No. 127603

IN THE
SUPREME COURT OF ILLINOIS

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

Plaintiff-Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
a municipal corporation

Defendant-Appellant.

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

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

BRIEF OF DEFENDANT-APPELLANT CHICAGO TRANSIT AUTHORITY

BRAD JANSEN
Acting General Counsel
CHICAGO TRANSIT AUTHORITY
567 West Lake Street – 6th Floor
Chicago, Illinois 60661
(312) 681-2932
idmitrieva@transitchicago.com
appeals@transitchicago.com

STEPHEN L. WOOD
Deputy General Counsel
IRINA Y. DMITRIEVA
Chief Counsel
Of Counsel

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CYNTHIA A. GRANT
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POINTS AND AUTHORITIES

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NATURE OF THE CASE

This is a wrongful death and survival action, in which plaintiff asserts negligence and willful and wanton misconduct claims against the Chicago Transit Authority (CTA) for the death of his son, Ricardo Quiroz (Quiroz). Quiroz sustained fatal injuries after he lay next to the train tracks inside the CTA's underground subway tunnel between two rail stations, and his body came into contact with a moving rapid transit train. C. 120-22, A. 6 – A. 16; Sup. E. 8. The circuit court dismissed the plaintiff's second amended complaint under 735 ILCS 5/2-615 for failure to state the CTA's legal duty to Quiroz because his injury was caused by an open and obvious danger, *i.e.*, a moving train. C. 228, A. 17. On appeal, the Appellate Court, First District, reversed, ruling that the CTA had a duty "to exercise reasonable care to prevent injury to [Quiroz]" because the second amended complaint alleged that he "either did not or could not recognize the danger and remove himself from harm." *Quiroz v. Chicago Transit Auth.*, 2021 IL App (1st) 200181-U, ¶¶ 21, 23; A. 31- A. 40. After the Appellate Court denied the CTA's rehearing petition, A. 41, this Court granted the CTA's Petition for Leave to Appeal pursuant to Supreme Court Rule 315, A. 42. The question of whether the second amended complaint sufficiently stated the CTA's legal duty to the decedent is raised on the pleadings.

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ISSUE PRESENTED FOR REVIEW

Whether the CTA owed a legal duty to protect a decedent, who lay next to the train tracks inside the CTA's underground subway tunnel, from the risk of injury by a moving rapid transit train.

JURISDICTION

On September 18, 2019, the circuit court dismissed the plaintiff's second amended complaint, with prejudice, pursuant to 735 ILCS 5/2-615. C. 228, A. 17.[1] On January 13, 2020, the circuit court denied the plaintiff's motion for reconsideration. C. 352, C. 363, A. 29. On January 27, 2020, plaintiff timely filed a Notice of Appeal from the circuit court judgment to the Illinois Appellate Court, First District. C. 353-55, A. 30. The Appellate Court had jurisdiction to review the circuit court's final judgment pursuant to Supreme Court Rules 301 and 303.

On June 30, 2021, the Appellate Court issued a Rule 23 Order reversing the circuit court judgment and remanding the case to the circuit court. *Quiroz,* 2021 IL App (1st) 200181-U, A. 31 – A. 40. On July 21, 2021, the CTA filed a motion for rehearing, which the Appellate Court denied on July 27, 2021. A. 41.

On August 30, 2021, the CTA petitioned this Court for leave to appeal

[1] We cite Common Law Record as "C. __," Supplemental Record, Exhibits Section as "Sup. E.," and the required Appendix as "A. __."

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pursuant to Supreme Court Rule 315. This Court granted the petition on November 24, 2021. A. 42. This Court has jurisdiction over this matter under Rule 315.

STATEMENT OF FACTS

This case arises out of an incident that occurred in the early morning hours of April 15, 2018, inside the underground subway tunnel connecting the Grand and Chicago rail stations on the CTA's Red Line. C. 120-22, A. 6 – A. 8; Sup. E. 8.

The plaintiff's second amended complaint alleges that the decedent, Ricardo Quiroz, was inside the CTA's subway tunnel, away from the platforms and "outside the boarding area." C. 120-22, ¶¶ 3, 10; A. 6 – A. 8. While inside the tunnel, he fell onto the ground near the train tracks, upon which rapid transit trains traveled southbound towards the Grand rail station. Id., ¶¶ 3, 6. The complaint alleges that Quiroz was "injured" and "unable to remove himself from the tracks." C. 121, ¶ 5; A. 7. "[A]t least two CTA trains" passed him, "as he lay next to the tracks." C. 122-23, ¶¶ 11, 17; A. 8 – A. 9.[2] Subsequently, "another southbound CTA Red Line train" came into contact with Quiroz, causing him fatal injuries. C. 122, ¶ 14; A. 8. The complaint alleges that the area where Quiroz fell "was a lighted area," and that the rapid transit trains "were equipped with headlights" that

[2] The complaint is inartfully drafted and alleges both that the decedent "lay next to the tracks"/"near the tracks," C. 123, ¶¶ 17, 20, as well as that he "lay on the tracks," C. 121-22, ¶¶ 4, 12. It is undisputed that, at the time of his injury, Quiroz was positioned parallel to the tracks and not across the tracks. *See* 2021 IL App (1st) 200181-U, ¶ 4 ("Ricardo continued to lay on the ground, parallel to the tracks"), A. 32; Sup. E. 8.

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"provided additional illumination onto the area in front of the trains." C. 121, ¶¶ 8-9; A. 7. It also alleges that there were security cameras inside the tunnel "in the area where [Quiroz] had fallen." C. 122, ¶ 13; A. 8.

Based on these allegations, plaintiff asserted claims for negligence, willful and wanton misconduct, and spoliation against the CTA. C. 122-29; A. 8 – A. 15. Specifically, Counts I and II assert wrongful death and survival claims based on ordinary negligence. C. 122-24; A. 8 – A. 10. They are based on the theory that, as Quiroz was lying inside the tunnel "next to the tracks," the operators of trains that passed him, as well as the security personnel who allegedly were monitoring the cameras, saw him, but failed to stop train service or to notify other CTA personnel of his perilous position. C. 122-23, ¶¶ 17-19; A. 8 – A. 9. Counts III and IV assert wrongful death and survival claims based on willful and wanton misconduct. C. 124-27; A. 10 – A. 13. They are based on an alternative theory that neither the train operators, nor the security personnel, saw the decedent, "even though he was plainly and clearly visible." C. 124-25, ¶¶ 17-18; A. 10 – A. 11. Plaintiff alleges that the CTA engaged in willful and wanton misconduct by failing to "watch for objects and people who might be situated" inside the tunnel, to "keep a proper and sufficient lookout" for "objects or people in the area where the trains were traveling," and to monitor security cameras "to determine whether people in the areas being monitored were endangered." C. 126, ¶ 21; A. 12. Finally, Count V asserts a spoliation claim based on the CTA's failure to provide videos from all the trains that passed Quiroz when he lay inside the tunnel. C. 127-29; A. 13 – A. 15.

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Before plaintiff filed his second amended complaint, the circuit court had ordered the CTA to provide him with all video footage from security cameras memorializing the incident. C. 69, C. 305. The CTA complied and submitted the videos to the plaintiff and the court, along with a sworn affidavit of its security personnel attesting to the videos' authenticity and accuracy. C. 95-96 (Higgins Aff. ¶ 8), C. 97-98 (video). The affidavit stated that the security cameras are operated automatically and "not monitored on a 24-hour basis;" rather, they are used "as a responsive investigatory tool" and are retrieved only "post-event." C. 95, ¶ 3.

Plaintiff did not challenge the video footage and relied on it in drafting his second amended complaint. C. 167 (Tr. 8: ". . . the video . . . That's what my information and belief is based upon, being a 615 motion"). Because the video's authenticity and accuracy is undisputed, this Court may take judicial notice of it. *See Board of Education of Richland Sch. Dist. No. 88A v. City of Crest Hill*, 2021 IL 126444, ¶ 5 (courts may take judicial notice of readily verifiable facts of indisputable accuracy, including government records).

The video reflects that Quiroz entered the CTA's underground subway tunnel between the Grand and Chicago stations around 3:43 a.m. on April 15, 2018. Supp. E. 8 (clip 1 at 3:43). He wore a black puffer jacket, dark jeans, and black shoes. Id. Quiroz ran down the catwalk inside the tunnel, then climbed into a pocket in the wall, where he remained for approximately two and a half hours. Id. (clip 2 at 3:44, clip 3 at 3:44, clip 5 at 6:04). At approximately 6:05 a.m., he fell out of the wall pocket and landed on the CTA's right-of-way, between the catwalk

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and the train tracks. Id. (clip 5 at 6:04:50). He lay parallel to the tracks and not on them. Id. (clip 5). Two rapid transit trains passed Quiroz, as he lay next to the tracks, without making contact with him. Id. (clip 5 at 6:05:25, 6:20:10). As the third train was passing through, Quiroz's body became entangled with the side of a rail car, which dragged him to a different place inside the tunnel, closer to the Grand station. Id. (clip 5 at 6:33:48 – 6:34). Eventually, an operator of a different train, after stopping the train at the Grand station, walked back into the tunnel with a flashlight, discovered Quiroz, and called authorities. Id. (clip 7 at 7:55 -7:59).

In response to the second amended complaint, the CTA moved for sanctions under Rule 137 and to dismiss pursuant to section 2-615. C. 276-89. In its motion for sanctions, the CTA pointed out that, prior to amending the complaint, the plaintiff "had the available security camera video recordings which captured the facts of the occurrence," as well as the sworn affidavit of the CTA security personnel stating that the CTA did not monitor its security cameras in real time. C. 278-79. Rule 137 requires pleadings to be "well grounded in fact." S. Ct. R. 137(a). Yet, several of the plaintiff's allegations misstated the facts. C. 279. Specifically, the CTA pointed out that, based on the videos and the affidavit, plaintiff knew that the CTA did not monitor its cameras in real time, that the subway tunnel was not "a lighted area," and that Quiroz fell on the side of the tracks and was never lying directly in front of the trains. Id.

In its motion to dismiss, the CTA argued that plaintiff's allegations were not well-pleaded and, in any event, were insufficient to establish that the CTA

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owed a duty to protect the decedent from an obvious danger of a moving train. C. 280-85. In response, plaintiff argued that the CTA owed a duty to Quiroz because he was a discovered trespasser "in obvious peril." C. 189-90.

On September 18, 2019, after a hearing, the circuit court entered an order dismissing the second amended complaint with prejudice, but denying the CTA's motion for sanctions. C. 228, C. 363; A. 17, A. 27. The court relied on Section 337 of the Restatement (Second) of Torts. C. 333, C. 339; A. 21, A. 27. Section 337, titled "Artificial Conditions Highly Dangerous to Known Trespassers," provides that a landowner who maintains a dangerous condition on the land that presents a risk of death or serious bodily harm, may be liable to trespassers who are injured by the dangerous condition, if two elements are satisfied:

> (a) "the [landowner] knows or has reason to know of [the trespassers'] presence in dangerous proximity to the [dangerous] condition; and
>
> (b) the condition is of such a nature that [the landowner] has reason to believe that the trespasser will not discover it or realize the risk involved."

Restatement (Second) of Torts, § 337. The circuit court ruled that, even if the complaint sufficiently alleged that the CTA personnel knew or had reason to know of Quiroz's presence inside the tunnel in dangerous proximity to moving rapid transit trains, plaintiff could not satisfy the second requirement. C. 333-34; A. 21 – A. 22. The court explained that no amount of re-pleading, and no amount of discovery, would help plaintiff overcome the fact that, under this Court's decision

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in *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, a moving train constitutes an open and obvious danger as a matter of law. C. 334; A. 22. Therefore, the CTA had no reason to believe that the decedent would not discover that danger or realize the risk associated with a moving train. Id.

Plaintiff moved for reconsideration. C. 229-38. Following another hearing, the circuit court denied his reconsideration request. C. 352, C. 363; A. 29. The court reiterated that Quiroz was injured by a moving train, which was an obvious danger as a matter of law. C. 362-63. The court also stressed that the duties plaintiff sought to impose on the CTA were "huge." C. 362. The court explained: "you're asking the CTA to do too much . . . they [would] have to always be on the lookout for someone being in an area where they're not supposed to be . . . It's a huge undertaking." Id.

On review, the Appellate Court reversed and remanded the entire complaint for further proceedings in the circuit court. *Quiroz,* 2021 IL App (1st) 200181-U, ¶ 26; A. 31 – A. 40. In a Rule 23 Order, the court ruled that plaintiff sufficiently pleaded the CTA's legal duty to prevent injury to Quiroz pursuant to Section 337 of the Restatement (Second) of Torts. *Id.*, ¶¶ 21, 23; A. 38, A. 39. The Court reasoned: "the CTA had a duty, pursuant to section 337 of the Restatement, to exercise reasonable care to prevent injury to [Quiroz] since the second amended complaint alleged that he was unable to remove himself from danger." *Id.*, ¶ 23; A. 39. Specifically, the court ruled that, by pleading that Quiroz was "clearly visible" to train operators and security cameras, the complaint satisfied the first

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prong of section 337, which requires that the landowner "knows or has reason to know" of the trespasser's proximity to the dangerous condition. *Id.*, ¶¶ 21, 23. The court then ruled that the complaint satisfied the second prong of section 337 by alleging that Quiroz "either did not or could not recognize the danger and remove himself from harm." *Id.*, ¶ 21; A. 38. The Court added that, "[n]o matter how incredulous or far-fetched [plaintiff's] allegations and the material inferences that flow from them may seem," they had to be accepted as true for purposes of ruling on a motion to dismiss under section 2-615. *Id.*, ¶ 22; A. 39.

The CTA requested a rehearing, asserting that the appellate court had misapplied the second prong of Section 337. 7/21/21 CTA Pet. for Rehearing at pp. 2-5. The CTA explained that, contrary to the appellate court's ruling, the second prong of Section 337 focuses *not* on the *subjective* state or mind of the trespasser, *i.e.*, whether he was unable to appreciate the risks, but rather on the *objective* nature of the dangerous condition – whether it is latent/hidden, as opposed to open and obvious; in other words, whether the condition was of such a nature that the CTA had reason to believe that Quiroz would not discover it or realize the danger involved. Id. The CTA argued that, had the court properly applied the second prong of Section 337, it would have become apparent that the CTA had no "reason to believe that [the decedent] will not discover [the dangerous condition] or realize the risk involved," because, under *Choate*, a moving train constitutes an obvious danger as a matter of law, which even children are expected to appreciate and avoid. Id. at pp. 6-9.

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The appellate court denied the CTA's reconsideration petition without explanation. 7/27/21 Order; A. 41. The CTA petitioned this Court for review pursuant to Supreme Court Rule 315, which this Court granted. A. 42.

ARGUMENT

The Appellate Court ruled that the CTA owed a duty of reasonable care to protect an adult trespasser inside its subway tunnel – where rapid transit trains travel non-stop between rail stations – from the risk of injury by a moving train. The Appellate Court completely ignored this Court's holding in *Choate v. Indiana Harbor Belt R.R. Co.*, that a moving train constitutes an open and obvious danger, which even children "should realize the risk of coming within the area made dangerous by it." 2012 IL 112948, ¶ 35. The appellate ruling should be reversed. Because the moving rapid transit train constituted an open and obvious danger as a matter of law, the decedent's injury was not reasonably foreseeable to the CTA; and requiring the CTA to be on a lookout for trespassers inside its subway tunnels, or to slow down or stop train service every time an object is seen near the tracks, which might or might not be a human being, would make on-schedule, reliable rapid transit service impossible. Indeed, these duties have never existed in Illinois. The circuit court properly dismissed the plaintiff's second amended complaint for failure to state the CTA's legal duty to the decedent, and its judgment should be affirmed.

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Legal Standards

A motion to dismiss brought under section 2–615 tests the legal sufficiency of a complaint. *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 13; *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008) (affirming an order dismissing a complaint under sec. 2-615). "On review, the inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to establish a cause of action upon which relief may be granted." *Napleton*, 229 Ill. 2d at 305. "Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish his or her claim as a viable cause of action." *Id.* "A claim should not be dismissed pursuant to section 2–615 unless no set of facts can be proved which would entitle the plaintiff to recover." *Id.* This Court reviews a dismissal of the plaintiff's action *de novo*. *Id.*

In ruling on a section 2-615 motion, a court may consider not only allegations in a plaintiff's complaint, but also "matters of which [it] can take judicial notice, and judicial admissions in the record." *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995). In the instant case, the Court may take judicial notice of the CTA's security camera videos memorializing the incident. Sup. E. 8. The CTA authenticated the videos by the affidavit of its security personnel, C. 95-97, and plaintiff never contested their authenticity and accuracy. Thus, the videos are sufficiently reliable for judicial

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notice. *See Board of Education of Richland Sch. Dist. No. 88A v. City of Crest Hill*, 2021 IL 126444, ¶ 5 (courts may take judicial notice of readily verifiable facts of indisputable accuracy, including government records). Moreover, plaintiff relied on the videos in amending his complaint. See C. 167.

Plaintiff here attempts to state a cause of action for negligence. "To properly state such a cause, a plaintiff must plead that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries." *Mt. Zion*, 169 Ill. 2d at 116. "A legal duty refers to a relationship between the defendant and the plaintiff such that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Choate*, 2012 IL 112948, ¶ 22. *See also Mt. Zion*, 169 Ill. 2d at 116. "Whether such a duty exists is a question of law, the determination of which must be resolved by the court." *Id.* Accord *Choate*, 2012 IL 112948, ¶ 22. "If no duty exists, it is axiomatic that no recovery can occur." *Mt. Zion*, 169 Ill. 2d at 116.

A legal duty may exist by virtue of a special relationship between the parties. *Iseberg v. Gross*, 227 Ill. 2d 78, 87 (2007) (citing Restat. (Second) of Torts, § 314A). Plaintiff here does not allege a special relationship, nor could he, given the decedent's status as a trespasser on the CTA's property. See C. 122, C. 124 (pleading that decedent was a "discovered trespasser"). In the absence of such a special relationship, courts consider the following four factors: "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant."

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Bruns v. City of Centralia, 2014 IL 116998, ¶ 14. Accord *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (2002); *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 456 (1996).

Where a risk giving rise to an injury is "open and obvious," the first two factors of the duty analysis weight against a finding of duty, *i.e.*, the plaintiff's injury is deemed not reasonably foreseeable and the likelihood of harm is considered slight. *Bruns*, 2014 IL 116998, ¶ 19. As this Court explained, "the law generally assumes that persons who encounter [open and obvious] conditions will take care to avoid any danger inherent in such condition. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks." *Bucheleres,* 171 Ill.2d at 448.

Introduction

Applying these standards to the instant case, the plaintiff's second amended complaint should be dismissed for failure to state a recognized legal duty the CTA owed to the decedent. As we explain below in Part I, there was no special relationship between the parties, and the analysis of the four legal duty factors weighs against a finding of duty here. In Part II, we explain that a finding of no duty would be consistent with the approach taken in section 337 of the Restatement (Second) of Torts, governing landowner's duty of care to known trespassers in a position of danger. In Part III, we explain why the appellate court erred by failing to apply the open and obvious danger doctrine, which *Choate* made applicable to moving trains. Finally, in Part IV, we argue in the alternative

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that plaintiff's claims should be dismissed because his second amended complaint failed to adequately plead a duty based on the "discovered trespasser" exception.

The existence of a legal duty is critical to all of the plaintiff's causes of action: negligence (Counts I and II), willful and wanton misconduct (Counts III and IV), and spoliation (Count V). *See Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 235 (2010) (willful and wanton misconduct is not a separate tort, but an aggravated form of negligence); *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 472 (1st Dist. 2006) (to state a spoliation claim, plaintiff has to establish that he "likely would have prevailed in the underlying suit"). Consequently, absent the CTA's legal duty to the decedent, all of plaintiff's causes of action fail.

I. THE CTA HAD NO DUTY TO PROTECT AN ADULT TRESPASSER INSIDE ITS SUBWAY TUNNEL FROM THE OPEN AND OBVIOUS DANGER OF A MOVING RAPID TRANSIT TRAIN.

In the instant case, as we explain below, there was no special relationship between the decedent and the CTA, which would have formed the basis of a legal duty. Moreover, the risk that gave rise to the decedent's injury was a moving rapid transit train, which, under *Choate*, constitutes an open and obvious danger as a matter of law. Consequently, it was not reasonably foreseeable to the CTA that the decedent would fail to appreciate and avoid the apparent danger of a moving train. Plus, imposing a burden on the CTA to guard against similar injuries would be too high and impractical – especially considering that the decedent was in the best position to avoid the risk.

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A. There Was No Special Relationship Between the Parties.

As a threshold matter, there was no special relationship between the parties, which could have formed the basis of the CTA's legal duty. *See Iseberg*, 227 Ill. 2d at 87-88 (citing to Restatement (Second) of Torts, § 314A, that sets forth special relationships recognized in Illinois). Far from alleging any type of special relationship, plaintiff's second amended complaint affirmatively pleads that the decedent was a trespasser, C. 122 (Count I heading), C. 124 (Count II heading) – which, by definition, means that he was inside the CTA's subway tunnel without invitation, permission, or right. *See, e.g., Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill. 2d 213, 228 (1996) ("trespasser is one who enters upon the premises of another with neither permission nor invitation and intrudes for some purpose of his own, or at his convenience, or merely as an idler"). Indeed, by entering the tunnel -- where rapid transit trains travel at high speeds non-stop between rail stations -- Quiroz violated a CTA ordinance that forbids "entering or remaining upon any track or right-of-way," except in emergency cases not applicable here, or "sleeping or dozing where such activity may interfere with CTA services." CTA Ordinance No. 16-110 (12, 13).[3] Consequently, at the time of his injury, the CTA and Quiroz did not stand in a special relationship to each other.

[3] The CTA, as a municipal corporation, is authorized to pass ordinances, which have the force of law. See Metropolitan Transit Authority Act, 70 ILCS 3605/31; *City of Chicago v. Roman*, 184 Ill. 2d 504, 511 (1998) (municipal ordinance has the force of law). Courts take judicial notice of municipal ordinances. 735 ILCS 5/8-1001, 1002. The CTA Ordinance No. 16-110 is available at www.transitchicago.com/assets/1/28/016-_110.pdf (last visited Feb. 15, 2022).

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In the absence of any special relationship, the legal duty analysis should be performed by analyzing the traditional four legal duty factors. *See, e.g., Bruns*, 2014 IL 116998, ¶ 14. As we demonstrate below, the first two duty factors – the reasonable foreseeability and likelihood of the injury -- weigh in the CTA's favor because Quiroz was injured by a moving train, which presents "an open and obvious danger" as a matter of law.

B. Quiroz's Injury Was Not Reasonably Foreseeable Because It Was Caused by an Open and Obvious Danger -- a Moving Train.

It is well established that the reasonable foreseeability of harm is an important consideration in the legal duty analysis. *See, e.g., Mt. Zion*, 169 Ill. 2d at 117 ("in Illinois, it is the reasonable foreseeability of harm which now determines liability in negligence actions involving injury to children"); *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). In cases where an injury is caused by an open and obvious condition, the harm is deemed not reasonably foreseeable, and the likelihood of injury slight, because people are expected to appreciate and avoid obvious risks. *Bruns*, 2014 IL 116998, ¶ 19. These principles apply to this case because, in *Choate,* this Court held that a moving train constitutes an open and obvious danger as a matter of law, which even children are expected to appreciate and avoid. 2012 IL 112948, ¶ 35.

1. Under *Choate*, a moving train constitutes an open and obvious danger as a matter of law.

In *Choate*, this Court considered whether a railroad company owed a legal duty to protect a trespassing child from a risk of injury by a moving train. 2012

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IL 112948, ¶ 22. There, children gathered in a parking lot of an apartment building in Chicago Ridge, Illinois, which was located next to the train tracks. *Id.*, ¶¶ 5-6. As a freight train approached them at 10 mph, the children stepped onto the railroad's right-of-way and decided to jump onto the train. *Id.*, ¶ 7. In doing so, the minor plaintiff slipped and fell, and the train ran over his foot, requiring amputation. *Id.*, ¶¶ 8, 13. In his negligence action against the railroad, the plaintiff argued that the railroad failed to protect children from an injury by a moving train by, among other things, fencing off the area, posting warning signs, and monitoring the area in the vicinity of trains to prevent children's access to it. *Id.*, ¶ 16.

In deciding the case, this Court treated a moving train as "a dangerous condition" on the railroad's premises. 2012 IL 112948, ¶¶ 27, 35. The Court pointed out that, under common law, landowners, including railroads, owed no duty of care to trespassers, except to refrain from willfully and wantonly injuring them, but that there were limited exceptions to this no-liability rule including the "child trespasser" exception. *Id.*, ¶¶ 25-27. Under that exception, a landowner might owe a duty to protect a child from a dangerous condition if: (1) the landowner knew or should have known that children frequented the property, (2) there was a dangerous condition on the property, (3) the dangerous condition was likely to injure children because they were incapable of appreciating its risk, and (4) the expense and inconvenience of remedying the dangerous condition was slight compared to the risk to children. *Id.* at ¶¶27-28 (citing Restat. (Second) of Torts, § 339, titled "Artificial Conditions Highly Dangerous to Trespassing Children").

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The evidence in the case established that the railroad "had *actual knowledge* that children were trespassing on its property and interacting with moving trains." 2012 IL 112948, ¶ 59 (J. Kilbride, dissenting) (emphasis in the original). Despite the railroad's actual knowledge of the risk of harm to trespassing children, this Court ruled that the plaintiff's injury was not reasonably foreseeable because a moving train constitutes an open and obvious danger, which even children are expected to appreciate and avoid. *Id.*, ¶¶ 35, 38. The Court stated: "in harmony with the majority of jurisdictions, we now explicitly recognize as a matter of law that a moving train is an obvious danger that any child allowed at large should realize the risk of coming within the area made dangerous by it." *Id.*, ¶ 35.

This Court further ruled that the expense and inconvenience of remedying the dangerous condition was too high, even when compared to the risk of harm to children. 2012 IL 112948, ¶ 43. The Court explained that, in evaluating the burdens, one had to consider not only the expense of doing so in a particular location at issue in the case, but system-wide. *Id.* The Court stated: "if a duty were imposed on a railroad to erect a fence where one 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. We hold that Illinois law does not impose any such requirement." *Id.* (internal citations omitted).

2. Consistent with *Choate*, the appellate court barred recovery in tort actions involving injuries by moving trains.

Consistent with this Court's decision in *Choate*, the Illinois Appellate Court

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has repeatedly ruled that, where a pedestrian sustains an injury by a moving train, there can be no recovery in negligence against a railroad because pedestrians are expected to appreciate and avoid the open and obvious danger of a moving train.

For instance, in *McDonald v. Northeast Illinois Regional Commuter R.R. Corp.*, 2013 IL App (1st) 102766-B, a decedent was crossing train tracks at a pedestrian crosswalk in Glenview, Illinois, when he was struck by a Metra commuter train running express through the North Glenview station. *Id.*, ¶ 3. The train operator *saw* the decedent, as he stepped onto the crosswalk and began to hurry across the tracks, directly in front of the incoming train. *Id.*, ¶ 17. The operator sounded the train's horn but did not stop in time to avoid the collision. *Id.* In her wrongful death complaint, plaintiff claimed that Metra negligently operated its train at an excessive rate of speed, "without keeping a sufficient lookout," and failed to slow down and avoid hitting the decedent. *Id.*, ¶ 4.

After this Court directed the appellate court to reconsider its initial decision affirming the verdict in the plaintiff's favor, *id.*, ¶ 1, the appellate court issued a new opinion, in which it held that Metra was entitled to judgment notwithstanding the verdict because it did not owe a legal duty to the decedent, *id.*, ¶ 28. Specifically, applying *Choate*, the appellate court ruled that Metra did not owe a legal duty to protect the decedent from the open and obvious risk of stepping in front of a moving train. *Id.*, ¶¶ 25, 28. The court cited Section 343A(1) of the Restatement (Second) of Torts, pursuant to which "the landowner is not liable for physical harm to individuals caused by any activity or condition on the

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land, whose danger is known or obvious, unless the landowner should anticipate the harm despite such knowledge or obviousness." *Id.*, ¶ 22 (citing Restat. (Second) of Torts, § 343A(1)). Relying on *Choate*, the Appellate Court ruled that the oncoming Metra train "was an open and obvious danger because the decedent could have seen it approaching the station, had he looked both ways prior to stepping on the crosswalk . . . ." *Id.*, ¶ 25. The court also determined that "the tracks in front of a moving train constitute[d] an area made dangerous by the train and . . . the decedent should have realized the risk of entering that area and attempting to hurry across the tracks in advance of the train's arrival." *Id*.

The court explained that neither of two exceptions to the open and obvious danger doctrine applied. 2013 IL App (1st) 102766-B, ¶¶ 26-27. Specifically, the "distraction exception" did not apply because Metra had no reason "to expect that the [decedent] would be distracted" from the obvious danger of an oncoming train. *Id.*, ¶ 26. The court further ruled that the "deliberate encounter" exception did not apply because no reasonable person in the decedent's position would decide that the advantages of crossing the tracks in front of an oncoming train would outweigh the apparent risk. *Id.*, ¶ 27. The court stated: "individuals who do so are not exercising reasonable care for their own safety at that time." *Id.*

Similarly, in *Park v. Northeast Illinois Regional Commuter R.R. Corp*., 2011 IL (1st) 101283, a decedent intended to board a Metra train at Edgebrook train station in Chicago. *Id.*, ¶ 3. Due to a schedule change, an Amtrak train, traveling at about 70 mph, approached the station at about the time the Metra train was scheduled

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to arrive. *Id.*, ¶ 4. Believing that it was a Metra train, the decedent attempted to cross the tracks at a pedestrian crossing, but was struck and killed by the express Amtrak train. *Id.*, ¶ 5. Plaintiff brought a negligence action against Metra and Canadian Pacific, which operated traffic controls, alleging that they failed to adequately warn the decedent of the approaching Amtrak train. *Id.*, ¶¶ 6-7.

The appellate court affirmed an order dismissing the plaintiff's complaint under section 2-615 for failure to state a legal duty. 2011 IL (1st) 101283, ¶¶ 27-28. Relying on Section 343A of the Restatement (Second) of Torts, the court ruled that defendants did not owe a duty to protect the decedent from the risk of injury by a moving train because a moving train constituted a dangerous condition that was open and obvious. *Id.*, ¶¶ 12, 18. The court stressed that whether a condition is open and obvious "depends not on plaintiff's subjective knowledge, but, rather, on the objective knowledge of a reasonable person confronted with the same condition." *Id.*, ¶ 14 (citing *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (1st Dist. 2005)). Consequently, an oncoming Amtrak train presented an open and obvious danger, even if the decedent subjectively mistook it for a slower commuter train. The court ruled: "the danger of stepping in front of a moving train is open and obvious regardless of the kind of train it is." *Id.*, ¶ 18.

The court further ruled that neither "distraction," nor "deliberate encounter" exception to the open and obvious danger doctrine applied. 2011 IL (1st) 101283, ¶¶ 22-26. The court explained that it was not reasonably foreseeable to defendants that the decedent would be distracted from the approaching train,

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even if it was rainy and windy that day. *Id.*, ¶¶ 24-25. The court further ruled that plaintiff alleged no "compulsion or impetus under which a reasonable person in [the decedent's] position would have disregarded the obvious risk of crossing railroad tracks while a train is approaching." *Id.*, ¶ 26 (internal citations omitted). Hence, plaintiff failed to state a cause of action in negligence against defendants.

Most recently, in *Pryor v. Chicago Transit Authority*, 2022 IL App (1st) 200895, the appellate court reached a similar conclusion in a case involving an adult trespasser. In *Pryor*, after lingering on an elevated CTA platform for about 45 minutes, a decedent walked directly into the path of an oncoming rapid transit train, sustaining fatal injuries. *Id.*, ¶¶ 3-4. Plaintiff brought a negligence action against the CTA, alleging that the train operator exceeded the speed limit and failed to slow down or stop the train in time to avoid the collision. *Id.*, ¶¶ 15-16.

The appellate court affirmed an order dismissing the case under section 2-619 for failure to state the CTA's legal duty to the decedent. 2022 IL App (1st) 200895, ¶¶ 39, 44. Relying on *Choate*, the court ruled that a risk of injury to the decedent was not reasonably foreseeable to the CTA. *Id.*, ¶¶ 29-31. The court explained: "Given the 'open and obvious' danger posed by the moving train, [the decedent's] actions in walking past the blue tactile edge off the platform directly onto the path of an almost simultaneously approaching train were not reasonably foreseeable to the CTA." *Id.*, ¶ 31. The court also ruled that requiring the CTA "to guard against the sudden and unreasonable actions of nonpassengers" would be "overwhelmingly detrimental to the efficient performance" of its rapid transit

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system. *Id.*, ¶ 38 (citing *Krywin,* 238 Ill. 2d at 234).

The court rejected plaintiff's contention that the "open and obvious danger" doctrine did not apply because plaintiff's allegations focused on the negligent operation of the train. 2022 IL App (1st) 200895, ¶¶ 34, 37. Relying on this Court's ruling in *Choate*, the court found this "a distinction without a difference." *Id.*, ¶ 34.[4]

McDonald, *Park*, and *Pryor* are well-reasoned appellate opinions that cannot be distinguished in any meaningful way from the instant case – all involve a pedestrian sustaining a fatal injury by a moving train. If anything, the circumstances in those cases were even more compelling because, there, the decedents were in the locations where their presence was reasonably foreseeable – at a "pedestrian crosswalk" (*McDonald*, 2013 IL App (1st) 102766-B, ¶ 3), at "a designated pedestrian railroad crossing" (*Park*, 2011 IL App (1st) 101283, ¶ 5), or on the station's platform (*Pryor*, 2022 IL App (1st) 200895, ¶ 4). In contrast, in the instant case, Quiroz was inside the CTA's subway tunnel where pedestrians are not only unexpected, they are prohibited from being there by the CTA ordinance.

Moreover, this case cannot be distinguished on the basis that Quiroz was allegedly "clearly visible" to train operators "as he lay next to the tracks." C. 122-

[4] The same results obtained in at least two unpublished dispositions. *See Tahir v. Chicago Transit Auth.*, 2015 IL App (1st) 142066-U, ¶¶ 5, 34, 37 (under *Choate*, CTA owed no legal duty to a decedent who fell off the platform when an incoming train struck her elbow); *Escobar v. Chicago Transit Auth.*, 2014 IL App (1st) 132056-U, ¶¶ 2, 29-39 (under *Choate*, CTA owed no legal duty to a decedent who was struck by an incoming train as he stood on elevated train tracks at a station). Attached as A. 43 - A. 51, A. 52 - A. 58.

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23, ¶¶ 12, 17. Each of the decedents in *McDonald*, *Park*, and *Pryor* – as well as the minor plaintiff in *Choate* – were within the train operators' line of vision because they were positioned either directly on train tracks in front of an oncoming train (*McDonald*, *Park*), or in the immediate vicinity of train tracks (*Choate, Pryor*).

3. Under the controlling case law, Quiroz's injury was not reasonably foreseeable to the CTA.

Just like all the defendants in *Choate*, *McDonald*, *Park*, and *Pryor* did not owe a legal duty to protect pedestrians from the risk of injury by a moving train, so the CTA in the instant case did not owe such a duty to Quiroz.

Applying *Choate*, a moving rapid transit train constitutes an open and obvious danger as a matter of law, which even children are expected to appreciate and avoid. 2012 IL 112948, ¶ 35. Consequently, it was not reasonably foreseeable to the CTA that Quiroz, an adult, would fail to appreciate and avoid the obvious risk of entering the subway tunnel, where rapid transit trains travel non-stop at high speeds between stations, and lying next to the train tracks, in the immediate proximity to the moving trains.

This Court has recognized only two exceptions to the open and obvious danger doctrine: the "distraction exception" and the "deliberate encounter" exception. *Bruns*, 2014 IL 116998, ¶20; *Sollami*, 201 Ill. 2d at 15. Neither exception applies in this case. The "distraction exception" applies if defendant has a reason to expect that plaintiff's attention might be distracted so that he or she would not discover the obvious condition. *See Ward,* 136 Ill. 2d at 152. In *Bruns,* 2014 IL

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116998, ¶ 28, this Court explained that, for the distraction exception to apply, there has to be "some circumstance . . . that required the plaintiff to divert his or her attention from the open and obvious danger, or otherwise prevented him or her from avoiding the risk."

In *Bruns*, an elderly plaintiff tripped and fell on a sidewalk defect on her way to an eye clinic. 2014 IL 116998, ¶ 4. Even though the sidewalk defect was open and obvious, the plaintiff argued that the distraction exception applied because at the time she tripped, she was looking "towards the door and the steps" of the clinic. *Id.* This Court ruled that the distraction exception did not apply. The Court explained that the issue was not whether plaintiff "was looking elsewhere, but *why* she was looking elsewhere." *Id.*, ¶ 30. The Court pointed out that plaintiff "did not focus her attention on the door and steps of the clinic in order to avoid another hazard," or "because some other task at hand required her attention." *Id.* Rather, her distraction was entirely "self-made," and thus not reasonably foreseeable to the City. *Id.*, ¶ 31. This Court explained:

> A plaintiff should not be allowed to recover for self-created distractions that a defendant could never reasonably foresee. In order for the distraction to be foreseeable to the defendant so that the defendant can take reasonable steps to prevent injuries to invitees, the distraction should not be solely within the plaintiff's own creation. The law cannot require a possessor of land to anticipate and protect against a situation that will only occur in the distracted mind of his invitee.

Id. (quoting *Whittleman v. Olin Corp.*, 358 Ill. App. 3d 813, 817-18 (5th Dist. 2005)).

In this case, like in *Bruns*, the plaintiff does not identify any external

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circumstance, which required Quiroz to divert his attention from the open and obvious condition, *i.e.*, moving rapid transit trains. There is no allegation that something inside the subway tunnel distracted Quiroz, who "lay next to the tracks," from observing the oncoming trains that "were equipped with headlights" and traveled immediately next to him. C. 121-23, ¶¶ 9, 17. Thus, to the extent any such distraction existed, it was self-made and not reasonably foreseeable to the CTA. Hence, the distraction exception does not apply here.

The "deliberate encounter" exception does not apply either. The "deliberate encounter" exception applies when a defendant "has reason to expect that [a plaintiff] will proceed to encounter the known or obvious danger because to a reasonable [person] in his position the advantages of doing so would outweigh the apparent risk." *Bruns*, 2014 IL 116998, ¶ 20 (quoting Restat. (Second) of Torts, § 343A cmt. f). There is no allegation here, nor can there be, that a reasonable person in Quiroz's position would have entered the subway tunnel and laid in the immediate proximity to moving rapid transit trains there, despite the apparent risk of doing so.

Because a moving rapid transit train constituted open and obvious danger, the first two factors of the legal duty analysis weigh in the CTA's favor – it was not reasonably foreseeable to the CTA that the decedent would be injured and the likelihood of injury is considered slight. As we explain below, the remaining two factors of the duty analysis – the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the defendant – also weigh

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in the CTA's favor.

C. The Burdens of Guarding Against Injuries by Moving Trains Would Be Too High.

The duties that the plaintiff seeks to impose on the CTA in this case have not been recognized in Illinois. In particular, plaintiff alleges that the CTA was negligent by:

> -- failing to "keep a proper and sufficient lookout on its trains" for "objects and people who might be situated in the area where said trains [are] directed;"
>
> -- failing to stop train service whenever train operators observe objects near the tracks that might or might not be human beings; and
>
> -- failing to "view its security monitors in order to determine whether people in the areas being monitored [are] endangered."

C. 126; A. 12. This Court recognized in *Choate* that, when assessing the burden of remedying a dangerous condition in a given case, a court considers the burden of remedying the dangerous condition system-wide. 2012 IL 112948, ¶ 43. If the duties suggested by plaintiff are imposed on the CTA system-wide, it would take "rapid" out of "rapid transit" – trains would not be able to accelerate in subway tunnels between stations; to the contrary, they would have to travel at a reduced speed, to ensure that train operators do not miss an object or a piece of debris, which was blown onto the tracks. And any time an object is seen, train operators would have to stop service, to ensure that the object is not a human being. This would make it impossible for the CTA to adhere to a schedule and to provide timely and reliable service to the traveling public.

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Moreover, such conduct would be itself unsafe. As a common carrier, the CTA owes "the highest degree of care" to the passengers on board its trains, "to carry them safely to their destinations." *Krywin,* 238 Ill. 2d at 226. Every time a train has to make an emergency stop, passengers on board may sustain injuries by being jolted out of place, hitting a railing, or falling onto the floor of the train. As the Association of American Railroads (AAR) points out in its *amicus* brief, requiring a train operator to make an emergency stop any time he or she sees a trespasser on the railroad's right-of-way, "is neither cost-free nor safe." AAR Amicus Br. at 16. As the AAR explains, "it would be of dubious effectiveness given the very long stopping distance typically required." Id. Additionally, "unplanned or emergency stops pose their own dangers to crew and passengers and also can lead to a derailment which can result in injuries as well as damage to both the railroad equipment and surrounding property." Id.

Additionally, if the CTA has a duty to protect trespassers inside its subway tunnels from the risk of injury by a moving train, it would have to illuminate all of its underground subway tunnels and keep them illuminated during all of its hours of operation – which is 24 hours a day, 7 days a week, 365 days a year. This would result in considerable additional operating expense.

Perhaps this is why, as plaintiff conceded in the appellate court, courts do not require railroads to be on a constant lookout for trespassers in areas where they do not expect them to be. Quiroz Opening Br. in Appellate Court, at p. 16 ("there is no duty to maintain a lookout to see if a trespasser is on train tracks").

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Indeed, plaintiff cited to section 333 of the Restatement (Second) of Torts, which this Court cited with approval in *Mt. Zion*, 169 Ill. 2d at 123, and which provides that "a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care . . . to carry on his activities so as not to endanger them." *Id.* (citing to Restat. (Second) of Torts, § 333 cmt. (a)). *See also Joy v. Chicago, B. & Q.R. Co.*, 263 Ill. 465, 468 (1914) ("the law casts no duty upon a railroad company to keep a lookout for trespassers on its track" away from populated areas and public crossings); *Wabash R. Co. v. Jones*, 163 Ill. 167, 174 (1896) ("a railroad company is not bound to keep a lookout for trespassers walking upon the track"), *Illinois Cent. R. Co. v. Noble*, 142 Ill. 578, 588 (1892) (same).

Neither have the courts in this State required trains to make an emergency stop every time an object is seen on or near the tracks. *See, e.g., Joy,* 263 Ill. at 468. For instance, in *Higgins v. Baltimore & O.R. Co.*, the appellate court explained that "the nation's need for rapid transit, and safety of passengers" "preclude[s] any rule of law that a train must make an emergency stop every time a pedestrian" – let alone a piece of debris – "is seen on or near the tracks." 16 Ill. App. 2d 227, 231 (4th Dist. 1958). The court also stressed: "The law does not require that trains proceed slowly at every crossroad, even if plainly visible, and certainly there can be no such requirement in rural or sparsely populated areas, simply because people have crossed into open fields." *Id.* at 232. The same rationale applies with an even greater force to the CTA's underground subway tunnels between stations, where trains ordinarily accelerate to bring passengers to their destinations on time.

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Neither is there any precedent for imposing a duty on the CTA to continuously monitor its security cameras in real time. The CTA has about 32,000 cameras across its system.[5] Monitoring them all in real time would entail considerable expense – in hiring additional security personnel and training them to determine when a given person is "in danger." Presumably, if a CTA employee determines that someone is in danger, he or she would have to halt the train service until that person could be removed from danger. This once again would slow down the train service, if not bring it to a complete halt – if the individuals monitoring the cameras chose to err on a side of caution. This would also risk exposing the CTA to additional liability in cases where plaintiffs would claim that the CTA personnel negligently mistook a human being for an object, or failed to determine that a person was in danger.

Indeed, the Appellate Court has previously recognized the infeasibility of requiring the CTA to monitor its security cameras in real time. In *Anderson v. Chicago Transit Auth.*, plaintiff sued the CTA for, *inter alia*, failing to monitor its security cameras "to look out for disturbed or disoriented individuals" on its platforms. 2019 IL App (1st) 181564, ¶ 44. The Appellate Court refused to impose such a duty, explaining: "the CTA is not an insurer of the safety of every individual customer and passenger but is focused on ensuring mass transit for the public at

[5] https://www.transitchicago.com/security/cameras/. This Court may take judicial notice of information on government websites. *Board of Education of Richland Sch. Dist. No. 88A v. City of Crest Hill*, 2021 IL 126444, ¶ 5.

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large." *Id.*, ¶ 46 (citing *Bilyk v. Chicago Transit Auth.*, 125 Ill. 2d 230, 243 (1988)). If the CTA has no legal duty to monitor in real time security cameras on passenger platforms, it should go without saying that it has no duty to monitor cameras in underground subway tunnels, where passengers are not allowed to be. Therefore, the duties the plaintiff seeks to impose on the CTA in this case are highly burdensome and have not been recognized in Illinois law.

Because the injury to a trespasser inside the CTA's subway tunnel was not reasonably foreseeable, and the burden of guarding against this injury would be too high, this Court should hold that the CTA owed no legal duty to protect the trespasser on its right-of-way from the open and obvious danger of a moving train.

As we explain below, such a holding would be consistent with section 337 of the Restatement (Second) of Torts, governing landowners' duties to adult trespassers encountering dangerous conditions on their land.

II. A FINDING OF NO DUTY WOULD BE CONSISTENT WITH THE APPROACH IN THE RESTATEMENT (SECOND) OF TORTS, § 337 ADOPTED IN ILLINOIS.

In *Choate*, this Court "harmonized Illinois law with the general principles expressed in section 339 of the Restatement (Second) of Torts," governing landowners' duties to trespassing children who encounter dangerous conditions on landowners' premises. 2012 IL 112948, ¶ 35. Because this case involves an adult trespasser, the relevant Restatement section is section 337, governing landowners' duties to adult trespassers who encounter dangerous conditions on landowners' premises. Section 337, titled "Artificial Conditions Highly Dangerous to Known

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Trespassers," provides that a landowner may be liable to an adult trespasser for physical harm caused by a dangerous condition on his land, if two elements are satisfied:

> "(a) the possessor knows or has reason to know of [the trespasser's] presence in dangerous proximity to the condition; and
>
> (b) the condition is of such a nature that [the landowner] has reason to believe that the trespasser will not discover it or realize the risk involved."

Restat. (Second) of Torts, § 337. The plain languages of subsection (b) makes it clear that it focuses on the nature of the dangerous condition and on the landowner's reasonable belief that the trespasser will not discover it. Section 337(b) does *not* focus on the trespasser's subjective ability to recognize and avoid the risk at issue.

This Court adopted section 337 in *Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 447-48 (1992), which involved a *latent* dangerous condition on the CTA's premises – an electrified third rail. In *Lee*, a decedent was electrocuted while urinating on the CTA's train tracks. *Id.* at 443. This Court found that the CTA could reasonably anticipate a risk of injury to pedestrians by an electrified third rail because the rail was positioned at street-level, only 6 ½ feet away from a public sidewalk, and was not visibly distinct from the non-electric rails. *Id.* at 451-52. The Court then ruled that the third rail "was of such a nature that the CTA had reason to believe that a trespasser would not discover it." *Id.* at 452. In making this determination, the

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Court relied on the facts that "[t]here was nothing which indicated either the existence or the location of the third rail, or that the electric current was carried in a rail," and that "[t]here were no markings on the third rail itself." *Id.* In other words, the dangerous condition at issue in *Lee* was hidden and latent. *Lee* makes it clear that the second prong of section 337 focuses on *the nature of the dangerous condition*, not on the decedent's subjective circumstances.

Applying section 337 to the instant case, the CTA owed no duty to protect Quiroz from the risk of injury by a moving train because the dangerous condition, *i.e.*, a moving train, was "of such a nature" that the CTA had no "reason to believe that [Quiroz] will not discover it or realize the risk involved." To the contrary, because a moving train constitutes an open and obvious danger as a matter of law, it was reasonable for the CTA to expect that Quiroz would appreciate and avoid the apparent risk of coming within the area made dangerous by it.

The Appellate Court erred when it ruled that plaintiff adequately pleaded the second prong of section 337 by alleging that Quiroz "either did not or could not recognize the danger and remove himself from harm." 2021 IL App (1st) 200181-U, ¶ 21; A. 38. As we explained, the second prong focuses on the nature of the dangerous condition, not on the trespasser's subjective ability to appreciate it. Moreover, this Court has consistently ruled that an inquiry into whether a given condition is latent/hidden, as opposed to open and obvious, is governed by an objective standard. As *Choate* explained: "The issue in cases involving obvious dangers . . . is not whether the child does in fact understand, but rather what the

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landowner may reasonably expect of him. The test is an objective one . . . ." 2012 IL 112948, ¶ 38 (quoting *Mt. Zion*, 169 Ill. 2d at 126-27). Similarly, in *Bruns*, 2014 IL 116998, this Court re-iterated: "'Obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment." *Id*., ¶ 16 (citing Restat. (Second) of Torts, § 343A cmt. b). It cannot be seriously disputed that a reasonable person in Quiroz's position would have recognized and appreciated the apparent danger of entering, and laying next to the tracks, inside a CTA subway tunnel, where rapid transit trains travel non-stop between rail stations.

Indeed, the appellate court's misapplication of section 337(b) leads to an absurd result, in which landowners would owe trespassers a duty that they do not currently owe even to persons lawfully on the premises/invitees. This is because under well-established law, a landowner does not have to protect an invitee from "any activity or condition" that is openly and obviously dangerous. Restat. (Second) of Torts, § 343A. Specifically, Illinois adopted Restatement's section 343A, which provides that a "possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land, whose danger is known or obvious to them." *Bruns*, 2014 IL 116998, ¶ 16 (quoting Restat. (Second) of Torts, § 343A). Yet, under the appellate court's ruling, a landowner may be liable to a trespasser for an injury caused by an obviously dangerous condition. Such a result would not make any sense because, at common law,

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landowners owe trespassers less, not more, duties, than they owe to people lawfully on the premises.

Therefore, the proper application of section 337(b), which incorporates the open and obvious danger doctrine, should lead to the dismissal of the plaintiff's complaint for failure to state a legal duty the CTA owed to the decedent. As we further explain below, the appellate court erred by ignoring the "open and obvious danger" doctrine in the instant case.

III. THE APPELLATE COURT ERRED BY APPLYING THE "DISCOVERED TRESPASSER" EXCEPTION TO THE GENERAL RULE THAT LANDOWNERS OWE NO DUTY OF CARE TO TRESPASSERS.

A. This Court Has Narrowly Construed, and Rarely Applied, the "Discovered Trespasser" Exception, in Recognition of Railroads' Public Duty to Provide Reliable, On-Time Transportation.

Prior to *Choate*, in deciding cases that involved injuries by moving trains, courts relied on the principle that those who enter a railroad's right-of-way were trespassers, to whom railroads owed no duty, except to refrain from willfully and wantonly injuring them. *See, e.g., Briney v. Illinois Cent. R. Co.*, 401 Ill. 181, 186 (1948), *Morgan v. New York Central R. Co.*, 327 Ill. 339, 344-45 (1927), *Cunningham v. Toledo, St. L. & W. R. Co.*, 260 Ill. 589, 592-95 (1913), *Illinois Central R. Co. v. Eicher*, 202 Ill. 556, 560 (1903), *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500, 506-08 (1874). Accordingly, trespassers could not sue railroads for ordinary negligence, such as exceeding a speed limit or failing to sound a horn. *See, e.g., Neice v. Chicago & A.R. Co.*, 254 Ill. 595, 603 (1912) (where a plaintiff was a trespasser, there could be no recovery for mere negligence); *Eicher*, 202 Ill. at 563-64 (reversing jury verdict

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based on erroneous instruction that railroad could be liable "upon proof of mere negligence"), *Abend v. Terre Haute & I.R. Co.*, 111 Ill. 2d 202, 209 (1884) (there can be no recovery for an injury sustained by a party who "lies down upon a railroad track where trains of a railroad company are continually passing, and falls asleep," even if a train traveled "at a forbidden rate of speed"). As this Court explained in *Robertson v. New York Cent. R. Co.*, 388 Ill. 580, 585 (1944), "the public should be held to a recognition of [the railroads'] right" to the uninhibited use of the tracks, "in order to facilitate rapid operation of both freight and passenger trains."

As to willful and wanton misconduct, courts found that it could be present when trains traveled without proper precautions through densely populated areas, public crossings, well-beaten paths, or other areas where the public presence was reasonably foreseeable. *See, e.g., Bernier v. Illinois Cent. R. Co.*, 296 Ill. 464, 467 (1921) (accident occurred on a cinder pathway across the tracks used by the public for many years), *Neice,* 254 Ill. at 604 (accident occurred at a station platform). This exception to the no-liability rule became known as the "frequent trespasser" exception. *See Lee*, 152 Ill. 2d at 447 (landowner may owe a duty to "frequent trespassers in a limited area where the landowner knows or should know of their constant intrusion"). This exception is not at issue in this case, and we do not discuss it further.

Another circumstance, in which a railroad might be liable to a trespasser, involved a situation where train crew actually observed a trespasser "in a place of danger" near or on the train tracks, in sufficient time to avoid the injury, but failed

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to take reasonable actions to avoid the collision. *See, e.g., Morgan,* 327 Ill. at 344; *Chicago Terminal Transfer Co. v. Kotoski*, 199 Ill. 383, 385-87 (1902) (trainman "actually saw" people on a narrow bridge ahead of the train, but made no effort to avoid the collision); *Illinois Central R. Co. v. Noble*, 142 Ill. 578, 587-88 (1892) (railroad not liable to trespassers on its tracks unless a train engineer saw trespassers in "sufficient time before reaching them to have been able, by the exercise of ordinary care, to stop the train and, thus, avoid colliding with them").[6] The latter exception came to be known as "a discovered trespasser in a place of danger" – and this is the exception on which plaintiff relies in this case. See C. 122 (Count I heading "Discovered Trespasser"), C. 124 (Count II heading, "Discovered Trespasser"); A. 8.

The "discovered trespasser" exception has been narrowly construed, in recognition of the railroads' public duty to provide speedy and reliable transportation. For instance, trainmen were not required to be diligent in discovering trespassers on the railroad's right-of-way; the exception applied only when they *actually observed* the trespasser. *See, e.g., Joy v. Chicago, B & Q R. Co.*, 263 Ill. 465, 468 (1914); *Illinois Central R. Co. v. O'Connor*, 189 Ill. 559, 564 (1901); *Wabash*

[6] Most recently, this Court referenced the "discovered trespasser" exception *in dictum* in *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill. 2d 213, 230 (1996), as follows: "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*, however, did not involve an injury by a moving train. There, a trespasser died of internal head injury in a warming house on railroad's premises. *Id.* at 217-18.

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R. Co. v. Jones, 163 Ill. 167, 175 (1896); *Noble*, 142 Ill. at 587-88. As this Court explained in *Eicher*: "railroad companies are engaged in the performance of public duties, and represent the right and interest of the public in cheap, safe, and rapid transit; and if they owed a duty to run their trains with reference to trespassers or licensees, to look out for them, to slacken speed, and perhaps to stop, wherever they have reason to expect them, the public would suffer, and the public duty would not be discharged." 202 Ill. at 561.

Even if a train crew saw an object near the tracks, there was no duty to slow down or stop the train to investigate whether the object, in actuality, was a human being. For instance, in *Joy*, 263 Ill. at 470, this Court rejected a claim that a train engineer was negligent in failing to stop the train to investigate whether an object he saw near the track was a human being. This Court explained: "where an accident occurs at a place where the railroad company is under no duty to look out for trespassers, the question is not whether the engineer could see the object, but is whether he did see it and discover it to be a human being in time to stop his train and avoid the injury." *Id.* at 469.

Further, even if a train crew saw a pedestrian on the right-of-way, they were justified in initially assuming that he or she "would do what a reasonably prudent man would do and refrain from going upon the track or putting himself in a place of danger." *Robertson*, 388 Ill. at 584. Accord, *Morgan*, 327 Ill. at 345; *Illinois Cent. R. Co. v. Hall*, 72 Ill. 222, 224 (1874).

Additionally, courts construed narrowly the requirement that a discovered

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trespasser be "in a place of danger." *See, e.g., Rhodes*, 172 Ill. 2d at 229-30 (the "place of danger" exception did not apply where an injured trespasser was discovered in a "relatively safe location" on railroad premises); *Briney v. Illinois Cent. R. Co.*, 401 Ill. 181, 187, 190 (1948) (a boy standing 8 feet away from a moving train was "in a safe place"); *Morgan*, 327 Ill. at 345 (even on a narrow path between a fence and train tracks, there was still "room for the train to pass without injuring [a trespasser]"), *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510, 515 (1876) ("there was space enough on either side of the track, where [a trespasser] might have walked and avoided the injury").

Construed so narrowly, it is perhaps not surprising that the "discovered trespasser" exception applied only rarely. Our research has located just one case, decided 120 years ago, in which this Court applied the "discovered trespasser" exception to hold a railroad liable for an injury caused by a moving train. *See Kotoski*, 199 Ill. at 386-87 (trainman "actually saw," and called to, pedestrians on a narrow bridge to run away, but did nothing to stop the train).

This historic review of the "discovered trespasser" exception shows that this Court has been reluctant to hold railroad companies liable in tort for injuries caused by moving trains, especially in the locations where trespassers' presence could not be reasonably expected. As we explain below, following this Court's 2012 decision in *Choate*, the "discovered trespasser" exception to a landowner's duty as to its premises can no longer form the basis of a legal duty in cases involving injuries by moving trains.

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B. Following *Choate*, the "Discovered Trespasser" Exception Can No Longer Form the Basis of a Legal Duty in Cases Involving Injuries by Moving Trains.

In *Choate*, this Court made the "open and obvious danger doctrine" applicable to cases involving injuries by moving trains. As we explain below, following *Choate*, the "discovered trespasser" exception can no longer form the basis for imposing a legal duty in cases involving moving trains because: (a) it is inconsistent with the open and obvious danger doctrine; (b) it would make it impossible for courts to decide the issue of legal duty as a matter of law, and (c) it would result in the lack of uniformity in case dispositions.

1. "The discovered trespasser" exception is inconsistent with the open and obvious danger doctrine.

As we explained above, the "discovered trespasser" exception turns on whether or not a train operator actually observed a trespasser in the path of an oncoming train. Yet, it is well established that, in cases involving dangerous conditions on landowners' premises, the existence of a duty turns on the nature of the dangerous condition – whether it is latent/hidden versus "open and obvious" – *not* on defendants' knowledge that the condition presents a risk of injury. For instance, in *Choate*, the railroad had "*actual knowledge* that children were trespassing on its property and interacting with moving trains." 2012 IL 112948, ¶ 59 (J. Kilbride, dissenting) (emphasis in the original). Despite the railroad's *actual knowledge of the risk* of injury to children, this Court ruled that it had no duty to protect the minor plaintiff because a moving train constituted an open and obvious

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danger, which the minor was expected to appreciate and avoid. *Id.*, ¶¶ 35, 45.

Similarly, in *Bruns v. City of Centralia*, 2014 IL 116998, the City of Centralia knew about a sidewalk defect on the way to an eye clinic. The eye clinic called the City at least twice, reporting that pedestrians "had tripped and fallen on the sidewalk." *Id.*, ¶ 5. Despite the City's actual knowledge of a risk of injury, this Court ruled that the City owed no legal duty to protect the elderly plaintiff who tripped and fell on the sidewalk defect, because the defect constituted an open and obvious danger, which she was expected to avoid. *Id.*, ¶ 37. The Court explained: "The plaintiff's position is contrary to the very essence of the open and obvious rule: because the risks are obvious, the defendant could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition." *Id.*, ¶ 34 (internal citations omitted).

Likewise, in *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 439 (1996), the Chicago Park District knew that persons had previously sustained injuries by diving into Lake Michigan from a ledge in its park. Despite defendant's actual knowledge of the risk of injury, this Court ruled that it owed no legal duty to protect the plaintiff, who was injured by diving into the lake, because the danger of diving was open and obvious. *Id.* at 459.

In other words, in cases involving open and obvious dangers, defendants' actual knowledge of the risk of injury does not constitute the basis for imposing a legal duty. This is in stark contrast to the "discovered trespasser" exception, which focuses on whether or not a train operator observed a trespasser on the tracks.

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Hence, the "discovered trespasser" exception is inconsistent with the open and obvious danger doctrine.

Indeed, the "discovered trespasser" exception would effectively create a loophole to avoid the application of the "open and obvious danger" doctrine in cases involving injuries by moving trains. This is because, in all such cases, a trespasser, by definition, would be positioned in the path of an oncoming train – either on train tracks or in their immediate vicinity. Hence, in each case, plaintiffs could allege, like the plaintiff did here, that the trespasser was "in the direct line of vision" of train operators and, thus, should have been "clearly visible" to them. Even if the collision happened at night in a remote location, plaintiffs could allege – like the plaintiff did here – that a train was "equipped with headlights" which "provided additional illumination," and thus the train crew must have seen the trespasser. C. 121; A. 7. These allegations would be sufficient to impose a legal duty on the railroad to protect a trespasser from a risk of injury by a moving train -- which would be contrary to the *Choate* holding. Because the "discovered trespasser" exception is inconsistent with the "open and obvious danger" doctrine, it should no longer be applied.

2. The "discovered trespasser" exception would make it impossible for courts to decide a legal duty as a matter of law.

Additionally, if the "discovered trespasser" exception applies in lieu of the open and obvious danger doctrine, the existence of a legal duty could never be decided as a matter of law by the court; it would always constitute a question of fact

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for a jury. As we explained, the "discovered trespasser" exception turns on whether or not a train operator actually observed a pedestrian in the train's way and was able to identify him or her as a human being prior to the collision. Consequently, to determine whether a defendant owed a duty to a plaintiff in a given case, it would always be necessary to question the train operator about (1) whether or not any of them actually saw the pedestrian and, if they did, (2) whether they identified him as a human being who would not remove himself from danger. Hence, the case by necessity would proceed to fact discovery.

But fact discovery alone would not be enough. Even if the train operator testifies that he or she did not see a pedestrian, or did not identify him as a human being in time to avoid the injury, plaintiffs could argue that such testimony was self-serving and not credible, and that the jury should be the ultimate judge of witness' credibility. Moreover, parties would likely engage in expert discovery, retaining accident reconstruction experts to opine on whether a reasonable train operator should have been able to see the pedestrian. Indeed, plaintiff plans to make a similar argument in this case – he had asked for all camera footage from head cars of trains that passed Quiroz, to determine whether a train operator should have been able to see him from the operator's position in the head car. See C. 127-28 (seeking footage from "video cameras on the front of" the trains that passed Quiroz); A. 13 – A. 14.

Consequently, in all cases involving a train vs. person collision, it would be the jury deciding whether or not defendants owed a legal duty to the plaintiffs in

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a given case – because the key issue, *i.e.*, whether or not the train operator actually observed the pedestrian and identified him as a human being, would be left to the jury's credibility determination. Such an outcome would contradict the well-established principle that the existence of a legal duty in a given case is a question of law for the court to decide, not a question of fact to be decided by the jury. *Choate*, 2012 IL 112948, ¶ 22.

3. Application of the "discovered trespasser" exception would result in the lack of uniformity in case dispositions.

Additionally, if a railroad's duty to a trespasser depended on whether or not a train operator happened to observe a trespasser prior to the collision, then there would be no uniformity and no predictability in the outcomes of cases presenting similar facts. Under identical circumstances, if a train operator does not observe a trespasser, there would be no legal duty; but if the train operator happened to see the trespasser, the railroad company could be liable for the trespasser's injuries. In other words, the existence of a legal duty would depend on a happenstance – whether or not a particular train operator happened to see the trespasser prior to the collision. This would undermine the significant interest in articulating legal rules that provide for consistent and predictable outcomes. *See, e.g., Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 400 (2008) (in a defamation case, emphasizing the value of ensuring "consistent outcomes" when applying the same legal standard to a media vs. non-media defendant); *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 157 (2007) (in a choice-

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of-law context, emphasizing the value of "predictability of outcome" when applying the place-of-injury rule).

On a related note, if the existence of a legal duty, and a railroad's ensuing liability, depended on whether or not its train operator actually saw the trespasser, then train operators might be discouraged from revealing their actual knowledge out of fear of losing their job -- which is yet another reason why plaintiffs would undoubtedly question the veracity of train operators' testimony and insist that a jury should be the final arbiter of their credibility.

Finally, such an outcome would create a situation in which railroad companies, including municipal corporations such as the CTA, would be put to the expense of defending themselves in costly discovery and trial in cases where a party in the best position to avoid the incident is a trespasser – because absent the trespasser coming onto the railroad's right-of-way and his or her voluntary exposure to the unmistakable danger, the incident would not have happened. This also would make railroads potentially liable for suicide-like behaviors of trespassers – something that has never been a part of the Illinois law. As this Court held in *Choate*, "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 . . . ." 2012 IL 112948, ¶ 39.

For all these reasons, this Court should not carve an exception to the open and obvious danger doctrine in cases involving "discovered trespassers." Like in other cases involving open and obvious dangers, the existence of a legal duty

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should turn on the reasonable foreseeability of injury, not on whether a train operator happened to spot a trespasser.

But even if this Court decides to apply the "discovered trespasser" exception in the instant case, the plaintiff's complaint still should be dismissed. As we explain below, plaintiff failed to set forth well-pleaded allegations supporting the application of the "discovered trespasser" exception in this case.

IV. ALTERNATIVELY, THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO SET FORTH WELL-PLEADED ALLEGATIONS SUPPORTING THE APPLICATION OF THE DISCOVERED TRESPASSER EXCEPTION.

Even if this Court applies the "discovered trespasser" exception, the plaintiff's complaint still should be dismissed because: first, the "discovered trespasser" exception never encompassed a duty to be on a lookout for trespassers or objects near the tracks (Counts III and IV); and second, the allegation that CTA personnel "saw" the decedent lying next to the tracks in the subway tunnel is conclusory and therefore insufficient to plead that the CTA "discovered" him in time to avoid the injury (Counts I and II). Moreover, plaintiff never alleged that an operator of the train that came into contact with the decedent could have done anything differently to avoid the collision.

A. Illinois Law Never Required Railroads to Be on the Lookout for Trespassers Where Their Presence Was Not Reasonably Foreseeable.

In reversing the circuit court judgment, the appellate court "revived" causes of action alleging that the CTA has a duty to be on the lookout for

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trespassers or objects inside its subway tunnel. Specifically, Counts III and IV allege that the CTA engaged in willful and wanton misconduct by failing to: "operate its rapid transit trains with personnel who watched for objects and people who might be situated in the area where said trains were directed;" "keep a proper and sufficient lookout" for "objects or people in the area where the trains were traveling," and "view its security monitors . . . to determine whether people in the area being monitored were endangered." C. 126; A. 12. But as we explained above, the "discovered trespasser" rule, on which the appellate court relied, never imposed a duty on railroads to be on the lookout for trespassers, let alone "objects" near the tracks, especially where – as here -- the presence of trespassers was not reasonably foreseeable. See *supra* at pp. 37-38. Accordingly, because Counts III and IV plead duties that are not recognized in Illinois, they should be dismissed with prejudice.

B. The Allegation that CTA Personnel "Discovered" Quiroz Prior to His Fatal Injury Is Conclusory.

Further, Counts I and II alleging that the CTA personnel "saw [the decedent] as he lay next to the tracks," C. 122-23, ¶ 17, should be dismissed because this allegation is conclusory and thus insufficient to plead that the CTA "discovered" Quiroz prior to the fatal injury.

Illinois is a fact-pleading jurisdiction, and "a plaintiff must allege facts, not mere conclusions, to establish his or her claim as a viable cause of action." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008). The only facts supporting the

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plaintiff's assertion that train operators actually saw the decedent are: that he had fallen in the area "next to the tracks," that he was allegedly in the train operators' "direct line of vision," that the area in the subway tunnel where he lay was allegedly "a lighted area," and that the trains "were equipped with headlights which . . . provided additional illumination onto the area in front of the trains." C. 121-23, ¶¶ 7-9, 17; A. 7 – A. 9. But these allegations merely provide an inference that the train operators *should have seen* the decedent, not that they actually saw him. Absent are any allegations that a train slowed down in the area where the decedent lay next to the tracks, or that any CTA employee walked up to him prior to his injury – which would have tended to show that the CTA personnel noticed him prior to the injury. And as we explained above, courts applying the "discovered trespasser" exception required plaintiffs to show that the train crew *actually observed* the trespasser and identified him or her as a human being – not that they *should have* seen him or her – prior to the collision. *See, e.g., Joy*, 263 Ill. at 468; *O'Connor*, 189 Ill. at 564.

Further, nowhere in his complaint does plaintiff allege that, prior to the injury, the CTA personnel identified the decedent as a human being and not an inanimate object, such as a piece of debris blown into the subway tunnel. Plaintiff's own complaint alleges that, "from time to time," there was "debris on the ground outside the boarding area of the tunnels." C. 121-22, ¶ 10; A. 7 – A. 8. After all, the decedent was "[lying] next to the tracks" inside the subway tunnel, not standing upright. C. 122-23, ¶ 17; A. 8 – A. 9. Significantly, plaintiff alleges

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that the CTA personnel should have been on a lookout for "objects" that "might be situated" in the area where the trains were traveling. C. 126, ¶21(a); A. 12. Thus, plaintiff seems to acknowledge that the decedent could have been easily mistaken for an abandoned object. But as we explained above, Illinois law never required trainmen to slow down or stop the train to investigate whether an object they see near or on the track is a human being. *See, e.g., Joy,* 263 Ill. at 469-70.

Moreover, the classic example of a "discovered trespasser" exception involves a situation where a train operator observes a trespasser in a position of danger, with sufficient time to take actions to avoid an injury, but fails to do so. *See, e.g., Joy*, 263 Ill. at 467-68, *Kotoski*, 199 Ill. at 387-88; *Noble*, 142 Ill. at 587-88. Plaintiff makes no pretense that this is such a case. Plaintiff never alleges that the train operator whose train came into contact with the decedent could have done anything differently to avoid the accident. Rather, plaintiff's allegations focus on the operators of the two trains that had passed the decedent without making contact. Specifically, plaintiff alleges that "notwithstanding the presence of [the decedent] in a position of peril, no attempt was made, in order to avoid a collision between *another* CTA rapid transit train and the [decedent], to notify *other* CTA personnel in order [to] stop or delay *other* rapid transit trains operated by the CTA from operating in the area where [the decedent] was situated and remained in obvious peril." C. 123, ¶ 19 (emphasis added); A. 9. These allegations tacitly acknowledge that CTA train operators could not have observed the decedent inside the tunnel, and identified him as a human being, in time to slow down or

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stop the train to avoid the injury. Accordingly, plaintiff seeks to impose on the CTA train operators a different duty – a duty to report to "other CTA personnel" the objects that they see near the tracks, so that the "other CTA personnel" could stop "other rapid transit trains" to investigate whether the object is a human being. A. 9. Such a duty to report has absolutely no precedent in Illinois law; it cannot support a claim of ordinary negligence, let alone a claim of willful and wanton misconduct.

Therefore, in the alternative, the plaintiff's second amended complaint should be dismissed because it fails to adequately plead the "discovered trespasser" exception.

CONCLUSION

For the foregoing reasons, the Appellate Court ruling should be reversed, and the circuit court judgment in the CTA's favor should be affirmed.

Respectfully submitted,

BRAD JANSEN
Acting General Counsel

s/ Irina Y. Dmitrieva
BY: IRINA Y. DMITRIEVA
Chief Counsel-Compliance,
Policy & Appeals
567 West Lake Street, 6th Floor
Chicago, Illinois 60661
(312) 681-2932
idmitrieva@transitchicago.com
appeals@transitchicago.com

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CERTIFICATE OF COMPLIANCE

I certify that the **Brief of Defendant-Appellant Chicago Transit Authority** conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 50 pages.

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

CERTIFICATE OF SERVICE

I, Irina Dmitrieva, an attorney, certify that on **February 16, 2022**, I caused the attached **Brief of Defendant-Appellant Chicago Transit Authority** to be filed with the Clerk of the Supreme Court of Illinois, with true and correct copies of the same served on the counsel listed below via the Court's Odyssey eFileIL system:

James P. Costello
COSTELLO, MCMAHON, GILBRETH & MURPHY, LTD.
150 N. Wacker Drive, Suite 3050
Chicago, Illinois 60606
service@costellaw.com

Verification by Certification:

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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

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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 Illinois Appellate Court,
First Judicial District, No. 20-0181

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

APPENDIX

TO DEFENDANT-APPELLANT'S BRIEF

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REPORT OF PROCEEDINGS

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FILED
7/1/2019 3:41 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018L010344

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

ALEJANDRO QUIROZ Administrator of the Estate of RICARDO D. QUIROZ, Deceased,	)	
Plaintiff,	)	
v.	)	No. 18 L 010344
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation,	)	
Defendant.	)	

SECOND AMENDED COMPLAINT AT LAW

NOW COMES Plaintiff, ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO D. QUIROZ, Deceased, by his attorneys, COSTELLO, MCMAHON, BURKE & MURPHY, LTD., and complaining of Defendant, CHICAGO TRANSIT AUTHORITY, states as follows:

[COMMON ALLEGATIONS]

1. That on and prior to April 15, 2018, Defendant, CHICAGO TRANSIT AUTHORITY ("CTA") was a municipal corporation existing pursuant to 70 ILCS 3605/1 et. seq., commonly known as the Metropolitan Transit Authority Act.

2. That on and prior to April 15, 2018, the CTA provided rapid transit rail service on the CTA Red Line between Howard Street and 95th Street in the City of Chicago, County of Cook and State of Illinois.

3. That on or about April 15, 2018, Plaintiff's Decedent, RICARDO D. QUIROZ, fell from the catwalk onto the ground near the southbound CTA Red Line train tracks just north of the Grand Avenue platform.

4. That on or about April 15, 2018, after falling onto the tracks, Plaintiff's Decedent,

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RICARDO D. QUIROZ, was positioned on the southbound tracks immediately outside the non-energized rails, closest to the platform ("the platform side") where passengers boarded said train and farthest away from the wall and energized rail ("the third rail side").

5. That on or about April 15, 2018, as a result of the fall, Plaintiff's Decedent, RICARDO D. QUIROZ, 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.

6. That on April 15, 2018, the CTA southbound rapid transit trains passing over the tracks were operated by CTA personnel who were seated and positioned on the platform side of the first train car as the train traveled down the tracks.

7. That on April 15, 2018, Plaintiff's Decedent, RICARDO D. QUIROZ, was positioned immediately underneath the CTA train, in the direct line of vision of the CTA personnel who were operating rapid transit trains over the area where the Plaintiff's Decedent, RICARDO D. QUIROZ, had fallen.

8. That on April 15, 2018, the area where Plaintiff's Decedent, RICARDO D. QUIROZ, had fallen was a lighted area.

9. That on April 15, 2018, the trains being operated by CTA personnel were equipped with headlights which were intended to and in fact provided additional illumination onto the area in front of the trains in the direction the trains were traveling, including but not limited to in the area where the Plaintiff's Decedent, RICHARD D. QUIROZ, had fallen.

10. That the Defendant, CTA, had notice of the fact that persons were in the subway tunnel from time to time, outside the boarding area, given the presence of graffiti on the walls and

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debris on the ground outside the boarding area of the tunnels. The CTA was also aware of the presence of people who, from time to time, fell, were pushed or for some other reason were on the tracks, outside the area where they would board the rapid transit trains.

11. That on April 15, 2018, at least two CTA trains passed directly over the Plaintiff's Decedent, RICHARD D. QUIROZ, at the spot where he had fallen.

12. That the Plaintiff's Decedent, RICHARD D. QUIROZ, was clearly visible to the each of the two operators of the train which passed over the Plaintiff's Decedent, RICARDO D. QUIROZ, as he lay on the tracks in the area previously mentioned.

13. That there were in operation certain security cameras in the area where the Plaintiff's Decedent, RICHARD D. QUIROZ, had fallen; and that the Plaintiff's Decedent, RICHARD D. QUIROZ, was clearly visible in said cameras.

14. That after the two or more CTA trains passed over the Plaintiff's Decedent, RICHARD D. QUIROZ, another southbound CTA Red Line train collided with Plaintiff's decedent, thereby causing him injury which ultimately caused the Plaintiff's Decedent's death.

15. That each and every one of the rapid transit train operators and security personnel were acting within the scope of their employment for the CTA at all times mentioned herein.

16. That each of the rapid transit train operators knew that avoiding collisions with people situated on the train tracks and objects on the train tracks could be a matter of life and death, both for people situated on the tracks and for passengers on the rapid transit trains.

COUNT I - WRONGFUL DEATH - DISCOVERED TRESPASSER

17. That on April 15, 2018, the rapid train operators who passed over the Plaintiff's Decedent, RICARDO D. QUIROZ, while the Plaintiff's Decedent was laying down in the area saw

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Plaintiff's Decedent as he lay next to the tracks.

18. That on April 15, 2018, the security personnel, who were monitoring the security cameras in the area where Plaintiff's Decedent fell, saw and took note of the Plaintiff's Decedent, RICARDO D. QUIROZ, while the Plaintiff's Decedent was laying down in the area where the Plaintiff's Decedent fell.

19. That notwithstanding the presence of the Plaintiff's Decedent in a position of peril, no attempt was made, in order to avoid a collision between another CTA rapid transit train and the Plaintiff's Decedent, to notify other CTA personnel in order stop or delay other rapid transit trains operated by the CTA from operating in the area where the Plaintiff's Decedent was situated and remained in obvious peril.

20. That the CTA, by and through its employees, train operators and security personnel, having discovered the presence of Plaintiff's Decedent near the tracks in a position of peril, owed a duty of exercising ordinary care for the safety of the Plaintiff's Decedent.

21. That contrary to and in violation of said duty, Defendant, CTA, acting by and through its duly authorized agents, servants, and employees, was then and there guilty of one or more of the following negligent acts or omissions:

a. Failed to stop train service until Plaintiff's decedent could be safely removed from the ground near the train tracks;

b. Failed to notify personnel operating rapid transit trains of the presence of the Plaintiff's Decedent in the area where he had fallen; and

c. Were otherwise negligent.

22. As a direct and proximate result of Defendant's negligence RICARDO D. QUIROZ

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sustained personal injuries which resulted in his death on April 17, 2018.

23. RICARDO D. QUIROZ left as his surviving next-of-kin, each of whom has suffered pecuniary loss by reason of said death and the loss of said decedent's society.

24. ALEJANDRO QUIROZ has been appointed Administrator of the Estate of RICARDO D. QUIROZ, deceased. A copy of Letters of Office is attached hereto as Exhibit "A".

WHEREFORE, ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO D. QUIROZ, Deceased, asks judgment against Defendant, CHICAGO TRANSIT AUTHORITY, in a fair and reasonable sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00) and costs.

COUNT II - SURVIVAL - DISCOVERED TRESPASSER

1 - 21. Plaintiff re-alleges and incorporates by reference Paragraphs 1 - 16 of the Common Allegations and Paragraphs 17 - 21 of Count I.

22. That as a direct and proximate result of the aforementioned negligence of Defendant, the Plaintiff's decedent, RICARDO D. QUIROZ, endured conscious pain and suffering prior to his death on April 17, 2018.

23. Plaintiff re-alleges and incorporates by reference Paragraph 24 of Count I.

WHEREFORE, ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO D. QUIROZ, Deceased, asks judgment against Defendant, CHICAGO TRANSIT AUTHORITY, in a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00) and costs.

COUNT III - WILFUL AND WANTON MISCONDUCT / WRONGFUL DEATH

1 - 16. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 16 of the Common Allegations.

17. That in the alternative to the allegations of Paragraph 17 of Count I, each and every one

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of the rapid train operators who passed over the Plaintiff's Decedent, RICARDO D. QUIROZ, while the Plaintiff's Decedent was lying down in the aforementioned area were not watching where the trains were being operated and were not observing what was directly in front of them. For one or both of those reasons, the operators did not see the Plaintiff's Decedent, even though he was plainly and clearly visible and would have been seen by said operators had they been watching where the rapid trains were traveling or observing what was directly in front of them.

18. That in the alternative to the allegations included in Paragraph 18 of Count I, the security personnel who were monitoring the security cameras in the area where Plaintiff's Decedent fell were not watching the cameras where the Plaintiff's Decedent fell, even though the Plaintiff's Decedent was plainly and clearly visible and would have been seen by said security personnel had they been watching the monitors.

19 That notwithstanding the presence of the Plaintiff's Decedent in a position of peril, no attempt was made to notify other CTA personnel in order stop or delay other rapid transit trains operated by the CTA from operating in the area where the Plaintiff's Decedent was situated and where he remained in obvious peril in order to avoid a collision between another CTA rapid transit train and the Plaintiff's Decedent.

20. That at all times mentioned, the CTA, by and through its employees, train operators and security personnel, owed a duty of refraining from wilful and wanton conduct in the operation of its rapid transit train system which would endanger the safety of the Plaintiff's Decedent.

21. That contrary to and in violation of said duty, the Defendant, CTA, acting by and through its duly authorized agents, servants and employees, then and there engaged in a course of conduct showing a conscious disregarding for the safety of others as follows:

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a. Did not operate its rapid transit trains with personnel who watched for objects and people who might be situated in the area where said trains were directed;

b. Did not keep a proper and sufficient lookout on its trains in order to determine that said trains could proceed without danger either to objects or people in the area where the trains were traveling or to people on those trains;

c. Did not look at the train tracks situated in front of the drivers to see whether people or objects were situated on or near the tracks;

d. Did not view its security monitors in order to determine whether people in the areas being monitored were endangered; and

e. Were otherwise engaged in wilful and wanton conduct.

22. That as a direct and proximate result of Defendant's wilful and wanton misconduct, the Plaintiff's Decedent, RICARDO D. QUIROZ, sustained personal injuries which resulted in his death on April 17, 2018.

23 - 24. Plaintiff re-alleges and incorporates by reference Paragraphs 23 and 24 of Count I.

WHEREFORE, ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO D. QUIROZ, Deceased, asks judgment against Defendant, CHICAGO TRANSIT AUTHORITY, in a fair and reasonable sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00) and costs.

COUNT IV - WILFUL AND WANTON CONDUCT / SURVIVAL

1 - 16. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 16 of the Common Allegations.

17 - 21. Plaintiff re-alleges and incorporates by reference Paragraphs 17 - 21 of Count III.

22. That as a direct and proximate result of the aforementioned wilful and wanton acts and omissions of the Defendant, the Plaintiff's decedent, RICARDO D. QUIROZ, endured conscious pain and suffering prior to his death on April 17, 2018.

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23 - 24. Plaintiff re-alleges and incorporates by reference Paragraphs 23 and 24 of Count I.

WHEREFORE, ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO D. QUIROZ, Deceased, asks judgment against Defendant, CHICAGO TRANSIT AUTHORITY, in a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00) and costs.

COUNT V - SPOLIATION

NOW COMES Plaintiff, ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO D. QUIROZ, Deceased, by his attorneys, COSTELLO, MCMAHON, BURKE & MURPHY, LTD., and pleading in the alternative to Counts I through Count IV, complains of Defendant, CHICAGO TRANSIT AUTHORITY, as follows:

1 - 16. Plaintiff re-alleges and incorporates by reference Paragraphs 1 through 16 of the Common Allegations.

17. On or about said date, Defendant, CHICAGO TRANSIT AUTHORITY, utilized a video surveillance system on the front of each train used to monitor and record activity as the train progressed down said tracks.

18. On or about said date, Defendant, CHICAGO TRANSIT AUTHORITY, through its actual, apparent, or implied agents and employees, was aware of the fact that Plaintiff suffered severe injury on its premises and knew or should have known that the surveillance video recording of the occurrence Plaintiff complains of herein constituted evidence that was material to a potential civil action.

19. Based upon the statement of an investigating police officer, the surveillance camera on the front of the train which stopped to investigate was operational and would have shown what the train operator was able to see.

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20. Upon information and belief, there would have been operational video cameras on the front of the two trains which passed QUIROZ without injuring him.

21. That notwithstanding a request for same, no video from any train cameras has been produced.

22. In light of the circumstances, it was the duty of Defendant, CHICAGO TRANSIT AUTHORITY, through its actual, or implied agents and employees, to exercise ordinary care and caution to preserve the integrity of evidence material to a potential civil action arising from the subject occurrence, and, in particular, to preserve the integrity of the surveillance video recording of the occurrence at issue.

23. Defendant, CHICAGO TRANSIT AUTHORITY, breached the aforementioned duty in on or more of the following ways:

a. Failed to preserve video surveillance recording of the occurrence;

b. Allowed material evidence to Plaintiff's claim to be overwritten;

c. Lost, destroyed or altered material evidence to Plaintiff's claim; and

d. Failed to copy, record or document the contents of the storage medium used to record the video surveillance of the occurrence.

22. That as a direct and proximate result of Defendant's breach of the aforementioned duty, Plaintiff is unable to prove sufficient facts to support his claims of negligence against the Defendant in this cause of action.

23. Plaintiff was damaged by Defendant's breach of the aforementioned duty and has sustained personal injuries which resulted in his death on April 17, 2018.

24. RICARDO D. QUIROZ left as his surviving next-of-kin, each of whom has suffered

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pecuniary loss by reason of said death and the loss of said decedent's society and by the loss of said evidence.

25. ALEJANDRO QUIROZ has been appointed Administrator of the Estate of RICARDO D. QUIROZ, deceased. A copy of Letters of Office is attached hereto as Exhibit "A".

WHEREFORE, ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO D. QUIROZ, Deceased, asks judgment against Defendant, CHICAGO TRANSIT AUTHORITY, in a fair and reasonable sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00) and costs.

Respectfully submitted,
COSTELLO, MC MAHON, BURKE & MURPHY, LTD.

Attorneys for Plaintiff

James P. Costello
Costello, McMahon, Burke & Murphy, Ltd.
Attorneys for Plaintiff
150 N. Wacker Dr., Suite 3050
Chicago, IL 60606
(312) 541-9700
Atty. No. 62049

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7/1/2019 3:41 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018L010344

FILED DATE: 9/24/2018 5:48 PM 2018L010344

LETTERS OF OFFICE-DECEDENT'S ESTATE (Rev. 12/2/99, CCG 0419)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

Estate of
RICHARDO D QUIROZ
Deceased

No. 2018 P 002868 5613381
Docket
Page

LETTERS OF OFFICE - DECEDENT'S ESTATE

ALEJANDRO QUIROZ has been appointed

Independent Administrator of the estate of

RICHARDO D QUIROZ, deceased,

who died Sunday, April 15, 2018 . and is authorized to to take possession of and collect the estate of the decedent and to do all acts required by law.

LS

WITNESS, May 09, 2018

Dorothy Brown
Clerk of the Circuit Court

CERTIFICATE

I certify that this is a copy of the letters of office now in force in this estate.

WITNESS, July 11, 2018

TG

Clerk of Court

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PLAINTIFF'S EXHIBIT A

SUBMITTED - 16734474 - Irina Dmitrieva - 2/16/2022 2:00 PM

11:30

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Quiroz

v.

CTA

No. 18 L 10344

ORDER

THIS CAUSE COMING TO BE HEARD ON CTA's 5/2-615 MOTION TO DISMISS WITH PREJUDICE PLAINTIFF'S SECOND AMENDED COMPLAINT AND FOR RULE 137 SANCTIONS, DUE NOTICE GIVEN AND THE COURT ADVISED IN THE PREMISES

IT IS HEREBY ORDERED 4802-O

1) CTA's 615 MOTION IS GRANTED on the basis of Court finding no duty and reasons stated on the record as in the transcript of the hearing

2) CTA's Rule 137 Motion is denied 5204

Attorney No.: 90500
Name: A. Madorno
Atty. for: Defendant
Address: 567 W Lake
City/State/Zip: Chgo Ill
Telephone: (312) 681-2930

ENTERED: Judge Brendan A. O'Brien

SEP 18 2019

Circuit Court - 2175

Dated:

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

SUBMITTED - 16734474 - Irina Dmitrieva - 2/16/2022 2:00 PM

FILED DATE: 12/12/2019 10:58 AM 2018L010344

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COOK COUNTY, IL
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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO D. QUIROZ, Deceased,
Plaintiff,
vs.) No. 18 L 10344
CHICAGO TRANSIT AUTHORITY, a municipal corporation,
Defendant.

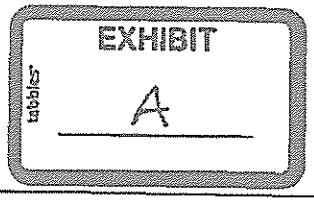
REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable Brendan A. O'Brien, Judge of said Court, on the 18th day of September, 2019 commencing at the hour of 11:43 o'clock a.m. and terminating at the hour of 12:14 o'clock p.m.

Reported by: Kimberly J. Karas, CSR
License No.: 084-003548

APPEARANCES:

COSTELLO, MCMAHON, BURKE & MURPHY, LTD., by
MR. JAMES P. COSTELLO
150 North Wacker Drive
Suite 3050
Chicago, Illinois 60606
(312) 541-9700
jcostello@costellolaw.com
for the Plaintiff;

CHICAGO TRANSIT AUTHORITY, by
MS. ANNE M. MADORMO
567 West Lake Street
Suite 600
Chicago, Illinois 60661
(312) 664-7200
amadormo@transitchicago.com
for the Defendant.



(Whereupon, the following proceedings were held in open court:)

THE COURT: Okay. So we're here in Chicago Transit Authority, 18 L 10344.

If the parties could introduce themselves starting with the plaintiff.

MR. COSTELLO: Your Honor, my name is Jim Costello or James P. Costello. I represent the Quiroz family.

MS. MADORMO: Anne Madormo on behalf of the Chicago Transit Authority.

THE COURT: Okay. So we're here on CTA's motion for 137 and a 615 to strike the second amended compliant in lieu of answer. I've read that brief. I've read the documents including my -- the hearing on the prior motion to dismiss. I've reviewed plaintiff's response. I have reviewed the CTA's reply. I have looked at the Lee case very closely which I'm familiar with. We're all familiar with that case. I've looked at the Nelson case which I think we talked about in the last hearing with the defendant. I have looked at the Choate, C-h-o-a-t-e, case which was cited in

the briefs which we're probably all familiar with.

I'm ready to hear argument I guess first on the 137. So go ahead, Defendant.

MS. MADORMO: Thank you, your Honor.

In fairness to the Court with the Court's standing order that oral arguments are allowed on issues not covered in the briefs and I'm happy to answer any questions but --

THE COURT: Okay. I guess in your 137 you say there's certain allegations in the complaint meaning plaintiff being on the platform as opposed to being in the tunnel.

MS. MADORMO: Yes.

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THE COURT: Things that you believe are factually inaccurate based on the video that was provided to the plaintiff's counsel, they know where the person was essentially, right.

MS. MADORMO: Yes.

THE COURT: Okay.

MS. MADORMO: Your Honor, it's important I -- the procedural history on the 137 obviously is very delicate and I rarely -- I can't even think of another time I've raised it. But the fact of the matter is this is a case where they have video in

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their possession before the first complaint. In the first complaint when counsel for the plaintiff, Mr. Allen, was here the issue was they had alleged he was a patron, he was on this plat -- a platform or in some boarding area of the tunnel. So we started with that. So they had video in their possession. The original complaint was filed. We moved under 615 to strike certain defective portions of it including specify where Quiroz is because you know where he is.

THE COURT: Well, and I had an issue too, I said I couldn't -- I remember in reading the transcript I couldn't tell where this happened. And then the plaintiff turned around and said, well, I had limitations because I didn't have the full video, right.

MS. MADORMO: Yes.

THE COURT: Okay. Go ahead.

MS. MADORMO: So substantively at that time we were arguing no duty was owed to the plaintiff based on the open and obvious doctrine. But, yes, that Court was at a bit of a disadvantage as to needing to know where the plaintiff was to determine both his relationship to us and answer

the question of duty. So --

THE COURT: Meaning if he was on the platform he likely isn't a trespasser, true.

MS. MADORMO: Correct.

THE COURT: Okay.

MS. MADORMO: At that time then the arguments also focused on whether in light of the open and obvious doctrine being raised plaintiff could satisfy the exceptions to it being recognized by the Illinois Supreme Court distraction or deliberate encounter. We moved away from that to the Nelson opinion. And a frequent trespasser exception. And in fairness in the first complaint plaintiff was citing graffiti and debris although we still had this question of where.

THE COURT: Again it's -- go ahead, I'm sorry.

MS. MADORMO: So as per the March 8th transcript Mr. Allen was given an opportunity to replead. He made the statement I'll try to plead in good faith and not throw stuff in or make stuff up.

We get the first amended complaint. The first amended complaint what also has happened in the meantime is CTA did go back and look. Again,

this was reported to us as a criminal event to the extent that it's investigated by our security personnel, an individual is found on the tracks.

The video that Mr. Allen did not have before the first complaint and he subsequently had by the first amended which was extra seconds depicting the fact that Quiroz actually climbed into a wall.

But I know we're only at a 615 but the fact of the matter is they had all of the video, they had an affidavit of completeness regarding the video prior to filing the first amended complaint.

The first amended complaint was then challenged by a 615 and 619. Understandably the Court again entertained the 615 portion and the focus in fairness was put on late in this discovery trespasser theory. And the Court inquired of the plaintiff, you've made this conclusory statement, he was discovered, what is your basis. You said in Paragraph 7 what is the basis for that. Mr. Allen represented the facts that he believes supported that were that there are lights in the tunnel, trains have lights. Again we had in the balance where Quiroz was.

THE COURT: But it's discovery, reasonably should have been discovered, right. Isn't that the standard or maybe I'm wrong.

MS. MADORMO: Yes, discovery or reasonably should have been discovered, 137.

THE COURT: Okay.

MS. MADORMO: Not being able to avail themselves of this frequent trespassing however. So the issue there was all you are saying with what you've pled and I think what Mr. Allen argued was, well, the subsequent train operator saw him and -- which comes into play now.

THE COURT: And this was after the fact.

MS. MADORMO: After the fact. And it remains after the fact.

So all of these issues.

MR. COSTELLO: I'm sorry, I missed that one the subsequent -- I beg your pardon, may I hear that again.

THE COURT: Well --

MS. MADORMO: Sure. The subsequent train operator discovered him after he had already put his leg on the third passenger train.

MR. COSTELLO: Thank you. I'm sorry.

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THE COURT: That's what I've got. And if I misstated that I apologize.

Go ahead.

MS. MADORMO: Okay. So Mr. Allen at that time said, well, all he had was that he would have been able to see him which was not necessarily the person had been discovered. And he was given an opportunity understanding it wasn't a question of proof, it was a question of do you have a basis to plead the discovery.

And so then the second amended complaint arrived. Mr. Costello had alerted me to the fact that he was assuming the responsibility for the pleading.

THE COURT: Okay.

MS. MADORMO: And the same exact things appear here. But we've also gone back to the first original complaint. And the 137 was raised on the basis of -- and I was very particular and specific with what I asserted that I believed to be in bad faith which is you possess this video and we're back to allegations that he fell from the catwalk when you know he was sleeping in a wall pocket in a subway tunnel. That he fell onto the track when

you know he isn't on the tracks. He's laying on the track bed or right of way. And if -- more specifically we specified rails, he's beneath them.

Video shows other things that I detail in the 137. But again we have basically gone backwards which is the basis for the 137.

THE COURT: Got it.

MS. MADORMO: In possession of the video that there are blatant misrepresentations of things. And we're still left in the second amended complaint now with suddenly the word saw. That the train operator saw.

THE COURT: Paragraph 7 -- strike that. In Counsel 1 under the wrongful death which I'm sure is incorporated in the other 17 says that the plaintiff's decedent in par -- well, strike that.

Paragraph 17 of Count 1 says while the plaintiff's decedent was lying down in the area saw plaintiff's decedent as he laid next to the tracks.

MS. MADORMO: Correct.

THE COURT: And that was in reference to rapid train operators.

MS. MADORMO: Correct. And the basis is, if we look in the rest of the complaint, is the tunnel

has lights, the train has lights, and that this subsequent operator saw him. So what is critical is that the operator -- and I say in the briefs, that reliance on the police report admitted the information they had before drafting the complaint is not necessarily admissible here. But I believe it's important we address it now because I believe the time has come to dismiss this with prejudice is that it is critical that the operator they are relying on for this saw statement didn't discover him until he had also passed him by.

THE COURT: And he was also moved by -- or strike that.

The body was moved by the occurrence --

MS. MADORMO: Correct.

THE COURT: -- correct.

MS. MADORMO: The body was moved by the third train. So to keep it straight two trains pass, the third train is passing. Quiroz wakes up, moves, puts his leg on the side of the front car, the first train, subsequently an -- and that train does take him.

THE COURT: So he is not in the location that he was in at the time that he was initially --

MS. MADORMO: Contacted.

THE COURT: -- contacted by the train, true.

MS. MADORMO: Correct.

THE COURT: And that's where he was discovered at that subsequent location, true.

MS. MADORMO: Correct. Once a train had stopped because it had passed him by just as the others got -- and the operator got out of the train, walked back into the tunnel --

THE COURT: Okay.

MS. MADORMO: -- with a flashlight.

So it is unreasonable and it is not an available inference from the fact that trains pass by that a passing train operator who demonstrates no responsive action whatsoever. And I believe in these briefs I cite Anderson versus CTA just to the extent that I believe it's an instructive opinion when we're talking about trains passing people by that is not responsive action whatsoever.

And I hope that otherwise my reply brief made clear that there is nothing new here. Plaintiff's conclusion that he was seen by a passing train operator has no good faith factual support.

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THE COURT: Okay.
MS. MADORMO: What the plaintiff is asking this Court to do -- and I would say imploring this Court to do is create a duty for CTA to be on the lookout for and to have discovered Quiroz a trespasser in a dark subway tunnel prior to this contact with a passing train. And his own response admitted as much on Page 11 of that response.
THE COURT: Okay. And now we're getting to the merits of your motion to dismiss though, right.
MS. MADORMO: Yes.
THE COURT: Okay. So you're -- ultimately it boils down to -- I got the 137. It ultimately boils down CTA owes no duty to this person, number one, because he is a trespasser and also because it's an open and obvious condition, train. You cite Choate, and if I mispronounced the name, which establishes trains and train tracks are open and obvious dangers, true.
MS. MADORMO: Yes.
THE COURT: Okay. You lead in to -- which begs the question on duty. And the duty has a requirement and you cite to the Lee case, Lee v CTA, for the duty element. And there are two

prongs even for known trespassers that have to be met by a plaintiff under the duty analysis, correct.
MS. MADORMO: Correct.
THE COURT: And that would be under the restatement 337 which is what Lee cites to, true?
MS. MADORMO: Correct.
THE COURT: Okay. Anything else?
MS. MADORMO: That the second prong of 337 obviously can't be met when we're dealing with an open and obvious danger.
THE COURT: And the second prong of 337 is -- I'm going to read it, I'm reading it right from Lee, the condition is of such -- such a nature that he has -- he being the injured person or decedent, has reason to believe that the trespasser -- or strike that, let me start over.
The condition is -- this is the second prong of 337 cited by Lee states the condition is such a nature that he being the landowner or possessor or whatever that is, has reason to believe that the trespasser will not discover it or realize the risk involved. Is that the second prong that you make reference to.

MS. MADORMO: Yes.
THE COURT: Okay. And that's not a pleading issue, that's just straight duty. No duty is a matter of law.
MS. MADORMO: Correct.
THE COURT: Is it your contention that that cannot be cleared up in a pleading issue.
MS. MADORMO: Yes.
THE COURT: The plaintiff can't --
MS. MADORMO: Or it can't be cleared up by this particular plaintiff.
THE COURT: In this setting, this case, it cannot be cleaned up as a pleading issue meaning plaintiff could not allege those issues because duty is a question of law and you're saying train is open and obvious and therefor could not be cleaned up just by stating something was a conclusion in the complaint that would meet that criteria, true.
MS. MADORMO: Yes. I believe there's no dispute, your Honor, that the condition that injured Mr. Quiroz was, in fact, a passing train, not to mention falling from the height that he fell from in a subway tunnel. It's only conditions in

there are -- are obviously dangers of falling from a height and passing trains.
THE COURT: Okay. Anything else?
MS. MADORMO: No. I would just say, you know, your Honor, not every accident is a result of negligence. Not every accident no matter how tragic is actionable. And CTA -- I know early in the arguments of this case you asked me what complaint Park was dismissed on, I didn't have the exact answer at the time, it was the 5th.
But I think the litany of events here and the three complaints we've had the time has come that the rules be enforced. We have an orderly procedure. This is simply not a case where CTA owed a duty to conduct itself in a certain way for the benefit of Mr. Quiroz. That being said CTA is entitled to dismissal with prejudice now.
THE COURT: Okay. So plaintiff I'll let you respond. But the two prongs the 137 on the pleading issue, after you got the video you kind of know where this took place. And it's the city's (sic) position that they've given you everything they have video related to this incident and therefor you know what's out there, you know as

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much as they know. So there's the 137 element.
But more importantly how can you get over that second prong of the duty analysis. I don't know how you can do it in this setting. Choate again says trains and tracks are open and obvious dangers. I don't think it's really in dispute that this person was a trespasser.
MR. COSTELLO: I'm not arguing that, Judge.
THE COURT: So I don't know how you get over that second prong.
MR. COSTELLO: Judge, if I may. If you look at the -- with the open and obvious and I wrote -- brief on --
THE COURT: Okay.
MR. COSTELLO: -- K-Mart. I've been around.
THE COURT: I remember that case.
MR. COSTELLO: The Cherokee case that I cited, not for -- just because I lifted stuff from the opinion on that.
THE COURT: Okay.
MR. COSTELLO: Open and obvious is -- the Supreme Court clarified in the Bruns case, B-r-u-n-s, versus City of Centrellia case. That's part one. And counsel referenced that fact when

she --
THE COURT: Okay.
MR. COSTELLO: -- went through the four factors. But if you look at open and obvious they say well that goes to reasonable foreseeability and likelihood of injury. What we're alleging on the plaintiff -- and the reason I wanted to take this over to make it real clear.
THE COURT: Sure.
MR. COSTELLO: We have a guy who is not with us. And can't tell us --
THE COURT: I got it.
MR. COSTELLO: And I don't know if that's clear to the Court how difficult it is for a plaintiff. But I've done this before and our firm has done that before.
THE COURT: I know, you gave response in your response, I got it.
MR. COSTELLO: I'm just saying this is not just me trying to shake down the CTA for money. This family wants to know what happened.
THE COURT: But I think what the city is -- or strike that.
The CTA is telling you is you know as much

happened as what they know. They have given you everything they have.
MR. COSTELLO: That's what they're saying, Judge. But if you look -- did you see that Fellon Smith case. This is because I'm being sanctioned.
MS. MADORMO: Your Honor --
MR. COSTELLO: Please, Counsel.
This is the second time somebody has asked for sanctions from me in 36 years.
THE COURT: Well, the sanction I've kind of moved on. I'm now talking about how you going to get the duty in, the duty part.
MR. COSTELLO: Well, that -- when I came across -- because it was me researching this when somebody is calling me on it, it's my firm.
THE COURT: I got it.
MR. COSTELLO: And did you see with the Fellon Smith they have actual photographs in there -- I don't know if you saw this, Judge.
THE COURT: Go ahead.
MR. COSTELLO: It's an actual photograph of the operator and what's he looking at. In that one he was looking at something else and laughing, which is fine. We don't have that information. We

haven't taken depositions. We haven't done any sorts of things we need to. So that puts me at --
THE COURT: In that case was the person a trespasser, the Fellon -- whatever it was.
MR. COSTELLO: Fellon Smith, yeah, she was a trespasser. Not only that but she was sober. My guy probably -- and I'd have to re-read the autopsy report to say it authoritatively he was either asleep or for whatever reason fell into and was in a position of peril.
My point to the Court is this, in the Fellon Smith case if you're looking to parse this out she actually chose to go down there. My guy for some reason went down there. I don't know that -- and I don't think anybody is claiming that he was jumping in front of the train. If he was this open and obvious comes right into play. My guy finds himself in a position of peril.
And two trains, not just one, two trains run past him. And they don't notice him, they don't do anything. And what I'd like to know is what were those operators doing. They have one job. They don't have to steer these trains, Judge.
THE COURT: I know.

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MR. COSTELLO: It's simply a matter of looking. Now, if you look and you look in the -- I'd like to see -- counsel just represented to the Court -- I don't know mean it disparagingly, that it was a dark subway tunnel. We allege that this was a lighted subway tunnel. And you have a train that has its lights on, Judge. And there's a reason those -- they have lights on, it's they can see what's ahead of them. Let's say it's -- fill in the blank, whatever it might be.

I would like to find out how many times people have been struck by CTA trains. And I'll bet you 10 bucks based on what we saw -- I'm sorry, Judge, let me put it in another way.

THE COURT: Go ahead.

MR. COSTELLO: I would -- I would submit to the Court that based on what I saw in that Tribune article the guy saying, hey, this shouldn't have happened. And they fired the guy in the Fellon Smith case. They have rules that say you got to look where you're going. This is not the kind of duty where you're saying, oh, you've got to check these -- you know, the one case where they say -- the plaintiff was saying you got to check all these

cameras to see what's going on and act immediately on that.

This is not that case, Judge. This is one where we're saying one of two things happened, either the two -- the two or more trains that went past him didn't look where they were going which is inappropriate. Or they saw him and chose to run him down. I'm going to guess without knowing that probably they were looking where they shouldn't be. But we don't know. And I'm telling this to the Court -- and this is my point --

THE COURT: Sure. I got it.

MR. COSTELLO: -- we don't know.

My -- my question is what would those cameras have shown in the prior two or more trains. You know, what were the operators doing. We can find that out but we can't if this case gets dismissed.

THE COURT: Okay. Let me just pose a hypothetical.

MR. COSTELLO: Sure.

THE COURT: A complete hypothetical. Not saying this will happen. Let's say you do find out who these two people are and let's say these two

people say, yeah, we saw something. Might have been something, might have garbage, sometimes we stop for garbage. Could have been a body but we would stop for that. Let's just assume that, just for sake of argument. I'm not saying that's going to happen, I have no idea. I still don't know how that gets you over the duty element that I just read off, the second part. I don't -- how -- how do you get over the issue of the condition is of such a nature that he, being the landowner or here the CTA, has reason to believe that the trespasser will not discover it meaning train tracks or a train or realize the risk involved meaning the risk being a train or train tracks. How do you get over that. I -- even if they saw him -- and that's kind of what I'm grasping with. I'm taking what you say is true that they maybe hypothetically, factually, maybe they did. But how do you get over that prong on the duty analysis.

MR. COSTELLO: The part that's --

THE COURT: That's the hardest part I'm struggling with.

MR. COSTELLO: Judge, may I look at that second prong, maybe I'm missing this.

THE COURT: Sure.

MR. COSTELLO: Thank you.

THE COURT: And it's the highlighted one with the red.

MR. COSTELLO: Sure.

THE COURT: And defense I'm going to ask this, you do believe that second prong has to be met for --

MS. MADORMO: Oh.

THE COURT: Hold on. Hold on.

MR. COSTELLO: Pardon me, Judge.

THE COURT: You do believe CTA that that second prong has to be met in order for the CTA to have a duty under the discovered trespasser for an open and obvious such as a train or train tracks, true.

MS. MADORMO: Yes, your Honor. It's and, two requirements.

THE COURT: And you believe they apply to the cases here in Illinois, true.

MS. MADORMO: Yes.

THE COURT: Yes.

Okay. So I don't know how you get over that, plaintiff.

MR. COSTELLO: Well, I -- this is a discovery

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-- it's either a discovery trespasser case where ordinary care kicks in. Or where they say, well, where the -- where the plaintiff -- you're saying this an open and obvious case, Judge. And I respectfully -- if you look back to -- what is it 363.

THE COURT: Well, I say it's open and obvious because the CTA cites the train and train tracks under Choate is an open and obvious danger. Correct, defendant.

MS. MADORMO: Yes.

MR. COSTELLO: Yeah, but that's - that, Judge -- if this guy -- if this was a voluntary encounter with that -- and I understand the Court's point. But if this was a place -- a situation where a guy says, you know what, I'm going to jump across the track and get me a lighter that I just dropped or a cell phone in the case of Fellon Smith from what I've read. That -- that -- that's -- you know, you're jumping down there, good luck.

THE COURT: Okay. So Fellon Smith is when she's on a platform, true?

MR. COSTELLO: And -- yes.

THE COURT: And she drops her cell phone or at

least factually that's what's been pled.

MR. COSTELLO: That's what we're hearing, yes.

THE COURT: Your person is in a tunnel.

MR. COSTELLO: For whatever reason. And he doesn't -- we don't know how he got there or why. Presumably he had a couple of beverages that evening.

THE COURT: I think that's probably a safe assumption, okay.

MR. COSTELLO: Let's just assure that for purposes of our discussion anyway.

THE COURT: But that's a little different. So she's on a platform.

MR. COSTELLO: And she chose to do it, Judge, that's my point. Whereas my guy finds himself in this precarious position of peril. See that's the point that was addressed by Justice Bilandic in Lee. And he says there's three exceptions to --

THE COURT: Okay. But Lee was more dealing with the third rail, right.

MR. COSTELLO: Correct.

THE COURT: Right.

MS. MADORMO: There's no open and obvious danger.

THE COURT: On the electricity or electrified third rail. Ours is the train tracks and the train, true.

MR. COSTELLO: Yes, sir.

MS. MADORMO: Yes.

THE COURT: Okay. I still don't know how you get over that in the second prong that I just read. I got it -- even if you say they saw -- I'm taking this as a hypothetical. And I just don't know how you meet it.

MR. COSTELLO: If the --

THE COURT: That's my issue. That's -- that's what this all boils down to. The pleading issues are the pleading issues. And I don't think that can be cured by filing a third amended complaint because you're saying no duty is a matter of law.

MS. MADORMO: Correct.

MR. COSTELLO: Well, and, Judge, let's say there were six trains that ran over this guy, let's say, instead of two.

THE COURT: But how does that go to what -- what the landowner knows or should have reason to believe that the person will not discover or realize the risk meaning a train or train tracks.

That's -- that's a different issue unless I'm missing something.

MR. COSTELLO: I think, Judge, if you look at the restatement section, I can't do it -- and I didn't bring it with and I'm sorry to say that, I should have. But if you look at the restatement section and it's the back end where they -- and they go into a discussion of this.

THE COURT: Okay.

MR. COSTELLO: And they talk about -- and this goes -- this is more like a -- what is it Kimbro, is that the case from '98 or '99.

THE COURT: I don't know.

MR. COSTELLO: It's the one where --

THE COURT: I know Kimbro it's versus Jewel.

MR. COSTELLO: Not Kimbro, I'm sorry, I got the wrong name. It's the one where Justice McMorrow wrote it, I just cant think of the name of it.

THE COURT: I can't either.

MR. COSTELLO: But it's the one where, hey, look if the person is there and they can't do anything about it. And -- and under those circumstances did he -- did he choose to encounter that risk. And this is the part --

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THE COURT: -- an encounter exception where he has to be there.

MR. COSTELLO: Yeah, but that goes -- it erupts two ways.

THE COURT: Yeah, it sure does.

MR. COSTELLO: Well, and here's the point. If my guy chose to encounter this risk it's on him. And I understand that. And if God forbid he were trying to do himself in or something, different case and I get that. But if somebody finds himself in a position of peril -- and we'll never find out if the Court dismisses the case.

THE COURT: But he's in a position of peril because he's a trespasser.

MR. COSTELLO: Because --

THE COURT: In a place he probably shouldn't be there -- be at, a tunnel off of a -- off of a platform off of Grand Avenue.

MR. COSTELLO: Could be.

THE COURT: Well --

MR. COSTELLO: I don't know.

MS. MADORMO: Judge, I have to interject here because --

THE COURT: Okay, I'm -- let him argue.

Go ahead. But do you understand my -- I'm sure you understand my problem. Even if you assume what he says is true that he was discovered which is what was alleged in the complaint if the person was discovered, that's what was alleged in the complaint. Even if I take that as true which I have to do at the pleading stage how does that still get to the duty part which is a question of law under the circumstances here which then begs the question how do you meet the second prong of 337 for a -- for an artificial condition dangerous to a known trespasser, how do you meet that second prong.

Defendant, go ahead.

MS. MADORMO: Plaintiff can't meet that prong, your Honor. This particular case -- yes, there are other train cases, there are other trespassers.

But the reason I wanted to interject is because this is an individual who was safely on a platform at Chicago Station. The video footage counsel has we know exactly what happened here. Mr. Quiroz walked into the tunnel on a catwalk where there would be nothing other than tracks, passing trains, and holes in the wall. He ran on

the catwalk. He slept in a wall. He fell out of the wall. He put his leg on the side of a passing train. So we do know.

And the fact of the matter is is considerable effort has been given and I -- as I stand here still say they can't satisfy the first prong with what they've pled but they certainly can't satisfy the second prong.

THE COURT: But at least the first prong they've at least pled it that he was discovered. They've alleged that. I have to take that as true.

MS. MADORMO: That's a conclusion.

THE COURT: It's a conclusion but I have to take it -- for sakes -- for sake of this motion -- I'm going to say on the pleading part they've covered the first prong meaning the possessor knows or has reason to know of their presence meaning the plaintiff or injured person in dangerous proximity to the condition. I'm going to take that as true because that's what they pled and they read the paragraph off of that.

But what I don't know and what I don't think they can ever prove by pleading or -- or by discovery the second prong which I've gone over. I

don't think that is met here. I don't think it could ever be met here under the facts as we know it which are supported by the videos which the CTA's representing they've given everything they have to the plaintiff. Plaintiff knows as much as they know about the facts underlying this case.

There's an issue about a camera on the front of another train. Okay, maybe that's true. Maybe that's out there. But I don't know -- I still don't know how that satisfies -- or whatever you would gather from that would satisfy the second prong under the duty analysis which I just went through.

So that's what I'm grasping with. That's the problem I see in this case.

Defense, anything else?

MS. MADORMO: No, your Honor. Tracks and trains and subways are open and obvious. The second prong of Section 337 which is a requirement to proceed under that theory cannot be satisfied by this plaintiff and these facts.

THE COURT: And that's the theory that was alleged by the plaintiff in the complaint.

MS. MADORMO: Yes.

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THE COURT: The current pleading, true.
MS. MADORMO: Yes, it's even a heading of the count.
MR. COSTELLO: Judge, can you give me one more second to look at that second prong.
THE COURT: Sure. I'm not hiding it, I just --
MR. COSTELLO: I know you're not. I didn't mean to imply it that way.
THE COURT: No, no, no, I didn't take it that way.
MR. COSTELLO: Judge, I'm just reading through 337 here.
THE COURT: Okay.
MR. COSTELLO: Is this -- is this on warning.
THE COURT: It says for -- I don't have --
MR. COSTELLO: Exercise -- here, let me just show you, Judge, what I'm looking at. It says failure to exercise reasonable care to warn. And I get that warning thing. It's like if it's a landowner case where you got warn if it's something dangerous. I don't think -- that's not the basis of our theory.
THE COURT: 337 is a restatement just reading again from the Lee case. Is entitled artificial

conditions highly dangerous to known trespassers.
MR. COSTELLO: I got it.
THE COURT: And it does go on to say cause to trespassers by his failure to exercise reasonable care to warn them. So I guess you're -- you're bringing up now that this may be limited only to reasonable care in warning the injured person or the decedent, true. So it's limited to that. That's -- based on your initial reading here in court, right.
MR. COSTELLO: Yeah, Judge, I'm sorry.
THE COURT: No, that's fine.
MR. COSTELLO: I got it right here.
THE COURT: How do you respond to that. He says this really only applies to a duty to warn.
MS. MADORMO: I would say that's the reason that I said before Lee doesn't necessarily apply when you have an open and obvious condition. Because for an open and obvious condition there's absolutely no duty to warn. But the duty to warn of an open and obvious conditions is broader than simply the duty to warn. It's a duty to protect from the danger. That's really what a warning is.
And so if counsel wants to make some claim

that he's alleged a duty to warn --
MR. COSTELLO: I'm not. I'm not so we're clear.
MS. MADORMO: -- 337 that's another reason that I have said in the past discovery trespasser doesn't apply when the condition you are talking about is open and obvious, that's a matter of law.
THE COURT: All right.
MR. COSTELLO: Judge, if I might.
THE COURT: You might.
MR. COSTELLO: This is from -- this is from the Lee case.
THE COURT: Okay.
MR. COSTELLO: And this is what I was focusing on. So I know where you're looking at and that's at the succeeding page.
THE COURT: Yeah.
MR. COSTELLO: I just printed this out so I'm not sure but --
THE COURT: Sure.
MR. COSTELLO: Anne, do you have this.
MS. MADORMO: Yes.
MR. COSTELLO: It's the Lee case. So Justice Bilandic went through on Lee and he said there were

exceptions to the rule of willful and wanton.
THE COURT: Got it.
MR. COSTELLO: He goes through them. Including a discovered trespasser. And then it kicks into ordinary care. And this is important it's like -- all right, so you're going along, does that mean they have to honk the horn. That would be a warning. If they honked the horn to my guy who's had two trains ran over him that's --
THE COURT: That's not going to do much. That's not going to help much.
MR. COSTELLO: Sorry.
THE COURT: It's not going to help much if they honk the horn. Go ahead.
MR. COSTELLO: It's a matter of stopping the train that's going to --
THE COURT: And that's what you've alleged.
MR. COSTELLO: That's it, Judge. And this is something that they should have seen. And not warned him, stop the trains, and get him off the tracks, because he's in a position of peril.
THE COURT: Okay. Defense, last word.
MS. MADORMO: Yeah, Judge, there is no duty to be on the lookout for trespassers. So again what

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they are asking you to do is find that there is this duty for a lookout when -- what they are -- seek -- the exception they're seeking, the ordinary care duty comes in after the fact. After a trespasser is discovered. It is not a duty to be on the lookout for the trespasser.

THE COURT: But if I take what you say is -- there's alleged that he was discovered so then does that ordinary care kick in then.

MS. MADORMO: No.

THE COURT: I mean, that's what you just said.

MS. MADORMO: Okay.

THE COURT: Maybe I'm missing it.

MS. MADORMO: Let me -- no, let me rephrase. The duty of ordinary care would not include open and obvious conditions.

THE COURT: Okay, fair enough.

All right. So the Court's heard argument. The Court's struggled with what it's struggled with the duty issue, the second prong, which I went over under the 337. I think under the circumstances, under the facts here I believe the CTA -- no duty to this person as a matter of law. Duty is a question of law and the Court's ruling that way.

However, and it says, however, if the Court misapplied the law under the 337 statement it's limited to something similar to reasonable care to warn which the plaintiff is not alleging in this case I would expect to see a motion to reconsider.

MR. COSTELLO: I'll do that, Judge. I get your point.

THE COURT: In good faith the motion to reconsider. But I'm not inviting it, I'm just saying take a look at it. But I'm going to say no duty as a matter of law here and the motion is granted.

MR. COSTELLO: Judge, just so we're clear -- and I don't mean to pin you down.

THE COURT: Sure.

MR. COSTELLO: Thank you for doing it this way.

THE COURT: No, it's okay.

MR. COSTELLO: But if I come back I want to do it for a reason.

THE COURT: Yeah.

MR. COSTELLO: The failure to warn is -- and I get the Court's point. You went through it, we've talked about that at great length and I understand

your point there. What I want to clarify --

THE COURT: -- issue. Go ahead.

MR. COSTELLO: Yeah, I want to come back and say, well, this is not that kind of case, it's a different kind of a case, do you --

THE COURT: And that would mean that the Court misapplied the Lee v CTA.

MR. COSTELLO: Got it.

THE COURT: I won't take offense. And then misapplied the 337. Because 337 in theory just hypothetically only dealt with duty to warn.

MR. COSTELLO: Exactly.

THE COURT: This isn't a duty to warn case. That would be a good faith motion to reconsider because I misapplied the law.

MR. COSTELLO: Very good.

THE COURT: If I'm ruling as a matter of law no duty --

MR. COSTELLO: To warn.

THE COURT: Yeah -- no, no duty. Good try.

MR. COSTELLO: I'm not going to warn, I'm not --

THE COURT: No duty as a matter of law as what's alleged in the complaint.

It's dismissed with prejudice but you can certainly bring a motion to reconsider.

MR. COSTELLO: All right. Judge, the 137 motion is denied.

THE COURT: That's denied.

MR. COSTELLO: Thanks, Judge.

MS. MADORMO: Thank you for taking the time, Judge.

(Which were all the proceedings had in the above cause this date and time.)

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

KIMBERLY J. KARAS, being first duly sworn, on oath says that she is a court reporter doing business in the State of Illinois; and that she reported in shorthand the proceedings of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said hearing and has set her verified digital signature.

Kimberly J. Karas

KIMBERLY J. KARAS, CSR
LIC. NO. 084-003548

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Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Qhiroz
v.
CTA

No. 18 L 010344

ORDER

This matter coming to be heard upon Motion of Plaintiff to Reconsider, due notice having been served + the Court being advised,

IT IS HEREBY ORDERED:

Plaintiff's Motion to Reconsider is denied. 5285

Judge Brendan A. O'Brien

JAN 13 2020

ENTERED: Circuit Court - 2175

Dated:

Judge Judge's No.

Attorney No.: 62049
Name: Costello/Cumbo
Atty. for: P
Address: 150 N Wacker
City/State/Zip: Chgo 60606
Telephone: 312/541-9700

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FILED
1/27/2020 1:31 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL

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APPEAL TO THE FIRST DISTRICT APPELLATE COURT
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ALEJANDRO QUIROZ Administrator of the Estate of RICARDO D. QUIROZ, Deceased, Plaintiff, v. CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Defendant.	)	No. 18 L 010344

NOTICE OF APPEAL

NOW COMES, the Plaintiff-Appellant, ALEJANDRO QUIROZ, Administrator of the Estate of RICARDO QUIROZ, deceased, by and through his attorneys, COSTELLO, MCMAHON, GILBRETH & MURPHY, LTD., and appeals from the attached orders granting Defendant-Appellee, CHICAGO TRANSIT AUTHORITY'S Motion to Dismiss on September 18, 2019 and denying Plaintiff-Appellant's Motion to Reconsider on January 13, 2020.

Plaintiff-Appellant prays the Appellate Court to reverse the afore-stated orders and to remand this case for further proceedings. In the alternative, Plaintiff-Appellant prays the Appellate Court to provide whatever other relief it deems appropriate.

Respectfully submitted,

Attorney for Plaintiff-Appellant

James P. Costello, Esq.
COSTELLO, MCMAHON, GILBRETH & MURPHY, LTD.
150 North Wacker Drive, Suite 3050
Chicago, IL 60606
(312) 541-9700
Cook County Atty #: 26146
ARDC #: 3122807
service@costellaw.com

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2021 IL App (1st) 200181-U

FIFTH DIVISION
JUNE 30, 2021

No. 1-20-0181

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALEJANDRO QUIROZ, an Administrator of the Estate of Ricardo Quiroz, Deceased, Plaintiff-Appellant, v. CHICAGO TRANSIT AUTHORITY, a municipal corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 18 L 10344 Honorable Brendan A. O'Brien, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Hoffman and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order dismissing the plaintiff's complaint is reversed based on the plaintiff's cause of action being sufficiently pled to survive a section 2-615 motion to dismiss.

¶ 2 The plaintiff-appellant, Alejandro Quiroz, as administrator of the estate of Ricardo Quiroz, deceased, brought a wrongful death action against the Chicago Transit Authority (CTA) in the circuit court of Cook County. The circuit court dismissed Mr. Quiroz's complaint on the basis that the CTA owed no duty of care to the decedent. Mr. Quiroz now appeals. For the following reasons,

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we reverse the judgment of the circuit court of Cook County and remand the case for further proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 The plaintiff's original pleadings and his subsequent amendments established the following facts. On April 15, 2018, at approximately 3:43 a.m., the decedent, Ricardo Quiroz,[1] entered a CTA train tunnel between the Grand Avenue and Chicago Avenue stations on the red line. He walked along the catwalk inside the train tunnel and eventually climbed into a recessed area of the tunnel wall. Ricardo remained inside the recessed wall pocket for two and a half hours, but then he fell out. He landed between the catwalk and the train tracks. Ricardo continued to lay on the ground, parallel to the tracks.

¶ 5 Two trains passed by Ricardo without incident. However, he apparently moved his body and placed his hand on the rail. When the next train passed by, it struck Ricardo, and his body became entangled with the train. The train dragged Ricardo to a different spot inside the tunnel. Seven more trains passed through the tunnel. Then a train conductor noticed something on the track, which he thought was garbage. After stopping the train at the station, the train operator walked back into the tunnel with a flashlight and discovered Ricardo's body.

¶ 6 On September 24, 2018, Mr. Quiroz filed a wrongful death complaint against the CTA, alleging that the CTA's negligence caused Ricardo's death. The CTA filed a motion to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)) on the basis that it owed no duty to Ricardo, a trespasser, from the open and obvious danger of trains moving inside a train tunnel. The trial court granted the CTA's motion and

[1]Since the decedent shares the same last name as the plaintiff, Mr. Quiroz, we will refer to the decedent by his first name, Ricardo.

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dismissed Mr. Quiroz's complaint without prejudice, allowing him the opportunity to amend it. The trial court further ordered the CTA to produce any surveillance video footage of the incident to Mr. Quiroz.

¶ 7 Thereafter, Mr. Quiroz filed his first amended complaint. The first amended complaint alleged that the CTA "knew that persons were in the subway tunnel from time to time because of graffiti on the walls and debris on the ground in the tunnels." Mr. Quiroz further alleged that, "on information and belief, that [train] operators would have been able to see [Ricardo] lying on the ground near the tracks in a position of peril." He therefore argued that the CTA owed Ricardo a duty of care. In response, the CTA filed a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2–619 (West 2018)), again arguing that it did not owe Ricardo a duty of care because not only was he a trespasser, but the moving trains were an open and obvious danger. The CTA's motion additionally argued that there was no evidence that Ricardo was *discovered* by CTA personnel prior to his death. The motion attached an affidavit from James Higgins, an employee in the CTA Security Investigations Department, which stated that the CTA's security cameras are "not monitored on a 24-hour basis" but instead are used "as a responsive investigatory tool" and are retrieved only "post-event."

¶ 8 Following a hearing, the trial court granted the CTA's motion and dismissed Mr. Quiroz's first amended complaint without prejudice. The trial court noted in its ruling that Mr. Quiroz's pleading that Ricardo was *discovered* by the CTA prior to his death was made "in a conclusory manner." The court's ruling provided Mr. Quiroz an opportunity to again amend his pleading.

¶ 9 Mr. Quiroz then filed a second amended complaint, which is the subject of this appeal. The second amended complaint alleged five counts: count I, "Wrongful Death - Discovered Trespasser"; count II, "Survival - Discovered Trespasser"; count III, "Willful and Wanton

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Misconduct/Wrongful Death"; count IV, "Willful and Wanton Conduct/Survival"; and count V, spoliation. The second amended complaint primarily alleged that the CTA train operators who drove the trains past Ricardo before he was struck, as well as the security personnel who monitored the security cameras which showed the inside of the tunnel, *saw Ricardo* but failed to stop the trains or notify other CTA personnel. Specifically, the second amended complaint alleged that Ricardo fell "in a lighted area" and was "injured, unable to remove himself from the tracks, and was obviously and clearly in a position of peril" and that he "was clearly visible to the two operators of the train[s] which passed over [Ricardo] as he lay on the tracks." It further alleged that "there were in operation certain security cameras in the area where [Ricardo] had fallen" and that he "was clearly visible in said cameras." Mr. Quiroz averred that this negligence by the CTA caused Ricardo's death because "after two or more CTA trains passed over [Ricardo], another southbound CTA [r]ed [l]ine train collided with [Ricardo], thereby causing him injury which ultimately caused [Ricardo's] death." The second amended complaint alleged, in the alternative, that the train operators and security personnel did not see Ricardo because they were not properly monitoring the train tracks while operating the trains. The spoliation count alleged that the CTA had failed to produce the surveillance video footage.

¶ 10 The CTA filed a motion to dismiss the second amended complaint pursuant to section 2-615 of the Code.[2] The CTA's motion to dismiss argued that Mr. Quiroz's second amended complaint failed to plead that the CTA owed a duty to protect Ricardo, a trespasser, from the open and obvious danger of moving trains or that it engaged in willful and wanton conduct. The motion argued that the second amended complaint pled speculative, conclusory statements without factual

[2]The CTA also filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018), which the trial court denied, and which is not at issue in this appeal.

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support. Additionally, regarding Mr. Quiroz's spoliation claim, the motion pointed out that the CTA had produced the surveillance video footage to Mr. Quiroz prior to him amending his complaint, which he relied upon in alleging specific facts in the second amended complaint, such as Ricardo falling and becoming stuck on the tracks as he was visible to the train operators and security cameras.

¶ 11 In response, Mr. Quiroz claimed that the CTA owed a duty to Ricardo because he was a discovered trespasser who was "clearly visible" and in "obvious peril." Mr. Quiroz again claimed that the CTA train operators and security personnel either saw Ricardo on the train tracks and ignored him or engaged in conduct which prevented them from seeing him.

¶ 12 Following a hearing on September 18, 2019, the trial court granted the CTA's motion and dismissed the second amended complaint with prejudice. Citing to section 337 of the Restatement of Torts (Restatement (Second) of Torts § 337 (1965)), the trial court noted that before a duty can be imposed on landowners as to trespassers, it must be established that the landowner has reason to believe that a trespasser would not realize the risk of the condition in which he was placing himself. The trial court emphasized that it has been well established that trains and train tracks are open and obvious dangers, especially in a location such as off the station platforms and inside the train tunnel where Ricardo placed himself. The trial court stated that it did not know how Mr. Quiroz could overcome the open and obvious danger presented by the condition and situation in which Ricardo placed himself. The court did not believe that discovery or further amending the pleadings could cure the defect. The trial court further found that Mr. Quiroz could not circumvent the duty element necessary to maintain his cause of action, regardless of any "hypotheticals" that the train operators saw Ricardo or were not paying enough attention to see him.

¶ 13 Mr. Quiroz moved for reconsideration, which the trial court denied. The trial court again

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noted that Ricardo was a trespasser and that the moving trains were an open and obvious danger. The trial court stated: "I don't know what you can plead to fix that." The trial court then told Mr. Quiroz that the duty he was seeking to impose on the CTA by having it "always be on the lookout for someone being in an area where they're not supposed to be" would be a "huge responsibility" and a "huge undertaking." This appeal followed.

¶ 14 ANALYSIS

¶ 15 We note that we have jurisdiction to consider this matter, as Mr. Quiroz filed a timely notice of appeal. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017).

¶ 16 Mr. Quiroz presents the following sole issue: whether the trial court erred in dismissing his second amended complaint pursuant to section 2-615 of the Code. Mr. Quiroz argues that his second amended complaint sufficiently pled that Ricardo was a trespasser who was discovered in a place of danger, and so he was owed a duty of care by the CTA to stop the trains and remove him from the train tracks. He argues that in the alternative, he adequately pled that the CTA engaged in willful and wanton conduct. He claims that further discovery is needed to determine the behavior of CTA personnel which would support his allegations and therefore, the trial court should not have dismissed the case at the pleadings stage.

¶ 17 As an initial matter, we will consider Mr. Quiroz's motion to this court to strike the CTA's brief within the context of resolution of the case as a whole. In his motion, Mr. Quiroz requests that this court strike the portions of the CTA's brief which include facts outside the pleadings, in particular, descriptions of the surveillance video footage from the incident. Interestingly, Mr. Quiroz's motion itself cites to newspaper stories about unrelated cases, which are also outside the pleadings. It is well established that when this court reviews a motion to dismiss pursuant to section 2-615, our review is limited to the face of the pleadings, *matters of which the court can take judicial*

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notice, and judicial admissions in the record. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 18; *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 52. Accordingly, we will not deviate from that standard and therefore deny Mr. Quiroz's motion to strike portions of the CTA's brief.

¶ 18 Turning to the merits of the appeal, a motion to dismiss brought pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint by alleging defects on its face. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 735 (2009). While a plaintiff is not required to prove his case at the pleading stage, he must allege sufficient facts to state all the elements which are necessary to sustain the cause of action. *Visvardis v. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (2007). A trial court should dismiss a complaint under section 2-615 only if it is readily apparent from the pleadings that there is no possible set of facts that would entitle the plaintiff to the requested relief. *Quinn v. Board of Education of the City of Chicago*, 2018 IL App (1st) 170834, ¶ 57. "In reviewing the sufficiency of a complaint, a court must accept *as true* all well-pleaded facts and all reasonable inferences that may be drawn from those facts." (Emphasis added.) *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007). Additionally, the complaint's allegations must be construed in the light most favorable to the plaintiff. *Id.* We review *de novo*, the trial court's dismissal of a complaint pursuant to section 2-615. *Wagner*, 391 Ill. App. 3d at 735.

¶ 19 The CTA's motion to dismiss in this case was based on the argument that it did not owe a duty to Ricardo, a trespasser who placed himself near an open and obviously dangerous condition. In a negligence action, the plaintiff must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach. *Smith v. The Purple Frog, Inc.*, 2019 IL App (3d) 180132, ¶ 11.

¶ 20 In this case, it is undisputed that Ricardo was a trespasser. See *Cockrell v. Koppers*

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Industries, Inc., 281 Ill. App. 3d 1099, 1104 (1996) (if an invitee deviates from the accustomed way or goes to a place other than that place covered by the invitation, he becomes a trespasser). Section 337 of the Restatement, entitled "Artificial Conditions Highly Dangerous to Known Trespassers," provides the duty owed to trespassers by landowners:

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

¶ 21 Our analysis turns on Mr. Quiroz's allegation that Ricardo was a *discovered* trespasser in a position of peril which he either did not realize or could not discover. Specifically, as outlined in subsection (a) of section 337, that the CTA knew or had reason to know of Ricardo's presence in the tunnel, and as outlined in subsection (b) of section 337, that Ricardo either did not or could not recognize the danger and remove himself from harm. In *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 446 (1992), our supreme court made clear that a landowner must use ordinary care to avoid injury to a trespasser who has been *discovered in a place of danger*. Mr. Quiroz's second amended complaint specifically alleged that the CTA *discovered* Ricardo in a place of danger. The second amended complaint alleged: that Ricardo was "injured, unable to remove himself from the tracks, and was obviously and clearly in a position of peril," that he was "clearly visible" to the train

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operators and security cameras "as he lay on the tracks," and that the CTA's failure to remove him from the tracks caused his injuries and death. In other words, the second amended complaint invited the inference that the train operators saw Ricardo but nevertheless did not stop the trains.

¶ 22 No matter how incredulous or far-fetched these allegations and the material inferences that flow from them may seem, once well-pleaded, we must accept them as true under Illinois law pursuant to section 2-615 of the Code. See *Henderson Square Condo Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 78 (when ruling on a section 2–615 motion to dismiss, a court must accept *as true*, all well-pleaded facts, as well as any reasonable inferences that may arise from them). This is particularly so considering that we must interpret the allegations of the second amended complaint in the light most favorable to Mr. Quiroz. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86 (1996).

¶ 23 Guided in our analysis by *Lee*, we focus on Mr. Quiroz's allegations that Ricardo was "clearly visible" to the train operators and security cameras, and that he was "injured, [and] unable to remove himself from the tracks." Under these facts, accepted as true (as we must at this stage in the proceedings), the CTA had a duty, pursuant to section 337 of the Restatement, to exercise reasonable care to prevent injury to Ricardo since the second amended complaint alleged that he was unable to remove himself from danger. See *Lee*, 152 Ill. 2d at 448 (adopting Restatement (Second) of Torts § 337 (1965)). On that assertion, Mr. Quiroz placed his pleadings within the parameters of section 337 of the Restatement and our supreme court's reasoning in *Lee*. Accordingly, we reverse the trial court's judgment and remand the case to the trial court for further proceedings.

¶ 24 We emphasize that we make no judgment as to the truth of Mr. Quiroz's allegations or his ability to establish them as true in further proceedings upon remand, specifically, the allegations

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that Ricardo was discovered in a position of peril and unable to remove himself, yet the train operators continued to operate the trains anyway, ultimately causing his death. Rather, our ruling recognizes that, *at this stage in the proceedings*, Mr. Quiroz's second amended complaint met the threshold to survive a section 2-615 motion to dismiss on the basis that he pled that the CTA *discovered* Ricardo in a position of peril and unable to either appreciate the danger or remove himself from it. In short, since the CTA chose to attack Mr. Quiroz's second amended complaint pursuant to section 2-615, the trial court erred in dismissing the complaint with prejudice at this stage of the proceedings.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the case for further proceedings.

¶ 27 Reversed and remanded.

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALEJANDRO QUIROZ Administrator of the Estate of RICARDO QUIROZ, deceased,	)	
Plaintiff-Appellant,	)	
v.	)	No. 1-20-0181
CHICAGO TRANSIT AUTHORITY, a Municipal Corporation,	)	
Defendant-Appellee.	)	

ORDER

Upon consideration of Defendant-Appellee's Petition for Rehearing;

IT IS HEREBY ORDERED that Defendant-Appellee's Petition for Rehearing, be and the same is hereby DENIED;

ORDER ENTERED

JUL 27 2021

APPELLATE COURT FIRST DISTRICT

JUSTICE

JUSTICE

JUSTICE

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SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

November 24, 2021

In re: Alejandro Quiroz, etc., Appellee, v. Chicago Transit Authority, etc., Appellant. Appeal, Appellate Court, First District.
127603

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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2015 IL App (1st) 142066-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois,
First District, First Division.

Meram TAHIR, as Administrator of the Estate of Friehiwet Tahir, deceased, Plaintiff–Appellant,

v.

CHICAGO TRANSIT AUTHORITY, a municipal corporation, Defendant–Appellee.

No. 1–14–2066.
|
Nov. 23, 2015.

Synopsis

Background: Train passenger's brother brought wrongful death action against Chicago Transit Authority (CTA) arising from passenger's death on tracks after an oncoming train struck her elbow and she fell off edge of platform onto tracks. The Circuit Court, Cook County, Kathy M. Flanagan, J., granted summary judgment for CTA. Brother appealed.

Holdings: The Appellate Court, Connors, J., held that:

[1] summary judgment affidavit of brother's expert was conclusory and lacked the required attachment of documents on which the expert relied;

[2] danger posed by a moving train was an open and obvious danger;

[3] the deliberate encounter exception to open and obvious rule did not apply notwithstanding a "fresh paint" sign on wall near platform; and

[4] CTA did not owe a duty of care to passenger.

Affirmed.

West Headnotes (5)

[1] **Appeal and Error** ⇐ Striking Out

Appellate Court would decline to strike plaintiff's brief and dismiss appeal of the grant of summary judgment for defendant in wrongful death action, notwithstanding the brief's noncompliance with Supreme Court rules including lack of citation to sufficient authority and problems with the statement of facts, where the brief complied with the rules in other ways and none of the violations were so flagrant as to hinder or preclude review. Sup.Ct.Rules, Rule 341(h)(2, 6, 7).

[2] **Judgment** ⇐ Documentary Evidence or Official Record

Judgment ⇐ Matters of Fact or Conclusions

Judgment ⇐ Defects and Objections

Summary judgment affidavit of plaintiff's expert, an architect, was conclusory and lacked the required attachment of documents on which the expert relied, and therefore was subject to being stricken in wrongful death action arising from death of train passenger who fell off edge of platform onto tracks; nearly every paragraph of affidavit contained conclusory statements that lacked factual support, and only expert's resume was attached to the affidavit despite expert referencing photographs, a video, the city building code, and transit authority design standards. Sup.Ct.Rules, Rule 191(a).

[3] **Carriers** ⇐ Taking Up Passengers

Danger posed by a moving train like the train that struck passenger's elbow causing her to fall off platform onto tracks and die was an open and obvious danger.

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[4] **Carriers** ⇨ Taking Up Passengers

Deliberate encounter exception to open and obvious rule did not apply to trigger a duty on part of Chicago Transit Authority (CTA) to warn of or guard against danger posed by a moving train like train that struck passenger's elbow causing her to fall off platform onto tracks and die, even if there was a "fresh paint" sign on a wall near where passenger stood to wait for train; a reasonable person in passenger's position would not have concluded that the advantage of standing close to edge of platform and avoiding any wet paint outweighed the apparent risk of being hit by an incoming train, and another passenger stood by a bench that he deemed to be a safe place.

[5] **Carriers** ⇨ Taking Up Passengers

Chicago Transit Authority (CTA) did not have a duty of care to passenger whose elbow was struck by moving train, an open and obvious danger, while she stood on edge of platform in area near a "wet paint" sign on wall, causing her to fall onto tracks and die, despite claim that CTA should have made platform wider or closed off sections of platform while work was being done; great expense and practical considerations were associated with widening the platform and there was a need to keep the platforms open in case of emergencies.

Appeal from the Circuit Court of Cook County. No. 09 L 175, Kathy M. Flanagan, Judge Presiding.

ORDER

Justice CONNORS delivered the judgment of the court:

***1** ¶ 1 *Held:* Affidavit of plaintiff's expert was properly struck because it was conclusory and did not attach the documents the expert relied on; summary judgment was proper where, due to the open and obvious rule, defendant did not owe a duty of care to plaintiff and so could not be found negligent.

¶ 2 Plaintiff, Meram Tahir, as administrator of the estate of her sister, Friehiwet Tahir (Friehiwet), appeals from an order of the circuit court that granted summary judgment to defendant, the Chicago Transit Authority (CTA), on plaintiff's wrongful death claim. On July 15, 2008, Friehiwet died after she was hit by a CTA train at the Argyle Red Line station. On appeal, plaintiff asserts that: (1) the circuit court improperly struck her expert's affidavit and (2) the circuit court improperly granted the CTA's motion for summary judgment. We affirm.

¶ 3 On July 5, 2011, plaintiff filed her third amended complaint against the CTA, alleging a wrongful death claim.[1] The complaint stated as follows. At around 5 p.m. on July 15, 2008, Friehiwet was standing on the Argyle station platform to board a northbound train. She inadvertently stood close to the edge of the platform, with her right arm and elbow extended into the path of an oncoming train that struck her elbow, causing her to lose balance and fall onto the tracks. According to plaintiff, the CTA had the highest duty of care to Friehiwet as a passenger and had to take all reasonable precautions to avoid striking and injuring her. Plaintiff contended that the CTA was negligent in the following ways: failing to properly and sufficiently look out for Friehiwet, failing to keep the train under proper control, failing to stop the train when it was discovered, or should have been discovered, that Friehiwet was standing too close to the edge of the platform with her right arm and elbow in the train's path, failing to warn Friehiwet to stand clear of the train's path, failing to blow the horn or otherwise notify or warn of the train's approach, failing to apply the brakes, and failing to take reasonable precautions to avoid a collision with Friehiwet. Plaintiff further asserted that the CTA operated a train with worn and defective equipment and at an excessive and dangerous speed. Plaintiff also alleged that the CTA was negligent in the design, maintenance, and operation of the platform and public address or announcement system. Plaintiff asserted that as a result of one or more of the CTA's negligent acts, Friehiwet was struck and killed at the Argyle station.

¶ 4 The record contains several photos from a surveillance video that purportedly shows the incident. The video itself is not in the record and the photos in the record are not readable. In her brief, plaintiff states that the video is roughly two hours long and only plays in special computers that are compatible with the video format. Plaintiff included some photos in her

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brief, but we cannot say with certainty which photos in her brief correspond to the unreadable photos in the record.

*2 ¶ 5 In addition to the aforementioned photos, the record includes transcripts from depositions, including that of Rahim McWilliams, who witnessed the incident. McWilliams had been standing by a bench on the platform about 10 feet south of Friehiwet. McWilliams described the platform as "not that wide" and "really short." McWilliams noticed that Friehiwet was wobbling and standing a little close to the edge, with her feet meeting the edge of the platform. McWilliams further stated, "in my head I'm thinking maybe she can see the train coming or hear it, * * * she's too close." Although the train was "coming in fast," McWilliams was in a safe position because he was "by the bench in the middle." However, the arriving train "caught [Friehiwet] with her elbow out," and she subsequently fell and ended up under the train. McWilliams stated that the train did not slow down until it "got real close" to Friehiwet and that the operator did not blow the horn.

¶ 6 Also in the record is the deposition testimony of Diane Sharp, who operated the train on July 15, and Larry Barber, who was in the cabin with Sharp to oversee her recertification. Sharp stated that Friehiwet "came out of nowhere" and that she first saw Friehiwet when Friehiwet was "rolling" or "flipping" in front of the train. Sharp further stated that she was in braking mode as she came into the station, but when she saw Friehiwet, she applied the braking system that immediately stops the train. Sharp also discussed the blue strips located on CTA platforms. Sharp stated that when a train approaches a station and someone is within the blue strip, she is required to blow the horn. According to Sharp, the Argyle station did not have a blue strip, but she knows about how wide the blue strip is and "what's safe and what's not safe," and if someone is too close to the edge of the platform when the train approaches, she will sound a horn or stop. Sharp stated that as she approached the Argyle station, no one was on the edge of the platform or within the width of a blue strip.

¶ 7 In his deposition, Barber stated that as the train approached Argyle, he observed 15 or 25 passengers spread out along the platform on the northbound and southbound sides. Barber stated that no one was close to the edge. Barber estimated that a blue strip was about two feet wide and stated that whether or not a station has a blue strip, "we always teach that there is a[two] feet safety margin." According to Barber, if someone had been within the two-foot safety margin, Sharp would have blown the train horn. According to Barber, there had not been a need to blow the horn because no one had been too close to the edge of the platform.

¶ 8 Also deposed was Lee Rogulich, an architect who worked at the CTA. Rogulich stated that based on photos he had seen, Friehiwet had been standing near the station's head house, which is an enclosure around the stairway that leads to the street. Rogulich further stated that the City of Chicago Building Code requires a minimum of three feet from the edge of a platform to the nearest obstruction, and it was agreed that the distance from the edge of the platform to the head house was three feet, two-and-a-half inches. Additionally, Rogulich stated that the Argyle station was 100 years old and to make the platform wider, the CTA would have to purchase real estate and tear down embankment walls. Rogulich noted that the Argyle station had been improved recently, but the platform and distance from the platform to the track remained the same "because there's no place else to go."

*3 ¶ 9 It was also mentioned that on the wall of the station's head house was a sign that read "wet paint" or "fresh paint." According to Rogulich, the CTA usually paints stations at off-hours, and he did not know long the sign had been up. In response to a question about why the CTA does not close sections of platforms that are being painted, Rogulich replied that the CTA wants to allow people to traverse freely on the platform and to take the stairs if they need to, such as in an emergency.

¶ 10 On August 26, 2013, the CTA filed a motion for summary judgment pursuant to section 2–1005 of the Code of Civil Procedure (735 ILCS 5/2–1005 (West 2012)). The CTA stated that it was entitled to summary judgment because it did not owe a duty to protect Friehiwet from the open and obvious dangers of an incoming train. According to the CTA, Friehiwet should have realized the risk of standing at the edge of the platform and there had been time for her to step away before the train reached her location. Additionally, the CTA stated that any failure of the operator to sound the horn was immaterial in light of the absence of a duty to warn of the open and obvious danger. The CTA also contended that the deliberate encounter exception to the open and obvious doctrine did not apply. Further, the CTA asserted that the magnitude of the burden on the CTA to guard against injury would be too great for a publicly financed agency and that placing a barricade at the edge of platforms would be potentially catastrophic if the CTA needed to urgently evacuate a train.

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¶ 11 In response to the CTA's motion for summary judgment, plaintiff asserted that there were questions of fact about whether the platform was defectively narrow and lacked proper safeguards. Plaintiff acknowledged that the platform met the minimum standard for width, but stated that the platform left "little margin of error in regard to the safety of passengers." Plaintiff further asserted that the "fresh paint" sign, which would prompt passengers to move away from the wall, along with the narrow platform and lack of blue strip, created an unreasonably dangerous condition. Additionally, plaintiff contended that the CTA was aware that because of the painting work being done, passengers could creep towards the edge of the platform to avoid contact with the walls. Plaintiff asserted that Friehiwet was forced to be in the vicinity of the train because of the "fresh paint" sign and lack of safety devices on the narrow platform.

¶ 12 Attached to plaintiff's response was an affidavit from Eras Beseka, an architect. Beseka averred that based on his review of photos, the Argyle station platform was made of wood and in poor condition and did not have two-foot safety warning strips. Beseka further stated that according to photos taken by police investigators, the platform was 38 1/2 inches wide, which was unsafe. Beseka averred that it was evident that work was being done on the platform at the time of the incident because the video showed a green tool chest, white work bucket, and "wet paint" sign on the wall close to where Friehiwet stood. Beseka asserted that "[t]he effective width of the platform must subtract at least 12 inches to clear the 'wet paint sign' on the wall, and must also subtract the 24[-]inch danger zone tactile safety strip," leaving an effective platform width of 2 1/2 inches that did not meet the minimum 36 inches required by the Chicago Building Code. According to Beseka, Friehiwet was "ushered to stand and wait" for the train in an area that was narrower than acceptable CTA design standards, and moreover, this location was "unsafe for any passenger to be positioned at any time especially when the train is approaching the station." Beseka stated that it was "scientifically and mathematically impossible" for Friehiwet not to be within the 24–inch "danger zone" due to the narrow platform and "wet paint" sign. Beseka asserted that the danger that Friehiwet found herself in was not open and obvious and a passenger "naturally assumes without verification" that the CTA has provided her with a safe place to stand. Additionally, Beseka stated that Sharp's and Barber's statements that no passengers were within two feet of the edge of the platform were false and "scientifically and mathematically impossible."

*4 ¶ 13 According to Beseka, the CTA failed in its duty and obligation to provide a reasonably safe place for passengers to alight, board, and wait for trains because the platform was unsafe and "essentially a latent death trap." Beseka stated that based on "industry standards, custom[,] and practice," as well as CTA design standards and the Chicago Building Code, the CTA was negligent by speeding, failing to close the section of platform where painting, repairs, and/or maintenance work was being performed, and failing to blow the horn as the train approached Friehiwet. Beseka's resume was attached to the affidavit.

¶ 14 The CTA filed a motion to strike Beseka's affidavit, contending that the affidavit failed to comply with Illinois Supreme Court Rule 191(a) (eff.Jan.4, 2013). In part, the CTA asserted that the affidavit failed to establish that Beseka had personal knowledge of the facts of the case, offered conclusions rather than specified facts, and had no papers attached to it other than Beseka's resume.

¶ 15 On April 14, 2014, the court granted the CTA's motion for summary judgment. In its opinion and order, the court stated that the danger posed by a moving train is open and obvious and there is no duty to guard against or warn of it. As to plaintiff's argument that the platform was a dangerous condition for which the CTA owed a duty of care, the court found that plaintiff failed to show that Friehiwet was injured by any dangerous or defective condition of the property rather than the danger posed by the train itself. Further, the evidence showed that the platform's width was larger than the minimum requirement and moreover, there was no evidence that the platform size was effectively reduced because of any painting activity such that Friehiwet was forced to stand on the very edge. The court noted that even if a "fresh paint" sign had been the wall or if the wall had been freshly painted, there was no evidence that this forced Friehiwet to stand on the edge of the platform as opposed to just slightly away from the wall. Additionally, the court was not persuaded by plaintiff's argument that the negligent operation of the train caused Friehiwet's death. The court stated that any issue of the operator's negligence was irrelevant in light of the lack of duty to guard against or warn of the moving train.

¶ 16 The court also struck Beseka's affidavit because it violated Illinois Supreme Court Rule 191(a) (eff.Jan.4.2013). In addition to finding that Beseka lacked personal knowledge, the court stated that the affidavit relied on inadmissible evidence and was "replete with conclusions, speculation,

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improper and irrelevant statements and subject matter, [and] lack of foundations."

¶ 17 On appeal, plaintiff challenges the findings that the CTA was entitled to summary judgment and that Beseka's affidavit violated Rule 191(a) (eff.Jan.4, 2013). Before we reach those issues, the CTA requests that we strike plaintiff's brief and dismiss her appeal because the brief violates Illinois Supreme Court Rule 341 (eff.Feb.6, 2013). The CTA asserts that plaintiff's brief failed to provide a concise, objective synopsis of the nature of the case, impermissibly included conclusory statements unsupported by the record in the statement of facts, and provided little, if any, legal analysis or citation to authority.

*5 ¶ 18 Although plaintiff's brief falls short of several of the requirements listed in Rule 341 (eff.Feb.6, 2013), the violations are not so egregious as to warrant striking the brief and dismissing the appeal. We discuss in turn each of the violations that the CTA raises. Rule 341(h)(2) (eff.Feb.6, 2013) requires the appellant's brief to include an introductory paragraph that states "(i) the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury, and (ii) whether any question is raised on the pleadings and, if so, the nature of the question." As the CTA notes, plaintiff strayed from these requirements. Plaintiff mentioned that this is an appeal from a grant of summary judgment, but failed to address whether any question was raised on the pleadings. Plaintiff also included content that does not belong in this section, including a summary of her expert's affidavit, testimony from depositions, and the statement that "[t]he trial judge apparently did not watch the real time surveillance video or did not watch it in sufficient detail."

¶ 19 Plaintiff's statement of facts is also problematic. According to Rule 341(h)(6) (eff.Feb.6, 2013), the statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." In contrast to this directive, plaintiff included argument, stating that the width of the platform "was very narrow" and that a "fresh paint" sign "further [cut down] on the available space for [a] passenger to stand and stay clear of the right of way of the train." Plaintiff also stated that "it is not possible for the decedent not to have been standing within the 24[-]inch danger zone at the time of this occurrence."

¶ 20 Lastly, we agree with the CTA that plaintiff failed to cite sufficient authority. Rule 341(h)(7) (eff.Feb.6, 2013) states that the argument section of a brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Yet, the bulk of plaintiff's argument section is a paragraph-by-paragraph response to the trial court's opinion and order, with various references to the affidavit of plaintiff's expert and very few citations to cases or other authority. Mere contentions without argument or citation of authority do not merit consideration on appeal, and further, contentions supported by some argument but absolutely no authority do not meet the requirements of Rule 341. *Eckiss v. McVaigh*, 261 Ill.App.3d 778, 786, 199 Ill.Dec. 637, 634 N.E.2d 476 (1994). Additionally, we are "entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research." (Internal quotation marks omitted.) *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5, 356 Ill.Dec. 103, 960 N.E.2d 1226. Both the structure and content of plaintiff's argument section fall short of the requirements of Rule 341(h)(7) (eff.Feb.6, 2013).

*6 [1] ¶ 21 Although parts of the brief do not comply with the supreme court rules, we decline to strike it. While the rules of appellate procedure are not merely suggestions (*Chicago Title & Trust Co. v. Weiss*, 238 Ill.App.3d 921, 928, 179 Ill.Dec. 78, 605 N.E.2d 1092 (1992)), striking a brief is appropriate only when the violations of the rules hinder our review (*Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 15, 360 Ill.Dec. 885, 969 N.E.2d 930). Because the violations are not so flagrant that we are unable to review the appeal, we will not strike plaintiff's brief, but we will disregard any inappropriate statements. See *Spangenberg v. Verner*, 321 Ill.App.3d 429, 432, 254 Ill.Dec. 319, 747 N.E.2d 359 (2001) (declining to strike brief where, although it deviated from the supreme court rules in some ways, the brief complied with the rules in other ways and none of the violations were so flagrant as to hinder or preclude review).

[2] ¶ 22 We next address plaintiff's contention that the court improperly struck Beseka's affidavit. Plaintiff asserts that the affidavit is based on Beseka's review of the record, depositions, site visits, sound reasoning, personal knowledge of the location of the incident, review of the surveillance video, and materials that experts in the same field usually rely on to render opinions. Additionally, plaintiff argues that any dispute with Beseka's opinion should have been resolved through a discovery deposition.

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¶ 23 According to plaintiff, the aforementioned video is tied to the affidavit. Plaintiff asserts that "[w]ithout a study of the video, some of the statements made in [p]laintiff's expert's affidavit may not be understood in their proper and fullest contexts ." As noted above, the video is not in the record. Plaintiff's brief includes several photos that she states are from the video, with written explanations of what the photos supposedly show, but without the actual video, we cannot verify plaintiff's explanations or whether the photos are indeed from the video. Further, to the extent that plaintiff suggests that review of the video is crucial, we remind plaintiff that the appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and any doubts that may arise from an incomplete record are resolved against the appellant. *Foutch v. O'Bryant,* 99 Ill.2d 389, 391–92, 76 Ill.Dec. 823, 459 N.E.2d 958 (1984).

¶ 24 Turning back to our review of the affidavit, we provide an overview of summary judgment principles for context. Summary judgment is proper if the pleadings, depositions, admissions on file, and affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2012). The purpose of summary judgment is not to try a question of fact, but instead to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.,* 211 Ill.2d 32, 42–43, 284 Ill.Dec. 302, 809 N.E.2d 1248 (2004). In determining whether there is a genuine issue of material fact, a court construes the materials of record against the movant and liberally in favor of the non-movant. *Ballog v. City of Chicago,* 2012 IL App (1st) 112429, ¶ 18, 366 Ill.Dec. 597, 980 N.E.2d 690. However, the non-movant must present a *bona fide* factual issue and not merely general conclusions of law. *Morrissey v. Arlington Park Racecourse, LLC,* 404 Ill.App.3d 711, 724, 343 Ill.Dec. 636, 935 N.E.2d 644 (2010). "A triable issue precluding summary judgment exists where the material facts are disputed, or where, the material facts being undisputed," reasonable people "might draw different inferences from the undisputed facts." *Adams,* 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248. Additionally, "summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill.2d 90, 102, 180 Ill.Dec. 691, 607 N.E.2d 1204 (1992). We review a grant of summary judgment *de novo. Id.* at 102, 180 Ill.Dec. 691, 607 N.E.2d 1204.

*7 ¶ 25 Illinois Supreme Court Rule 191(a) (eff.Jan.4, 2013) governs the requirements for affidavits that support or oppose motions for summary judgment. The rule states that affidavits:

> "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

Because affidavits submitted in the summary judgment context serve as a substitute for testimony at trial, affidavits must strictly comply with Rule 191(a) to ensure that trial judges are presented with valid evidentiary facts on which to base a decision. *Robidoux v. Oliphant,* 201 Ill.2d 324, 335–36, 266 Ill.Dec. 915, 775 N.E.2d 987 (2002).

¶ 26 Generally, this court reviews a circuit court's decision to strike an affidavit for an abuse of discretion, but when the motion to strike " 'was made in conjunction with the court's ruling on a motion for summary judgment,' " we use a *de novo* standard of review for the motion to strike. *US Bank, National Ass'n v. Avdic,* 2014 IL App (1st) 121759, ¶ 18, 381 Ill.Dec. 254. See also *Filliung v. Adams,* 387 Ill.App.3d 40, 50–51, 326 Ill.Dec. 268, 899 N.E.2d 485 (2008); *Jackson v. Graham,* 323 Ill.App.3d 766, 773–74, 257 Ill.Dec. 330, 753 N.E.2d 525 (2001). But see *Xeniotis v. Satko,* 2014 IL App (1st) 131068, ¶ 68, 383 Ill.Dec. 596 (stating there is a split of authority on what standard of review to apply to a trial court's ruling on a motion to strike an affidavit).

¶ 27 The affidavit from plaintiff's expert, Beseka, fails to meet Rule 191(a)'s requirements. Significantly, the affidavit did not have attached the documents on which Beseka relied. Beseka referenced photos, the video, the Chicago Building Code, and CTA design standards, but none of these items were attached to the affidavit. Only Beseka's resume was attached. The affidavit's failure to include the items Beseka relied on violates Rule 191(a)'s explicit requirement that the affidavit "shall have attached thereto sworn or certified copies of all documents upon which the affiant relies." Ill. S.Ct. R. 191(a) (eff.Jan.4, 2013). This provision is "not a mere technical requirement," and "is inextricably linked to the provisions requiring factual support in the affidavit itself." *Robidoux,* 201 Ill.2d at 344, 266 Ill.Dec. 915, 775 N.E.2d 987.

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¶ 28 In addition to violating Rule 191(a)'s attached papers provision, Beseka's affidavit is riddled with conclusory statements, including:

- "CTA has the duty and obligation to provide a reasonably safe place for its passenger to wait for, board, and alight from the CTA train."
- "In this case, CTA failed in its duty and obligation because the platform where passenger Ms. Tahir was standing waiting for the CTA train is unsafe, and in fact essentially a latent death trap."
- "The danger that Ms. Tahir found herself in is not open and obvious. More so depending on what side of the stairway one uses to enter the station platform. A passenger naturally assumes without verification that CTA is providing him or her a safe place to stand while waiting to board its train."

*8 Additionally, Beseka stated without any explanation that the "effective width of the platform must subtract at least 12 inches to clear the 'wet paint sign' on the wall * * *." Beseka also avers, again without any explanation, that Barber's and Sharp's statements that no passengers were within two feet of the edge of the platform as the train approached were "false" and "scientifically and mathematically impossible."

¶ 29 Similar conclusory statements that lack factual support are in nearly every paragraph of the affidavit. Rule 191(a) "does not bar legal conclusions *per se*," but rather, "simply bars any conclusion, legal or otherwise, for which the affiant provides no specific factual support." *Cain v. Joe Contarino Inc.*, 2014 IL App (2d) 130482, ¶ 62, 381 Ill.Dec. 520. Beseka's affidavit is missing the factual support needed to comply with Rule 191(a). Still, plaintiff relied on the affidavit in her response to the CTA's motion for summary judgment and in her brief, encouraging this court to read Beseka's affidavit to "fully understand Plaintiff's position." However, plaintiff "cannot create a trial issue of fact by the conclusory affidavit of its expert." *Northrop v. Lopatka*, 242 Ill.App.3d 1, 9, 182 Ill.Dec. 937, 610 N.E.2d 806 (1993). See also *Kosten v. St. Anne's Hospital*, 132 Ill.App.3d 1073, 1079, 88 Ill.Dec. 149, 478 N.E.2d 464 (1985) (affidavit had no facts to substantiate its conclusions, which was insufficient to defeat a motion for summary judgment). Because Beseka's affidavit did not meet the requirements of Rule 191(a), it was properly stricken.

¶ 30 We next address plaintiff's contentions that there were genuine issues of material fact about CTA's liability and whether the danger here was open and obvious. Plaintiff argues that the CTA had a duty to provide a safe platform for waiting passengers. Plaintiff further asserts that the open and obvious doctrine fails here and that the danger at issue was not easily known to a transient passenger who was focused on boarding the train. Additionally, plaintiff contends that Friehiwet was forced to be in a place of danger due to the painting work that the CTA was negligently performing on the platform. According to plaintiff, the maintenance and painting activities reduced the available platform width, and in any event, the platform was already too narrow. Plaintiff asserts that the danger posed by the CTA's maintenance and painting activity worked in tandem with the danger posed by the train to create the fatal injury. Plaintiff states that the CTA should have closed off the section of platform being painted and that the rail operator failed to sound the horn.

¶ 31 During summary judgment, the plaintiff does not need to prove her case, but she must present some evidence to support each element of the cause of action. *Prostran v. City of Chicago*, 349 Ill.App.3d 81, 85, 285 Ill.Dec. 123, 811 N.E.2d 364 (2004). To state a cause of action for negligence, a plaintiff must show that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, and the injury was proximately caused by the breach. *Id.* In any negligence action, a court must first determine as a matter of law whether the defendant owed a duty to the plaintiff. *Ballog*, 2012 IL App (1st) 112429, ¶ 21, 366 Ill.Dec. 597, 980 N.E.2d 690. Duty is determined by asking whether the plaintiff and defendant stood in such a relationship to one another that the law imposed on the defendant an obligation of reasonable conduct for the plaintiff's benefit. *Bucheleres v. Chicago Park District*, 171 Ill.2d 435, 445, 216 Ill.Dec. 568, 665 N.E.2d 826 (1996). Courts typically consider four factors in determining whether a duty of care exists: "(1) the reasonable foreseeability of injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against injury; and (4) the consequences of placing that burden on the defendant." *Wilfong v. L.J. Dodd Construction*, 401 Ill.App.3d 1044, 1051–52, 341 Ill.Dec. 301, 930 N.E.2d 511 (2010). If there is no legal duty of care owed to the plaintiff, the defendant cannot be found negligent. *Ballog*, 2012 IL App (1st) 112429, ¶ 20, 366 Ill.Dec. 597, 980 N.E.2d 690.

*9 ¶ 32 Generally, a landowner owes a duty of reasonable care for the state of its premises and the acts conducted on it to all entrants except for trespassers. *McDonald v. Northeast Illinois Regional Commuter R.R. Corp.*, 2013 IL App (1st) 102766–B, ¶ 22. An exception to this principle is the open and

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obvious rule, which states that a landowner is not liable for physical harm to people caused by any activity or condition on the land whose danger is known or obvious unless the landowner should anticipate the harm despite such knowledge or obviousness. *McDonald,* 2013 IL App, 102766–B, ¶ 22. Whether a condition is open and obvious is an objective test. *Wilfong,* 401 Ill.App.3d at 1052, 341 Ill.Dec. 301, 930 N.E.2d 511. "Obvious" means that "both the condition and the risk are apparent to and would be recognized by a reasonable person, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." (Internal quotation marks omitted.) *Prostran,* 349 Ill.App.3d at 85–86, 285 Ill.Dec. 123, 811 N.E.2d 364. Where there is no dispute about the physical nature of a condition, whether a condition is open and obvious is a question of law. *Choate v. Indiana Harbor Belt R.R. Co.,* 2012 IL 112948, ¶ 34, 366 Ill.Dec. 258, 980 N.E.2d 58.

¶ 33 In the duty analysis, whether a condition is open and obvious relates to the issues of foreseeability and the likelihood of injury. *Wilfong,* 401 Ill.App.3d at 1052, 341 Ill.Dec. 301, 930 N.E.2d 511. "[I]t is not reasonably foreseeable that someone will be injured by an open and obvious condition because it is assumed that people will appreciate the risks of such a condition and exercise care for their own safety ." *Id.* at 1052–53, 341 Ill.Dec. 301, 930 N.E.2d 511. Additionally, the likelihood of injury from open and obvious conditions is considered slight because the law assumes that people encountering such conditions will appreciate and avoid the risks. *Id.* at 1053, 341 Ill.Dec. 301, 930 N.E.2d 511.

[3] ¶ 34 Here, although plaintiff devotes much of her argument to the condition of the platform, it was the incoming train that caused the injury. And, Illinois law has established that moving trains are open and obvious conditions. See *Choate,* 2012 IL 112948, ¶ 35, 366 Ill.Dec. 258, 980 N.E.2d 58 (recognizing as a matter of law that a moving train is an obvious danger that any child allowed at large should realize the risk coming within the area made dangerous by it); *McDonald,* 2013 IL App (1st) 102766–B, ¶ 25 (oncoming commuter train running express through station was open and obvious danger, and tracks in front of moving train also constitute area made dangerous by the train); *Park v. Northeast Regional Commuter R.R. Corp.,* 2011 IL App (1st) 101283, ¶ 18, 355 Ill.Dec. 882, 960 N.E.2d 764 ("the danger of stepping in front of a moving train is open and obvious regardless of the kind of train it is"). Here, there is no dispute that the incoming CTA train was visible. Friehiwet, who had been standing on the platform, was injured by an open and obvious condition.

[4] ¶ 35 Plaintiff's arguments about the condition of the platform are an attempt to contend that we should apply the deliberate encounter exception to the open and obvious rule. According to the deliberate encounter exception, the open and obvious rule does not apply if the possessor of the land has reason to anticipate or expect that the invitee will proceed to encounter an open and obvious danger because to a reasonable person in the invitee's position, the advantages of doing so outweigh the apparent risk. *Kleiber v. Freeport Farm & Fleet, Inc.,* 406 Ill.App.3d 249, 258, 347 Ill.Dec. 437, 942 N.E.2d 640 (2010) (citing Restatement (Second) Torts § 343A, Comment *f* (1965)).

***10** ¶ 36 For purposes of this analysis, we accept that there was a "fresh paint" sign on a wall on the platform near where Friehiwet stood to wait for the train. See *Adams,* 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248 (during summary judgment, a court construes the pleadings, depositions, admissions, and affidavits liberally in favor of the non-movant). However, we cannot agree that a reasonable person in Friehiwet's position would conclude that the advantage of standing close to the edge of the platform and avoiding any wet paint outweighed the apparent risk of being hit by an incoming train. Further, for the deliberate encounter exception to apply, there must be an indication of a compulsion or impetus under which a reasonable person in the plaintiff's position would have disregarded the risk of standing close to the edge of the platform. See *Park,* 2011 IL App (1st) 101283, ¶ 26, 355 Ill.Dec. 882, 960 N.E.2d 764. There was no such compulsion here. Plaintiff acknowledged throughout her brief that it was a section of platform that was being painted—not the entire platform—and maintained that the CTA should have closed off "that section" of the platform. Of note, McWilliams, one of the witnesses, stated in his deposition that he stood by a bench, which was a "safe place." Although the deliberate encounter exception does not depend on whether or not a plaintiff had alternative ways to avoid the danger (*LaFever v. Kemlite Co.,* 185 Ill.2d 380, 393, 235 Ill.Dec. 886, 706 N.E.2d 441 (1998)), we still conclude that the CTA could not have foreseen that someone would have stood too close to the edge of the platform rather than elsewhere along the platform or close to or against a freshly painted wall. But see *Morrissey,* 404 Ill.App.3d at 728, 343 Ill.Dec. 636, 935 N.E.2d 644 (evidence raised issue of material fact about whether deliberate encounter exception applied where exit with condition was closer to where plaintiff

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performed his duties, time was of the essence, and a witness stated that she never saw anyone taking the other exit).

[5] ¶ 37 Because the incoming train was an open and obvious condition and the deliberate encounter exception does not apply, the first two factors of the duty analysis are resolved in the CTA's favor—it was not reasonably foreseeable that someone would be injured and the likelihood of injury is considered slight. See *Wilfong*, 401 Ill.App.3d at 1052–53, 341 Ill.Dec. 301, 930 N.E.2d 511. The remaining two factors —the magnitude of the burden of guarding against injury and the consequences of placing that burden on the defendant (See *Park*, 2011 IL App (1st) 101283, ¶ 13, 355 Ill.Dec. 882, 960 N.E.2d 764))—also weigh in favor of the CTA. Rogulich stated in his deposition that to make the platform wider, the CTA would have to buy real estate and tear down embankment walls. This effort would impose a great financial burden on the CTA. Rogulich also noted that after recent improvements at the station, the platform and distance from the platform to the track remained the same "because there's no place else to go." Additionally, when asked why the CTA does not close off sections of platforms where work is being done, Rogulich stated that the CTA wants to allow people to move freely, including during emergencies. Given the great expense and practical considerations associated with widening the platform and the need to keep the platforms open in case of emergencies, the last two factors in the duty analysis favor the CTA. See *Bucheleres*, 171 Ill.2d at 457–58, 216 Ill.Dec. 568, 665 N.E.2d 826 (taking measures such as fencing off seawall areas or enforcing existing prohibitions with more personnel and warnings would create "a practical and financial burden of considerable magnitude"). The CTA did not owe a duty of care to Friehiwet, and as a result, the CTA cannot be found negligent.

*11 ¶ 38 Lastly, we also note that plaintiff's complaint also alleged that the train operator was negligent. In her brief, plaintiff stated that the CTA "owes its passengers the highest degree of care with respect to the operation of its train" and asserted without further argument or support that the train operator failed to keep a lookout, failed to sound the horn, and traveled at an excessive rate of speed. However, because plaintiff did not develop this line of argument, we consider it waived and do not address it. See Ill. S.Ct. R. 341(h)(7) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing").

¶ 39 We conclude that the circuit court properly struck Beseka's affidavit and awarded summary judgment to the CTA.

¶ 40 Affirmed.

Presiding Justice LIU and Justice CUNNINGHAM concurred in the judgment.

All Citations

Not Reported in N.E.3d, 2015 IL App (1st) 142066-U, 2015 WL 7451195

Footnotes

1 Plaintiff's third amended complaint also asserted a survival action and a claim related to section 15 of the Rights of Married Persons Act (750 ILCS 65/15 (West 2010)), but these counts were dismissed on September 28, 2011.

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2014 IL App (1st) 132056-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, First District, Fifth Division.

Julio ESCOBAR, Individually and as Special Administrator of the Estate of Juan J. Escobar, Deceased, Plaintiff–Appellant,

v.

CHICAGO TRANSIT AUTHORITY, a municipal corportation, Defendant–Appellee.

No. 1–13–2056.

Sept. 19, 2014.

Synopsis

Background: Son of pedestrian who had been killed after being struck by a train at an elevated train station brought negligence action against city transit authority. The Circuit Court, Cook County, Kathy M. Flanagan, J., entered summary judgment in favor of transit authority, and son appealed.

Holdings: The Appellate Court, McBride, J., held that:

[1] oncoming train was an open and obvious danger, and

[2] pedestrian's suicide was an independent intervening act that transit authority could not have foreseen.

Affirmed.

West Headnotes (3)

[1] **Urban Railroads** ⇦ Injuries to Persons on or Near Tracks

Doctrine of open and obvious danger applied to action against city transit authority arising when pedestrian was struck and killed by while trespassing on tracks at train station, for purposes of determining whether transit authority owed any duty to pedestrian, even though plaintiff styled claim as one of "active" negligence rather than premises liability.

1 Cases that cite this headnote

[2] **Urban Railroads** ⇦ Injuries to Persons on or Near Tracks

City transit authority did not owe a duty to pedestrian who was struck and killed by train while trespassing on tracks at elevated train station, since oncoming train was an open and obvious danger; no reasonable person would have trespassed onto the elevated train tracks from the platform.

1 Cases that cite this headnote

[3] **Urban Railroads** ⇦ Proximate Cause

Pedestrian's suicide was an independent intervening act that city transit authority could not have foreseen, and thus transit authority train operator could not have been the proximate cause of any damages arising from pedestrian's death after being struck by train while trespassing on tracks at elevated train station; medical examiner ruled that pedestrian's death had been a suicide and noted that pedestrian had been standing on the tracks, showing that he had control of his limbs, his injuries were not consistent with a fall, and he did not attempt to get out of the way of the oncoming train, and there were no witnesses to describe the manner in which pedestrian had gotten onto the tracks.

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Appeal from the Circuit Court of Cook County, No. 06 L 4898, Kathy M. Flanagan, Judge Presiding.

ORDER

Justice McBRIDE delivered the judgment of the court:

*1 ¶ 1 *Held:* The trial court properly granted summary judgment because an oncoming train is an open and obvious condition when the plaintiff's decedent was trespassing on the tracks at a CTA elevated train station.

¶ 2 Plaintiff Julio Escobar, Individually and as Special Administrator of the Estate of Juan J. Escobar, deceased, appeals the trial court's entry of summary judgment in favor of defendant Chicago Transit Authority (CTA). Plaintiff's decedent Escobar was standing on the elevated train tracks when he was struck and killed by an Orange Line train at the Ashland station on January 1, 2002. On appeal, plaintiff argues that the trial court erred in granting the CTA's motion for summary judgment because the open and obvious doctrine is not applicable to allegations of active or ordinary negligence.

¶ 3 At approximately 11:10 p.m. on January 1, 2002, Juan Escobar was standing on the elevated train tracks at the Ashland Orange Line station, located at 3069 South Ashland Avenue in Chicago, when he was struck by a train entering the station. The train was operated by Orrin Morris, a CTA employee. The four-car train was headed southbound toward Midway Airport. Escobar was pronounced dead at the scene.

¶ 4 In May 2006, plaintiff filed a complaint against the CTA, alleging negligence, failure to maintain a safe and secure environment, and family expenses. The complaint stated that it was the refiling of case number 02 L 010469. The complaint asserted minimal facts. In January 2002, Escobar was 66 years old, married, and plaintiff was his son.

¶ 5 The complaint alleged in the negligence count that it was the duty of the CTA "to exercise reasonable care under the circumstances to protect the safety of [Escobar] and others on or near the tracks and/or upon the platform" at the Ashland station. According to the complaint, the CTA negligently, carelessly, and improperly operated the train at a high rate of speed and/or in a manner it knew was unsafe, failed to keep a proper lookout, failed to appropriately train its employees concerning the operation of the train, and failed to provide adequate lighting and adequate viewing so the train operator could see people who were upon the tracks. The second count of complaint alleged that the CTA failed to provide a safe environment for an intoxicated individual and the third count asserted that plaintiff sustained great losses in the form of medical, funeral, and burial expenses.

¶ 6 In December 2006, the CTA filed a combined motion to dismiss the complaint pursuant to section 2–619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2–619.1 (West 2010)). The CTA argued that the first two counts should be dismissed under section 2–619(2) of the Code (735 ILCS 5/2–619(2) (West 2006)) because plaintiff failed to attach an appointment as special administrator of Escobar's estate. The CTA additionally argued that the third count should be dismissed under section 2–619(2) because the Family Expense Act (750 ILCS 65/15 (West 2006)) does not create a cause of action on behalf of children in relationship to their parents. The CTA further argued that the second count failed to state a cause of action and should be dismissed pursuant to section 2–615 of the Code (735 ILCS 5/2–615 (West 2006)).

*2 ¶ 7 In February 2007, the trial court granted leave for plaintiff's new counsel to file an appearance. In June 2007, plaintiff filed his first amended complaint alleging one count of negligence against the CTA. The complaint asserted that the following factual allegations.

¶ 8 On January 1, 2002, Escobar was lawfully on the premises of the Ashland Orange Line station and upon entering the premises, he went up the escalator to wait on the platform. Morris was operating an Orange Line train southwest near the Ashland station and acting in the scope of his employment as an employee/agent of the CTA. Escobar was struck by the aforementioned train and suffered serious injuries which proximately caused his death.

¶ 9 Despite its duty to exercise reasonable care to protect the safety of Escobar and others on or near the tracks and/or platform, the CTA negligently and carelessly operated and controlled a train at a high rate of speed, operated and controlled a train in manner it knew or should have known was unsafe, failed to keep a proper and sufficient lookout approaching the Ashland station when it knew or should have known there may be persons on or near the platform, failed to reduce the speed of the train as it approached the Ashland station, failed to provide adequate lighting for the train operator to see persons on the tracks, failed to properly train employees concerning the operation of a train, failed

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to properly train employees concerning the prevention of persons from being on or near the edge of the platform, failed to properly train employees concerning the prevention of persons from falling on the tracks, failed to properly train employees concerning the removal of persons from the tracks, failed to take necessary precautions to prevent persons from being on or near the edge of the platform, failed to take necessary precautions to prevent persons from falling on the tracks, failed to take necessary precautions to get persons off the tracks prior to a train entering the Ashland station, and failed to warn and/or inform the train conductor that a person was on the tracks before the train entered the Ashland station.

¶ 10 In April 2013, the CTA filed a motion for summary judgment, arguing that (1) the CTA did not have a duty to protect Escobar from the open and obvious danger of standing on elevated train tracks in front of a moving train, (2) Illinois law does not recognize a duty to prevent suicide because the suicide is an independent intervening act, (3) Escobar was more than 50% contributorily negligent and should be barred from any recovery, and (4) the CTA cannot be held liable for negligent training of its employees. In May 2013, plaintiff filed his response to the motion for summary judgment, contending that (1) the open and obvious doctrine is inapplicable to the instant case, (2) there is no evidence of suicide, (3) the CTA owed Escobar the highest duty of care, or in the alternative, a duty of reasonable care, (4) there is no evidence of contributory negligence, and (5) plaintiff is alleging direct negligence against the CTA and has not alleged educational malpractice. The CTA filed its reply brief in May 2013.

*3 ¶ 11 The exhibits attached to the summary judgment briefing included deposition testimony, CTA incident reports, the CTA rule book, and interrogatories and a document from an unrelated case concerning train braking distances. These exhibits set forth the following facts.

¶ 12 Morris is the only known eyewitness to the accident. At the time of the accident, Morris was operating an Orange line train heading southbound from the Loop to Midway Airport. The train was four cars long and he was standing on the right side of the motor cab. The train controls have eight different positions, four each for power and brake. The train platform has markers for different train lengths indicating the point the train must reach for the train to be stopped entirely within the station. According to Morris, a train operator is not required to stop the train next to the number for the corresponding number of cars on the train. Morris stated that his practice at night was to stop near the exit stairs so passengers could exit the station more quickly.

¶ 13 As he approached the station, Morris testified at his deposition that he was traveling approximately 35 miles per hour. He then put the train in Brake 3 position, which is the normal position for stopping a train entering a station. Morris observed a person standing with his back to the train in the center of the track. Morris stated that the lead edge of the train was outside of the station when he saw the individual. He said there was nothing obstructing his view. As soon as he saw the person, Morris activated Brake 4, the emergency brake, pulled the emergency brake cord, and blew the horn. As the train approached, the person turned and faced the train. Morris said that the person "stepped over and put his elbow on the platform." Morris stated that the man did not appear to make any attempt to get out of the way of the train. Morris was unable to stop the train before it made contact with the person.

¶ 14 After the accident, Morris remained with the train. He alerted the CTA of the accident. He also made an announcement to passengers instructing them to pull the emergency release to open the doors and exit the train. Morris only observed a Caucasian male exit the train.

¶ 15 Kenneth Elam stated at his deposition that at the time of the accident he was the CTA transportation manager for the Green, Orange and Brown Lines. Elam explained that Brake 4 is the designated emergency brake which provides full dynamic braking, full friction braking, and a track brake which is a magnet underneath the train that brings the train to a complete stop. He stated that train operators have been instructed to activate Brake 4 when an emergency arises. He stated that Brake 4 activates all the braking mechanisms, and the emergency cord does not add any additional braking. Elam reported to the scene of the accident and observed that the train brake was in the Brake 4 position.

¶ 16 According to the CTA investigation, the point of impact was 160 feet from the west edge of the station and the train came to a stop 102 feet from the point of impact.

*4 ¶ 17 Maria Rivera testified at a deposition that she was on board the train at the time of the accident. She did not come forward, but observed plaintiff asking for witnesses a few days later. She said she spoke with plaintiff's attorneys, but was not disclosed as a witness until four years later. The CTA objected at the deposition because Rivera's initial statement

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was prepared by plaintiff's counsel with Rivera's son acting as a translator from English to Spanish. The interview was transcribed by a secretary at the firm and the recording with Rivera's Spanish statements was erased. The CTA was unable to prepare its own transcription from the recording.

¶ 18 At the deposition, plaintiff's counsel initially questioned Rivera using the date December 31, 2001, but later referred to January 1, 2002. The accident happened on January 1, 2002. Rivera stated that she worked at the Hotel 71 downtown from 3 p.m. to 11:30 p.m. She boarded an Orange Line train toward Midway shortly thereafter. She said she boarded the third train car and the ride was normal until Ashland. At Ashland, Rivera said the train stopped quickly, but she did not feel any sudden jolt that would indicate emergency braking. Rivera testified that she had not experienced an emergency stop on a CTA train. She said the train stopped briefly, then continued for a moment before stopping completely and the lights went out. When she exited the train, she testified that she saw a hand stuck between the platform and the train. Rivera did not see Escobar on the tracks.

¶ 19 The report prepared by the coroner indicated that Escobar's blood alcohol concentration was .23. Dr. Joseph Cogan testified at the deposition that he performed the postmortem on Escobar's body. After reviewing the evidence, he ruled the death a suicide. He noted that the fact that Escobar was standing on the tracks indicated that he had control of his limbs and he did not have injuries indicative of a fall.

¶ 20 After considering the briefs and materials submitted, the trial court granted the CTA's motion for summary judgment, finding that a moving train is an open and obvious danger. The court pointed out that plaintiff's position that the open and obvious doctrine did not apply was "belied by the applicable case law." The court found that "being on the tracks in front of a moving train is an open and obvious danger for which the CTA owes no duty."

¶ 21 This appeal followed.

¶ 22 On appeal, plaintiff argues that the trial court erred in granting the CTA's motion for summary judgment because the open and obvious doctrine does not apply in this case.

¶ 23 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2012). We review cases involving summary judgment de novo. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill.2d 342, 349, 233 Ill.Dec. 643, 701 N.E.2d 493 (1998).

*5 ¶ 24 "In order to recover in an action for negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff proximately caused by the breach." *Sameer v. Butt*, 343 Ill.App.3d 78, 85, 277 Ill.Dec. 697, 796 N.E.2d 1063 (2003). "The question of the existence of a duty is a question of law, and in determining whether a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party." *Sameer*, 343 Ill.App.3d at 85, 277 Ill.Dec. 697, 796 N.E.2d 1063. "In considering whether a duty exists in a particular case, a court must weigh the foreseeability that defendant's conduct will result in injury to another and the likelihood of an injury occurring, against the burden to defendant of imposing a duty, and the consequences of imposing this burden." *Ziemba v. Mierzwa*, 142 Ill.2d 42, 47, 153 Ill.Dec. 259, 566 N.E.2d 1365 (1991).

¶ 25 "A legal duty refers to a relationship between the defendant and the plaintiff such that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Choate v. Indiana Harbor Belt Railroad Co.*, 2012 IL 112948, ¶ 22, 366 Ill.Dec. 258, 980 N.E.2d 58. "At common law, the general rule is that a landowner is under no duty to maintain the premises for the safety of trespassers, whether they are adults or children." *Id.* ¶ 25. A landowner owes no duty of reasonable care to trespassers, except to refrain from willfully and wantonly injuring them. *Id.* This rule applies when the premises is a railroad right-of-way. *Id.* "Absent a duty, 'no recovery by the plaintiff is possible as a matter of law.' " *Id.* (quoting *Vesey v. Chicago Housing Authority*, 145 Ill.2d 404, 411, 164 Ill.Dec. 622, 583 N.E.2d 538 (1991)). Further, "[t]he existence of a duty under a particular set of circumstances is a question of law for the court to decide." *Id.*

¶ 26 The CTA argued in its motion for summary judgment that it did not owe a duty to Escobar because a moving train is an open and obvious danger, and the trial court agreed.

[1] [2] ¶ 27 Plaintiff maintains that the open and obvious doctrine is inapplicable because he has raised claims of active negligence and not premises liability. Plaintiff contends

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that the CTA and Morris were actively negligent, causing Escobar's death. He relies on exhibits that he obtained from an unrelated case against the CTA to assert that if Morris applied the emergency brakes sooner, then the train would have stopped before striking Escobar. However, these documents were prepared in a case involving a Red Line train at the Argyle station, not the Orange Line at the Ashland station. Plaintiff has not shown that the stopping distances tested in the documents would be the same at a different train station. Plaintiff also asserts that there is evidence that Morris did not put the train into Brake 4 position until after it was already stopped. However, this point is speculation based on the distance the train traveled in the station and Rivera's testimony that she did not feel a jolt or sudden movement to indicate emergency braking. In contrast, Morris testified that he activated Brake 4 as soon as he saw Escobar and Elam testified that the train was in Brake 4 position when he arrived at the scene. Plaintiff has failed to offer any evidence that Brake 4 was not applied when Morris saw Escobar on the tracks.

*6 ¶ 28 Further, we question the reliability of Rivera's testimony. She testified that she left work at 11:30 p.m. in downtown Chicago and then boarded an Orange Line train. However, it is undisputed that the accident occurred at approximately 11:10 p.m. This time discrepancy is significant because Rivera's own testimony makes it impossible for her to have been on the train at the time of the accident. Regardless, the reliability of Rivera's testimony does not impact our decision.

¶ 29 "In Illinois, the open and obvious doctrine is an exception to the general duty of care owed by a landowner." *Park v. Northeast Illinois Regional Commuter Railroad Corp.*, 2011 IL App (1st) 101283, ¶ 12, 355 Ill.Dec. 882, 960 N.E.2d 764 (citing Restatement (Second) of Torts § 343A(1) (1965); *Sandoval v. City of Chicago*, 357 Ill.App.3d 1023, 1028, 294 Ill.Dec. 310, 830 N.E.2d 722 (2005)). "When a condition is deemed open and obvious, the likelihood of injury is generally considered slight as it is assumed that people encountering potentially dangerous conditions that are open and obvious will appreciate and avoid the risks." *Id.* " 'Whether a condition is open and obvious depends on the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge.' " *Ballog v. City of Chicago*, 2012 IL App (1 st) 112429, ¶ 22 (quoting *Prostran v. City of Chicago*, 349 Ill.App.3d 81, 86, 285 Ill.Dec. 123, 811 N.E.2d 364 (2004)). "Where there is no dispute about the physical nature of the condition, whether a danger is open and obvious is a question of law." *Choate*, 2012 IL 112948, ¶ 34, 366 Ill.Dec. 258, 980 N.E.2d 58.

¶ 30 Three recent Illinois cases have considered whether a moving train is an open and obvious danger. In *Choate*, the Illinois Supreme Court reversed a jury verdict and entered a judgment *n.o.v.* on appeal. There, the plaintiff was a 12 year old boy who trespassed onto a railroad property through a fence and was seriously injured after he tried to jump onto a moving train. *Id.* ¶¶ 4–13. The supreme court observed that the plaintiff was a trespasser and "the general rule is that a landowner is under no duty to maintain the premises for the safety of trespassers, whether they are adults or children." *Id.* ¶ 25. The court noted that an exception exists for child trespassers if the landowner knew children habitually frequent the property, the dangerous condition was present on the property, the dangerous condition is likely to injure children because they are incapable, based on age and maturity, of appreciating the risk involved, and the expense or inconvenience to remedy the dangerous condition was slight in comparison to the risk to children. *Id.* ¶ 31. However, the supreme court concluded this exception was inapplicable, holding "as a matter of law that a moving train is an obvious danger that any child allowed at large should realize the risk of coming within the area made dangerous by it." *Id.* ¶ 35.

¶ 31 In *Park*, which was decided prior to *Choate*, the plaintiff brought a negligence accident after the decedent was struck and killed by an Amtrak train while crossing at a Metra pedestrian crossing. The plaintiff asserted that the decedent believed the train was a Metra commuter train that would stop before the crossing, but instead it was an Amtrak train that continued through the station without warning. The plaintiff alleged negligence against both Metra, which operated the station, and Canadian Pacific, who was responsible for traffic control on the railroad line. The trial court granted the defendants' motion to dismiss. *Park*, 2011 IL App (1st) 101283, ¶¶ 3 –9, 355 Ill.Dec. 882, 960 N.E.2d 764.

*7 ¶ 32 On appeal, the reviewing court affirmed the dismissal, finding that "the danger of stepping in front of a moving train is open and obvious regardless of the kind of train it is." *Id.* ¶ 18. The danger to the decedent was not foreseeable to Metra because "he was expected to appreciate and avoid the danger of stepping in front of a moving train." *Id.* ¶ 21. The court held that the "findings concerning Metra's duty, or lack thereof, apply with equal force to Canadian Pacific." *Id.* ¶ 27.

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¶ 33 In *McDonald v. Northeast Illinois Regional Commuter Railroad Corp.*, 2013 IL App (1 st) 102766–B, the plaintiff's decedent[1] was struck and injured by a Metra commuter train running express through the station while he was in a pedestrian crosswalk. The plaintiff alleged that Metra owed

> "the decedent the highest duty of care because it was a common carrier with respect to its operation of the North Glenview station and the passengers intending to board the trains therein and that defendant breached its duty by operating a train through the station without having activated the pedestrian signals it had previously installed; allowing the public to access the station when it knew it did not have adequate protections in place for the safety of pedestrians; failing to adequately warn the decedent that the pedestrian signals had not been activated; operating a train without keeping a sufficient lookout; failing to adequately warn the decedent of the approach of the train; operating its train at an excessive rate of speed given the fact that the pedestrian signals had not been activated; failing to adequately slow the train and avoid hitting the decedent; and/or failing to activate the pedestrian signals that had previously been installed." *Id.* ¶ 4.

¶ 34 The reviewing court reversed a jury verdict in favor of the plaintiff and entered a judgment *n.o.v.* on appeal, finding that pursuant to *Choate*, "the danger posed by the oncoming train in this case was open and obvious and that the decedent should have realized the risk of trying to hurry across the tracks before it arrived at the station." *Id.* ¶ 25. The court concluded that Metra did not owe a legal duty to warn the decedent because the oncoming train was an open and obvious danger. *Id.* ¶ 28.

¶ 35 Plaintiff asserts that these cases and the open and obvious doctrine are not applicable to the instant case because he alleged active negligence, not premises liability, in his complaint. Plaintiff cites *Smart v. City of Chicago*, 2013 IL App (1st) 120901, to support his position. In *Smart*, a cyclist was injured when his bicycle tire was caught in a groove in a street being repaved by the City. *Id.* ¶ 7. However, *Smart* did not involve a question of an open and obvious danger, but was an appeal from a jury verdict in which the City argued that it was entitled to a new trial because the trial court refused to submit a special interrogatory and tender a proffered jury instruction on premises liability to the jury. *Id.* ¶ 1. Further, plaintiff fails to cite any case in which a distinction has been made between "active" and "passive" negligence, such that the open and obvious doctrine would only apply to the latter.

*8 ¶ 36 We find the decisions in *Choate*, *Park*, and *McDonald* to be applicable to the instant case. We particularly note that in *McDonald* the allegations in the complaint included the failure to keep a sufficient lookout, operating at an excessive speed, and failure to timely apply the brakes, all of which are allegations made by plaintiff here. The facts of this case are similar to *Choate* in that Escobar was not lawfully where a CTA passenger should be waiting for a train, but instead was trespassing on the train tracks. Plaintiff's arguments attempt to circumvent this key fact, but we cannot ignore that Escobar was trespassing in an unsafe area in the path of an oncoming train. As these cases have made it clear, a moving train is an open and obvious danger. A reasonable person would not have trespassed onto the elevated train tracks from the platform. In *Park* and *McDonald*, the reviewing courts found no duty when the decedents were in an intended pedestrian crossing in the path of an oncoming train, in contrast to the trespassing in this case. We also point out that in *Park*, Canadian Pacific was not a landowner and the reviewing court held that it owed no duty to the plaintiff's decedent because of the open and obvious danger of the moving train. See *Park*, 2011 IL App (1st) 101283, ¶ 27, 355 Ill.Dec. 882, 960 N.E.2d 764. Trespassing onto the train tracks at an elevated CTA station in front of an oncoming train is an open and obvious danger.

¶ 37 We note that the open and obvious doctrine does provide for two exceptions (*Park*, 2011 IL App (1st) 101283, ¶ 22, 355 Ill.Dec. 882, 960 N.E.2d 764), though we find neither applicable in this case. The first is the distraction exception where "a property owner may have a duty to protect if there is a reason to expect that the plaintiff's attention might be distracted so that he would not discover the obvious condition." *Id.* ¶ 24. "The question is 'whether [a] defendant should reasonably anticipate injury to those entrants on his premises who are generally exercising reasonable care for their own safety, but may reasonably be expected to be distracted.' " *Id.* (quoting *Ward v. K Mart Corp.*, 136 Ill.2d 132, 152, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990)). Here, the CTA should not reasonably anticipate passengers exercising reasonable care to leave the platform and go onto the train tracks.

¶ 38 The second exception is the deliberate encounter exception, where "a duty is imposed when a defendant has reason to expect that a plaintiff will proceed to encounter the known or obvious condition, despite the danger, because to a reasonable person in his position the advantages of doing so

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would outweigh the apparent risk." *Id.* ¶ 26, 143 Ill.Dec. 288, 554 N.E.2d 223. A reasonable person in Escobar's position would not have gone onto the train tracks, the apparent risk far outweighed any possible advantages.

¶ 39 As these recent decisions have held, a moving train is an open and obvious danger. "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." *Choate*, 2012 IL 112948, ¶ 39, 366 Ill.Dec. 258, 980 N.E.2d 58. Accordingly, the CTA did not owe Escobar a duty when he trespassed onto the train tracks at the Ashland Orange Line station into the path of an oncoming train. The trial court properly granted summary judgment in favor of the CTA.

*9 [3] ¶ 40 However, even if the open and obvious doctrine was inapplicable, plaintiff would be unable to recover because Escobar's death was a suicide. Here, the record shows that Dr. Cogan ruled Escobar's death to be a suicide. He noted that Escobar was standing on the tracks, showing that he had control of his limbs, his injuries were not consistent with a fall, and he did not attempt to get out of the way of the oncoming train. There were no witnesses to describe the manner in which Escobar got onto the train tracks. Plaintiff has not presented any evidence to rebut Dr. Cogan's findings. " 'It is well established under Illinois law that a plaintiff may not recover for a decedent's suicide following a tortious act because suicide is an independent intervening event that the tortfeasor cannot be expected to foresee.' " *Crumpton v. Walgreen Co.*, 375 Ill.App.3d 73, 79, 313 Ill.Dec. 178, 871 N.E.2d 905 (2007) (quoting *Chalhoub v. Dixon*, 338 Ill.App.3d 535, 539–40, 272 Ill.Dec. 860, 788 N.E.2d 164 (2003)). Since Escobar's death was ruled a suicide, his conduct was an independent intervening act that the CTA could not have foreseen and could not support a recovery by plaintiff.

¶ 41 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 42 Affirmed.

Presiding Justice PALMER and Justice GORDON concurred in the judgment.

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Footnotes

1 The plaintiff's decedent died subsequently unrelated to the train accident.

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