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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JULIO ESCOBAR, Individually and as Special)	Appeal from the
Administrator of the ESTATE OF JUAN J. ESCOBAR,)	Circuit Court of
Deceased,)	Cook County
)	
Plaintiff-Appellant,)	
v.)	No. 06 L 4898
)	
CHICAGO TRANSIT AUTHORITY,)	
a municipal corporation,)	
)	Honorable
Defendant-Appellee.)	Kathy M. Flanagan,
)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Gordon concurred in the judgment.

ORDER

¶ 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)).

¶ 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 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.

¶ 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.

¶ 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 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 (1998).

¶ 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 (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. "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." *Ziamba v. Mierzwa*, 142 Ill. 2d 42, 47 (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. "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 (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.

¶ 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 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.

¶ 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 (citing Restatement (Second) of Torts § 343A(1) (1965); *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (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 (1st) 112429, ¶ 22 (quoting *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 86 (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.

¶ 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.

¶ 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.

¶ 33 In *McDonald v. Northeast Illinois Regional Commuter Railroad Corp.*, 2013 IL App (1st) 102766-B, the plaintiff's decedent¹ 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

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

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.

¶ 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. 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), 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 (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 would outweigh the apparent risk." *Id.* ¶ 26. 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. 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.

¶ 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 (2007) (quoting *Chalhoub v. Dixon*, 338 Ill. App. 3d 535, 539-40 (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.