likely / probable.

The Illinois Supreme Court answered the question of what is foreseeable in the circumstance of a trespasser discovered in a position of peril 122 years ago in the *Martin* decision and has re-affirmed that principle ever since. There may be no duty to keep a lookout for the trespasser, but once the trespasser is seen, a duty of care applies.

Proximate Cause. Beyond the magnitude of such a burden, the *Choate* Court pointed out that the presence or absence of additional fencing would have made little difference, given the facts. "[P]laintiff admitted that he was trying to impress his friends. No fence would have prevented such bravado. " ¶44

Comment f Exceptions to the Open and Obvious Rule. Much has been written in the caselaw about the "two" stated exceptions to the open–and-obvious danger rule set forth in Comment f of the Restatement, Second, of Torts, §343A. A look at the discussion by the Supreme Court in *LaFever v. Kemlite Co., a Div. of Dyrotech Industries, Inc.*, 185 Ill.2d 380, at 448, 706 N.E.2d 441, at 448 (Ill. 1998), and Comment f itself shows that while there are two considerations behind the open-and-obvious hazard rule that have been adopted, Comment f to §343A actually provides four articulated

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exceptions. These exceptions are separated in the text of both *Lafever* and Comment f by the disjunctive "or":

> Whether the possessor of the premises should guard against harm to the invitee, despite the obviousness of the hazard, depends on two considerations. According to committee comments appended to section 343A (Restatement (Second) of Torts § 343A, Comment f, at 220 (1965)), the possessor of the premises should anticipate harm to an invitee when the possessor **[1]** 'has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or **[2]** will forget what he has discovered, or **[3]** fail to protect himself against it.' [Citation omitted.] Similarly, harm may be reasonably anticipated **[4]** when the possessor 'has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.' Restatement (Second) of Torts § 343A, Comment f, at 220 (1965).

LaFever v. Kemlite Co., a Div. of Dyrotech Industries, Inc., 185 Ill.2d 380, at 448, 706 N.E.2d 441, at 448 (Ill. 1998). The bases for the rule was set forth in the previously referenced discussion in 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 27.13, at 248 (2d ed. 1986), footnote 25, third paragraph (discussed above, at 23).

Our point here is that although we are aware that there are only two recognized exceptions to the open-and-obvious hazard rule, generally, Comment f itself recognizes that there may be situations where an individual fails to protect himself against a stated hazard (our number 3). This is one such case. To state the obvious, the third exception applied because the CTA should have anticipated harm to Ricardo because the CTA had reason to know that he would "fail to protect himself against" the possibility of harm.

Hypothetical. We repeat here the hypothetical we posed in the Appellate Court. We believe it demonstrates how it would be inappropriate to find no duty of care in a situation with an individual who was observed to be in a helpless state by a railroad.

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Assume a police officer is chasing a miscreant. The police officer, in doing so, chases the miscreant into the catwalk area. The officer falls onto the tracks and is injured upon falling and was in a position of obvious peril. She is seen by one or two CTA motormen as their trains run past the officer. How could the CTA escape responsibility for ignoring the police officer while in a position of peril? Or consider the same hypothetical, but change one fact. Instead of a police officer chasing the miscreant, what if it was simply the victim of a purse snatcher or another civilian chasing a purse snatcher on the CTA? Same scenario, the civilian is injured, in a position of obvious peril, but outside the normal CTA platform and instead in a catwalk area. In the process of chasing the miscreant, somehow / some way the civilian loses his or her footing and falls into the CTA tunnel, injured, in a state of obvious peril, and unable to get back. Is there no duty on the part of the CTA, having seen and recognized the civilian, to help him or her? Can the CTA claim that it owed no legal duty to that individual?

The above hypothetical situations illustrate our point pretty well. There simply are times when an individual – trespassing or not – will be discovered in a position of peril. Under the Restatement, the premises owner, having discovered that individual, cannot be allowed simply to ignore the plight of the person. The open-and-obvious rule exists, but that rule has exceptions. One of them fits the situation of our hypothetical as well as the situation of Ricardo, where "the possessor has reason to expect that the invitee ... will fail to protect himself against [the danger]." The fact that a possessor should have that expectation has long been the established public policy of Illinois.

Can a Hazard be "Open and Obvious" to a Person Helpless and in a Position of

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Peril? This may be a case where the hazard is simply not open and obvious, because harm to the plaintiff was actually foreseen under these circumstances, even though it might not necessarily have been one that was typically foreseeable. *Cf., American National Bank & Trust Co. v. National Advertising Co.*, 149 Ill.2d 14, 26, 171 Ill.Dec. 461, 594 N.E.2d 313 (1992) (low-hanging electric wire in an area requiring the plaintiff to look down; hazard might otherwise have been open and obvious).

Policy Reasons for the Open-and-Obvious Hazard Rule. The Court in ***Ward v. K Mart Corp.,*** 136 Ill.2d, at 147 (1990) set forth the open-and-obvious rule:

> The only sound explanation for the "open and obvious" rule must be either that the defendant in the exercise of reasonable care would not anticipate that the plaintiff would fail to notice the condition, appreciate the risk, and avoid it, or perhaps that reasonable care under the circumstances would not remove the risk of injury in spite of foreseeable consequences to the plaintiff. But neither of these explanations justifies a per se rule that under no circumstances does the defendant's duty of reasonable care extend to conditions which may be labeled "open and obvious" or of which the plaintiff is in some general sense "aware."

Our case is before this Court 30 years after *Ward* was decided, but our facts fall clearly outside the only two articulated justifications for the open-and-obvious rule: the CTA here *did* notice the presence of the plaintiff; and reasonable care required that the trains both slow down to avoid striking Ricardo and that the operators notify the CTA that there was a person on the tracks.

Entire Duty Analysis Required. The entire negligence duty analysis, including the open-and-obvious rule, was set forth by the Supreme Court in the case of *Bruns v. City of Centralia,* 2014 IL 116998, ¶¶17 - 30. Whether a condition is open and obvious is only one part of the entire four-part duty analysis. The four factors include: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the

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burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant.

Bruns recognized and repeated the Illinois Supreme Court's rule that the "open and obvious" rule is not a per se´ bar to the imposition of a duty. *Bruns,* at ¶19.

Foreseeable Harm. We understand that typically, if a hazard is open and obvious, the four-part calculus may result in a finding of no duty. However, the point of the adoption of the discovered trespasser rule is that foreseeable harm to the person on the tracks is obvious and preventable, notwithstanding the status of the individual as a trespasser. In our case, not one but *two* different trains ran past Ricardo without the operator calling for help (at least as far as we know, given the absence of discovery). Under those circumstances, the magnitude and consequences of placing a burden of shutting down access while a human being is extricated from a train tunnel is minimal in comparison with the harm likely to follow in the absence of such intervention.

Reconciling Different Sections of the Restatement Second of Torts.[2] The CTA argues, in essence, that there is not room enough in Illinois jurisprudence for the existence of both the open-and-obvious hazard rule and the discovered trespasser rule. The Restatement, Second, of Torts didn't see it that way.

Chapter 13 of the Restatement is entitled "Liability for Condition and Use of the Land." Chapter 13, Title B, is "Liability of Possessors of Land to Trespassers." That includes §§333 - 339. Chapter 13, Title E is "Special Liability of Possessors of Land to

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[2] The Restatement Third of Torts would continue to find a duty of ordinary care for discovered trespassers – even those who are miscreants, as opposed to "technical" trespassers like Ricardo. See §52 of the Restatement Third of Torts.

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Invitees." Our point: both §§336 - 337 (Discovered Trespassers) and §343A (Open and Obvious) *all* fall under the broad category of Liability of Land to Trespassers.

Ongoing Recognition of Discovered Trespasser Rule Despite Adoption of §343A. We here make the point as clearly as we can: *After* this Court's rulings in *Ward*, *after Bucheleres v. Chicago Park District,* 171 Ill.2d 435 (1996), *after American National Bank & Trust Co. of Chicago v. National Advertising Co.,* 149 Ill.2d 14 (1992); and *after Deibert v. Bauer Brothers Construction Co.,* 141 Ill.2d 430, 434–36, 152 Ill.Dec. 552, 566 N.E.2d 239 (1990), the Illinois Supreme Court stated: "[A] trespasser discovered by a railroad on the tracks in the path of the railroad's moving train would properly be considered to be in a place of danger such that the railroad owed him a duty of ordinary care to avoid injury to him." *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill.2d 213, 230, 665 N.E.2d 1260, 1269 (Ill. 1996).

If There Is No Duty to Maintain a Lookout, Why Can't a Train Just Go Ahead and Run Over a Trespasser with Impunity? The *Miller* Court, citing Prosser, among other authorities, set forth the rationale as to why the duty owed a trespasser changes once the train operators become aware of the trespasser's presence:

> [T]he engineer of a train who discovers a trespasser ahead on the track may ordinarily assume that he is in possession of his faculties and that after proper warning he will remove himself to safety. (Citation omitted.) *It is only when it becomes apparent that he is insensible or helpless, or that the warning has not been heard, that something more than a whistle is required. [Citing] Chicago Terminal Transfer R.R. Co. v. Kotoski* (1902), 199 Ill. 383, 65 N.E. 350; see also W. Keeton, Prosser & Keeton on Torts § 58, at 399 (5th ed. 1984).

Miller v. General Motors Corp., 207 Ill.App.3d 148, at 158 (4th Dist. 1990) (emphasis supplied).

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One hundred and twenty years ago, the Illinois Supreme Court stated pretty much the same thing in the *Kotoski* case: "We do not hold that it was the duty of the trainmen to anticipate the presence of trespassers on the tracks or to keep a lookout for them, but we do hold that when they knew that persons were there they had no right to willfully run them down and inflict injury upon them." *Chicago Terminal Transfer Co. v. Kotoski,* 199 Ill. 383, 65 N.E. 350, at 387 - 88 (Ill. 1902).

We do not believe that the public-policy interest in keeping the "rapid" in rapid transit outweighs the seemingly straightforward principle set forth in these authorities.

Litigation Games. The CTA argues that allowing this sort of case to proceed might result in plaintiffs raising all sorts of allegations in cases like those in this case. Why, if the Court were to rule for the Quiroz family here, it would be creating a "loophole," no less. Plaintiffs could make all sorts of allegations. The CTA brief goes on, at page 43, to describe how juries would answer questions of duty as well as breach.

That argument is a bit unnerving, particularly in the context of this particular case. Forgetting, for the moment, that prosecuting a case on behalf of a family which has lost a son can be exceptionally difficult for the lawyers who undertake that sort of representation, the CTA seems to be telling the Court that all a plaintiff would have to do is to come up with a pleading, comparable to ours in this case. The plaintiff could then hire an expert, a gun for hire, as it were, and then take the case to a jury. It would then be up to the jury to decide the question of duty, as opposed to breach.

That argument ignores the Code of Civil Procedure, the Illinois Supreme Court Rules, and existing jurisprudence. The CTA is no doubt well-aware that there a motion

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for summary judgment could have been filed in a case like this. However, such a motion would first require that: 1) discovery proceed; and 2) that there be no questions of fact. In this case, *all* of the litigation in this case[3] could have been avoided if the CTA had simply responded to our email with something *other* than "another round of motions."

We here raise the same point we did in our Reply Brief in the Appellate Court, at 3. Why did the CTA never respond to our request for in-cab video like the in-cab video seen in the Felon Smith case? That video would tell us exactly what the engineers of (no fewer than) two trains were doing as they drove past / by Ricardo. Again, we were and remain unwilling to take the CTA's word for the fact that all rules were followed.

The easiest way to have resolved the conflict in this case (see our email) would have been for the production of the in-cab and other relevant video.

III. IN THIS §2-615 MOTION RULING, THE TRIAL COURT ERRED BY NOT CONSIDERING ONLY FACTS IN THE COMPLAINT AND INFERENCES THEREFROM; IN NOT CONSTRUING THOSE FACTS IN A LIGHT MOST FAVORABLE TO PLAINTIFF; AND IN NOT CONSIDERING FACTS WHICH, IF PROVEN, WOULD HAVE ENTITLED PLAINTIFF TO RECOVER. THE TRIAL COURT ALSO ERRED BY CONSIDERING THE PARTIAL CTA VIDEO AS SUBSTANTIVE FACT IN OUR PLEADINGS.

Section 2-615 Motions Generally. A motion to dismiss under §2-615 challenges the legal sufficiency of a complaint. In ruling on such a motion, a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. The essential question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of

[3] For Plaintiff in this case: our Response to the Motion to Dismiss our Second Amended Complaint; our Motion to Reconsider; our Reply; our Appellate Court brief; our Motion to Strike in the Appellate Court; our Reply brief in the Appellate Court; our Answer to the PLA; this Brief; and presumably preparation for and participation in Oral Argument.

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action upon which relief may be granted. A cause of action should not be dismissed under §2-615 unless it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Cochran v. Securitas Sec. Servs. USA, Inc.*, 2017 IL 121200, 93 N.E.3d 493 (Ill. 2017), ¶11. In ruling upon a 2-615 motion, a trial court may consider only the allegations of the complaint (*Curtis Casket Co. v. D.A. Brown & Co.*, 259 Ill.App.3d 800, 198 Ill.Dec. 145, 632 N.E.2d 204 (1994)). It may not consider other supporting material. *Bryson v. News America Publications, Inc.*, **174 Ill.2d** 77, 91, 672 N.E.2d 1207, 1216 (Ill. 1996) (citing *Oravek v. Community School District 146*, 264 Ill.App.3d 895, 202 Ill.Dec. 15, 637 N.E.2d 554 (1994)).

§2-615 vs. Summary Judgment. Our point here is that in a §2-615 analysis, a defendant may not cherry-pick what it wants to produce to the plaintiff, and then incorporate that uncontested but partial discovery as a proper subject of judicial notice. The court, in ruling on a §2-615 motion, may not consider affidavits, the products of discovery, documentary evidence not incorporated into the pleadings as exhibits, testimonial evidence or other evidentiary materials. *Elson v. State Farm Fire and Cas. Co.*, 295 Ill.App.3d 1, 6, 691 N.E.2d 807, 811 (1ST Dist. 1998).

The Facts in this Case Are Undeveloped, Underdeveloped, or Very Much in Dispute. We hope it is abundantly clear from our Statement of Facts that in the trial court, in the appellate court, and in this Court (Answer to PLA, at 1-2), our primary purpose in filing this lawsuit has been simply to determine how Ricardo Quiroz came to die. Given the *very* limited facts which were provided by the CTA, we now know very little which had not been included in the police report other than the facts that two CTA

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trains ran over or past ran Ricardo; and that neither train did anything to prevent additional trains from coming into contact with Ricardo. We do know that a subsequent train operator was able to see what, he later told police, appeared to him to be garbage on the tracks. As he got closer, he realized it might be a person. He notified the CTA to turn the power off. He also called 911. C201

Undeveloped Facts: Our Case Was Prejudiced by a Lack of Discovery. We have a number of questions which remain. This is not a Motion for Summary Judgment, so the answers to these questions, for purposes of a §2-615 analysis, must be resolved in favor of the Plaintiff. Among other questions: after already having gone down to the platform, what exactly did Ricardo discuss with the ticket agent? Might he have needed to use a bathroom? Was he otherwise ill? What does the CTA do when people request to use a washroom? In the absence of permission to use a bathroom, was Ricardo then obliged to go to a private area to deal with either of these possibilities? When the two train operators saw Ricardo while passing by him, why did they not call for help? Why didn't those two, unlike the subsequent train operator, call for help? In the wake of the Felon Smith case, we know that there likely was in-cab video taken of operators of the two CTA trains which ran over but did not strike Ricardo. What was visible, inside the cab of the trains from those trains and others which drove through this area? What did the in-cab video disclose in terms of what the operators actually saw while driving past Ricardo? Were the train operators actually looking the other way as they ran over Ricardo? Or were they asleep? Why weren't the videos produced? It seems clear that we know more about what happened to Ms. Smith, and the operator of the train which struck her than we

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do in this case, which has been pending in the Circuit Court, the Appellate Court of Illinois, and now this Court. There was also the surveillance video "at the front of the SB train" mentioned in the police report. Presumably there was surveillance video in the other two trains. What could be seen in the surveillance video from what could be seen in front of the trains? Was there a call that was in fact made, but no one at the CTA reacted by shutting down the succeeding trains? What is the only reasonable inference to draw from the CTA's failure to produce?

Is there a policy the CTA has in place where operators are obliged – of all things – to look where they are going not just at a platform but in an area, *e.g.,* 200 yards in front of a boarding platform? We do know the operators do not have to steer. Are operators instructed that their attentiveness could be a matter of life and death? See, *e.g.,* C189; C237 - 38

Were the drivers of the trains that went past Ricardo disciplined? What was their stated bases for not seeing Ricardo? How prevalent is the problem of distracted CTA train operators? What is the CTA's stated policy and procedure regarding operators watching the tracks (raising the additional question of whether the CTA already had undertaken a duty of ensuring that operators of its trains look where the train is headed – see C203-204.); Were the CTA spokespersons being truthful when they told the press that they take the matter of CTA train operators watching the tracks in front of them "very seriously?" How many engineers have lost their jobs for not paying attention to what is in front of him or her?

We know that it is common knowledge – reported in a Chicago newspaper, no

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less – that the operators of CTA equipment have been driving while distracted for years and were not being disciplined for doing so. (C207-208.) We know from the NTSB report of at least two instances where operators fell asleep. And in the wake of the reporting from the Felon Smith case, we know the CTA's policies were for its drivers to keep their eyes on the track in front of them and that CTA drivers could be – and have been – disciplined for not doing so. C203-205.

Because this case was dismissed without discovery being allowed, even more questions remain unanswered. Again, for purposes of a §2-615 analysis, at the very least, these questions must be resolved in favor of the Plaintiff.

Our point in submitting these questions: the answer to these questions may lead to a "set of facts [which] can be proved which will entitle Plaintiff to recover." In our case, many of these additional, specific facts came to light in an odd way: the research we performed in order to respond to the CTA's Motion for Sanctions. Nevertheless, they were and are a part of the record developed in this case. The possible facts which may develop via discovery, along with the facts which have already been developed, both via the limited input from the CTA and from our ancillary investigation, allow for "reasonable inferences that may be drawn" which in turn lead to a set of facts which entitle Plaintiff to recover. See, *e.g.*, our argument asking for more discovery during the hearing on the Motion to Reconsider. R6, transcript at 16 - 17 We referenced, specifically, the *Tribune* article and the policies and procedures referenced in the *Sun-Times* article as being the basis for further discovery. We had previously mentioned other theories of liability (C190) with the additional information we had developed in response

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to the CTA's Motion for Sanctions (which Motion had accompanied the CTA's §2-615 Motion to Dismiss). (C132 *et seq.*)

Questions to be Answered in Favor of Plaintiff. To reiterate, for purposes of a §2-615 motion, the answer to all of these questions and others that we raise or points we make, be they based upon reasonable inferences or otherwise, must be construed "in a light most favorable to the Plaintiff."

Insufficient Facts. The CTA, and not Plaintiff, chose to seek review of this matter in this Court rather than proceed in the trial court with discovery and then moved for dismissal based upon a Motion for Summary Judgment.[4] Any complaint by the CTA that the facts in this appeal are one-sided may be accurate, but that is what an analysis pursuant to §2-615 pre-supposes.

Discovery Developed During Other Wrongful Death Cases. We recognize that, particularly for lawyers and judges not involved personally in Wrongful Death litigation discovery, it might seem that the preceding questions and implications we make are in fact far-fetched – little more than a matter of smoke, mirrors and conjecture. With that notion in mind, we submitted to the trial court, the appellate court, and to this court (in our Answer response to the PLA), surprising answers to questions not dissimilar from those posed above – *viz.,* questions that go beyond the pleadings. Those answers from other cases demonstrate that our argument here is more than a matter of wishful thinking.

As we explained in the Trial Court below, at C-179 - 181, our firm alone has been involved in a number of cases in the past, three of which went to verdict, where the facts

[4] Which pre-supposes that we would have continued pursuing this case in the event the other video established that there was no basis for recovery in this case.

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which formed the basis of our liability theory were not available to us until after substantial discovery had been undertaken. In one, the jury held a thoracic surgeon liable for the death of a young man for actions / omissions during a follow-up consult in an emergency room. Of significance: we had been completely unaware of the consult by the doctor who saw the decedent in the ER; the doctor had not made a single note in the patient's chart. Because the patient / decedent was unable to tell us about it, we first learned of the visit during the course of the surgeon's discovery deposition. (***Thiele v.*** *Ortiz*, 165 Ill.App.3d 983 (1st Dist. 1988).) In another case, a young man was killed by an Amtrak truck while crossing the street close to Union Station. We were required to file a separate lawsuit in Ohio to secure the testimony of the sole eyewitness – also employed by Amtrak but who later "retired" (and was no longer subject to a Rule 237 Notice to Appear at Trial). The testimony, which we set forth in the Trial Court, was disturbing (both to us and the jury). C-179 - 180 In a third case, a young man having an asthma attack died after his mother phoned 911 seeking help. The 911 call went unanswered for more than 20 rings. The paramedics responding to the 911 call testified under oath that the young man had signs of early rigor mortis when they arrived. They implied the young man was already dead when the call was made. During trial preparation, the lawyer in charge of the case, Paul McMahon, turned the volume all the way up on our office boombox to replay the 911 tape.[5] At that volume, the young man – the one whose body supposedly had rigor mortis when first seen – could be heard, but only in the background, complaining, "I can't breathe." *Gant v. City of Chicago.*

[5] The reason as to why McMahon decided to turn the volume on the tape up all the way (a true story) sounds even more far-fetched than Doug Gant's voiced inability to breathe.

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In addition to those three cases, we have had at least one other case which was originally dismissed on a pleadings motion. In *Lopez v. Clifford Law Offices, P.C.*, 841 N.E.2d 465, 362 Ill.App.3d 969 (Ill. 2005) (PLA den. 218 Ill.2d 541 (Ill. 2006)), a legal malpractice case, a §2-619 dismissal was reversed by the Appellate Court. When on remand discovery on the underlying case was undertaken, the facts developed during the depositions were both compelling and completely contrary to the official story provided by the exceptionally well-qualified (Columbia U. Ph.D.) administrator of a special ed school, which story followed in the wake of a drowning death of a young, severely mentally handicapped 14-year-old student from the school.

§2-615 Analysis. Our point: for purposes of this §2-615 analysis, in view of the pleadings, the reasonable inferences therefrom, and in the complete absence of discovery, there are a great number of inferences demonstrating:

1) Ricardo was clearly visible, helpless, and in a position of peril;

2) In-cab video of the two operators which passed over Ricardo would have shown that the operators were asleep or otherwise distracted;

3) The CTA has had actual notice on the issue of CTA drivers who caused collisions with pedestrians due either to being distracted or literally asleep at the wheel; and

4) The CTA has a policy under the terms of which its operators are to watch the track in front of them, which policy justified the CTA's termination of the employment of at least two CTA train operators.

Purported Judicial Notice. The Trial Court here took judicial notice of the "facts" included in the video. That sort of video, which with an appropriate foundation might be considered evidence in a Motion for Summary Judgment, should not have been considered in deciding a §2-615 motion – other than as facts that can be proved "that

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would entitle a plaintiff to recover." Those sorts of Answers to Discovery might have their place in a §2-619 motion or in a motion for summary judgment. They do not belong in a §2-615 motion, other than as noted. *Elson v. State Farm Fire and Cas. Co.*, 295 Ill.App.3d 1, 6, 691 N.E.2d 807, 811 (1ST Dist. 1998).

The CTA's stated basis for having its video considered in a §2-615 motion is the fact that it was authenticated and never contested as to its authenticity and accuracy. CTA Brief, at page 5. The same might be said of a Answers to Interrogatories favoring a defendant or self-serving affidavits, at least for purposes of a §2-615 analysis. The primary problem with that argument, in the context of a §2-615 motion, is that a plaintiff opposing the motion – at least one who was not allowed to undertake discovery – is not allowed to test either the accuracy or the completeness of the video produced. In *this* case, assuming the police report is accurate, we know that there is other video, video never produced by the CTA. That video would have shown what the train operators could see ahead of them. Assuming the newspaper accounts in the Felon Smith case were accurate, there should also have been additional video showing what was taking place within the train cabs.

In essence, looking only at the facts from the pleadings and whatever self-serving documents or video might exist can *not* be the basis of a §2-615 motion. Considering that sort of self-serving, uncontested (by necessity) evidence allows for a new sort of Motion for Summary Judgment – one based only upon the evidence the defendant has chosen to submit, free from analysis by way of cross-examination or exploration undertaken by way of further discovery.

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We acknowledge that there are a number of decisions that are to the effect that a court can decide a §2-615 motion based in part upon facts of which the court took judicial notice. However, in our case, the videotape in question was one-sided evidence rather than an uncontroverted fact. It may have been accurate, it may not have been. We do not know, because we were not allowed to take discovery which would have allowed to see how this video fit along with in-cab video, both that trained on the operator and on the track in front of the train. It *is* clear to us that the video we were provided, showing at least two trains running close to but not striking Ricardo, provides little help in answering the question of the Quiroz family: how did Ricardo come to die? The video produced serves only to raise other compelling questions: why did the first two train operators not see Ricardo? If they did see him, why did they not call for help?

The Appellate Court, in its 3-0 Rule 23 opinion (an opinion we never asked to have published), seemed to understand our primary point that *at this stage of the proceedings*, more discovery was required in order to determine what actually happened – no matter how "far-fetched" the Plaintiff's theory of recovery might have been.

These Pleadings Were Sufficiently Specific. The CTA argues that we were not sufficiently specific in our pleadings. This is a §2-615 motion. As we have stated elsewhere in this Brief, beginning at Page 2, dismissal of a complaint at law like ours is appropriate only where it is *clearly* apparent that *no set of facts* can be proved that would entitle a plaintiff to recover. *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2017 IL 121297, ¶5, 90 N.E.3d 400, 401-02 (2017).

None of the arguments made by the CTA are persuasive, but in any event

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whatever defects there *might* be in these pleadings could be remedied by a simple amendment. In the meantime, our clients could engage in discovery and, we presume, then amend the pleadings to conform the proofs generated during the course of discovery.

IV. WILFUL WANTON COUNTS AND SPOLIATION COUNTS, THOUGH LIKELY TO BE AMENDED UPON THE FURTHER DEVELOPMENT OF FACTS DURING DISCOVERY, ARE PLED SUFFICIENTLY.

Whether there was wilful misconduct giving rise to a cause of action will likely require discovery in order to assert an appropriate cause of action. Here, though, there are already facts sufficient to state a cause of action. Regarding whether the act of not stopping a train after seeing a trespasser in a position of peril is wilful, see *Chicago Terminal Transfer R.R. Co. v. Kotoski* (1902), 199 Ill. 383, 386, 65 N.E. 350: "We are of the opinion that, admitting the plaintiff below was a trespasser while attempting to cross the bridge, the evidence fairly tends to show that his injury was the result of the *willfulness* of those in charge of the train, and that his recovery should be sustained upon that ground alone." (Emphasis supplied.)

Whatever questions might remain regarding our pleadings, our allegations can be repleaded upon remand, particularly *after* discovery is undertaken and assuming that the CTA operators had a pattern and practice of ignoring policies and procedures, that its drivers and their supervisors had a long history of allowing distracted drivers or, worse still, drivers who were literally asleep at the wheel (like the O'Hare Airport case). Under those circumstances, a case of wilful misconduct could be made out. We believe this is an argument for another day, since it was not addressed by either the trial court or the appellate court and since there has been no discovery on the issue.

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Whether conduct was willful requires a different analytical framework involving completely different sections of the Restatement (§500, *et seq.*). We make this argument here simply to preserve our right to inquire into these issues during discovery and following what we assume will be re-pleading following discovery upon remand.

Finally, our count for spoliation is premature and will require discovery in order to determine whether it is meritorious.

CONCLUSION

The CTA's argument is one that would put the interest of rapid transit ahead of the basic dignity of an individual – a *helpless* individual *found in a position of peril* – whose life could have been saved by a simple message being delivered and acted upon by the CTA. That never came to pass, and it should have. The Indiana Appellate Court addressed a similar issue and set forth that anyone, lawyer or not, could read and find no quarrel with;

> [D]uty [to discover a trespasser to chattel] has its origin in an inherent sense of justice and human and humanity present in every civilized and enlightened people which places so high a regard on life and limb that it will not permit their possessor, when helpless and in a situation of peril, to be deprived of the one or injured in the other by an affirmative act of negligence of another in the use of his property when such person has knowledge, actual or constructive, of the helpless and perilous situation of the former. *Surratt v. Petrol, Inc.*, 312 N.E.2d 487, 493 (Ind. App. 1974).

We ask the Court to deny the CTA's appeal, to affirm the Appellate Court ruling, to reverse the trial court dismissal, to remand this matter for further proceedings, and for other such relief that this Court finds appropriate in the interest of justice.

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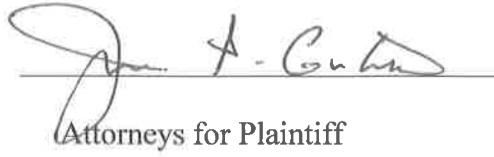
Respectfully submitted,



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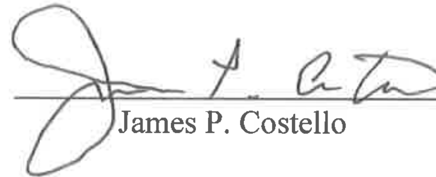
No. 127603

IN THE
SUPREME COURT OF ILLINOIS

ALEJANDRO QUIROZ Administrator of the Estate of RICARDO D. QUIROZ, Deceased,	)))	On Appeal from the
	)	Illinois Appellate Court,
Plaintiff-Appellee,	)	First District, No. 20-0181
	)	
v.	)	Appeal from Cook County
	)	Circuit Court No. 18 L 010344
CHICAGO TRANSIT AUTHORITY,	)	Judge Brendan A. O'Brien
a Municipal Corporation,	)	Date of Notice of Appeal: 1/27/20
	)	Dates of Orders: 1/13/20, 9/18/19
Defendant- Appellant.	)	

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) statement of points and authorities and table of contents, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.



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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 Appellate Court of Illinois First Judicial District, No. 1-20-0181 There Heard on Appeal from the Circuit Court of Cook County, Illinois County Department, Law Division Circuit Court Case No. 18 L 10344 The Honorable Brendan O'Brien, Judge Presiding

NOTICE OF FILING

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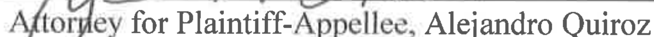
YOU ARE HEREBY NOTIFIED on Wednesday, April 20, 2022, we caused to be electronically filed with the Clerk of the Supreme Court of Illinois, the attached Plaintiff-Appellee's Response Brief, a copy of which, along with this Notice of Filing and Proof of Service is herewith electronically served upon you.

COSTELLO, MCMAHON, GILBRETH & MURPHY, LTD.



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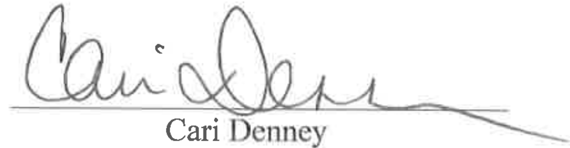
PROOF OF SERVICE

I, **Cari Denney,** a non-attorney, on oath duly state that I served a copy of this Notice and the documents referenced therein, to the parties listed above at their respective mailing address by electronic filing at their respective email addresses listed above prior to 5:00 p.m. on Wednesday, April 20, 2022.

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



Cari Denney

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