SECOND DIVISION
December 20, 2016

No. 1-14-1932

EILEEN DENYS, as administrator of the Estate of Mark Yednak, Plaintiff-Appellant, v. CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, and DELORIS WOODS, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 11 L 004151 Honorable John H. Ehrlich, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's complaint for failing to allege that the defendants owed decedent any duty of care.

¶ 2 Plaintiff brought this wrongful death and survival action against defendants on behalf of the decedent who died after falling from a CTA subway platform and coming into contact with an electrified steel rail. Plaintiff alleged that the CTA was acting as a common carrier, and thus owed the decedent the highest duty of care. Plaintiff also alleged that the defendant train conductor who observed the decedent on the platform was negligent in rendering assistance. Defendants moved to dismiss plaintiff's fourth amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2012)). The trial court granted the

motion with prejudice, finding that plaintiff could not establish that defendants owed the decedent any duty of care. Plaintiff appeals, arguing that the trial court erred in dismissing her complaint. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 For purposes of this appeal, we recite and accept as true all well-pleaded facts in the complaint and draw all reasonable inferences from these facts in favor of plaintiff. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003).

¶ 5 Plaintiff's fourth amended complaint alleged that on July 22, 2006, at 1:43 a.m., Mark Yednak was lying on the platform of the Chicago Transit Authority's (CTA) Harrison Street subway station along the CTA's Red Line. Yednak's legs were protruding over the side of the platform. Deloris Woods, a CTA employee, was driving a northbound Red Line train into the Harrison Street station when she observed Yednak lying on the platform with his legs protruding over the edge of the platform. Woods stopped and exited the train. Plaintiff alleges that Woods then forced Yednak to his feet and, while grasping him, Woods walked Yednak across the platform, and then caused him to stumble and fall off of the platform into the track bed. Yednak made contact with the electrified steel rail (the third rail) causing his death. It was undisputed that at the time of his death, Yednak's blood alcohol level was .213.

¶ 6 Plaintiff's fourth amended complaint contained four counts. Count I alleged wrongful death and negligence, and asserted that the CTA "owed its paid passengers *** a duty to exercise the highest degree of care to avoid injury" to its passengers. Count I went on to assert that when Woods saw Yednak lying on the platform, Woods had a duty to: (1) have the power turned off to the third rail; (2) call 911 for paramedics; and (3) not place Yednak in further danger. Plaintiff alleged that Woods failed to: (1) call for emergency services; (2) prevent further injury to

Yednak; (3) warn Yednak of the risk of electrocution; (4) control Yednak after initiating contact with him; (5) guard against Yednak contacting the third rail; and (6) guard the third rail against having passengers come into contact with it. Count II was a survival claim arising from the same alleged negligent conduct in count I. Count III was styled as "Wrongful Death/Failure of CTA to train and supervise," and alleged that the CTA was negligent in hiring, training, and supervising its employees so as not to cause injury to passengers, and that the CTA failed to train and instruct Woods on: (1) using proper precaution and providing additional care to an incapacitated person; (2) communicating with and dealing with persons on the underground platform with regards to warning them of the risk of electrocution; (3) guarding against paid passengers coming in contact with the third rail; and (4) guarding the third rail from coming into contact with passengers. Count IV was styled as "Survival Action/Failure of CTA to train and supervise," and alleged a survival claim arising from the same alleged acts of negligence set forth in count III.

¶ 7 The CTA and Woods (collectively, defendants) filed a motion to dismiss the fourth amended complaint pursuant to 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)), section 13-214(b) of the Code (735 ILCS 5/13-214(b) (West 2012)), and section 41 of the Metropolitan Transit Authority Act (Transit Act) (70 ILCS 3605/41 (West 2012)). Defendants argued that the survival claims should be dismissed pursuant to section 2-619 of the Code and section 41 of the Transit Act because plaintiff failed to submit a proper Notice of Claim to the CTA identifying Yednak as the person to whom the survival claim accrued.[1] Defendants moved to dismiss various paragraphs from plaintiff's allegations pursuant to sections 2-619(a)(9) and 13-214(b) of the Code as barred by the statute of repose, since more than 10 years had passed since the construction of the third rail at the Harrison Red Line station, which

[1] The trial court found no error with the notice of claim, and neither party raises any argument on appeal regarding the trial court's ruling.

constituted an improvement to real property, such that any allegation pertaining to defective design was time barred. Defendants further moved to dismiss counts I-IV pursuant to section 2-619(a)(9), asserting that defendants owed no duty of ordinary care to Yednak once he left the platform, since at that point he was a trespasser. Defendants moved to dismiss various paragraphs from each count of the fourth amended complaint pursuant to section 2-615, asserting that neither the CTA nor Woods owed Yednak any of the duties alleged in each count of the fourth amended complaint, and that many paragraphs in the complaint were conclusory. Finally, defendants moved to dismiss counts III and IV regarding negligent hiring and supervision since the CTA had previously admitted that Woods was acting as its agent at the time of the accident.

¶ 8 On May 27, 2014, the trial court entered a written order granting defendants' motion to dismiss with prejudice "pursuant to the Judge's oral ruling." The written order did not specify the section under which the trial court dismissed plaintiff's complaint. Plaintiff filed a timely notice of appeal.

¶ 9 ANALYSIS

¶ 10 We begin by observing the deficiencies in plaintiff's appellant's brief.[2] Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 3, 2013) requires that an appellant's brief contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Plaintiff's brief repeatedly asserts facts without providing any citation to the record. For example, plaintiff asserts that Woods, after stopping and exiting the train, "grabbed," "forced," or "dropped" Yednak during and after the attempt to get him to move from the edge of the platform, although the statement of facts set forth in the appellant's brief contains no description of Woods' conduct after she stopped and exited the

[2] We also note that plaintiff has not filed a reply brief in this court.

train. Plaintiff's repeated failure to cite to the record in support of her argument has made our review of her claims on appeal more difficult.

¶ 11 Plaintiff also fails to provide us with a citation to the record for the transcript containing the trial court's oral ruling. As noted above, the trial court's written order states that the dismissal of plaintiff's complaint was with prejudice "pursuant to the Judge's oral ruling." This court is not a depository in which the appellant may dump the burden of argument and research (*Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986)), and it is not the job of this court to scour the record and make arguments for the appellant. *In re Estate of Parker*, 2011 IL App (1st) 102871, ¶ 47.

¶ 12 That said, the record does contain a transcript of the trial court's oral ruling on defendant's motion to dismiss. The trial court found that plaintiff's complaint failed to allege a duty owed by defendants' to Yednak. The trial court found that there is no duty in Illinois to prevent a person from being a danger to himself or herself, to prevent an intoxicated person from further injuring himself or herself, to turn off the electricity to the third rail, or to call 911. The trial court further found that the CTA has no duty to prevent people from falling off the platform while they are intoxicated, and that it was not foreseeable that Yednak would fall off the platform and come into contact with the third rail. Finally, the trial court found that the CTA would be immune from liability because Yednak became a trespasser when he left the platform.

¶ 13 In addition to failing to provide us with the bases for the trial court's dismissal, plaintiff's brief regularly fails to develop any cogent legal argument or cite relevant authority in support of her contentions on appeal. Plaintiff makes no argument and cites no authority that might suggest that defendants owed Yednak a duty to turn off the power to the third rail or to call 911 for paramedics when Woods discovered Yednak on the platform. Plaintiff offers no argument that

the circumstances here warrant the imposition of such duties. Plaintiff also offers no argument regarding her negligent training and supervision claims (counts III and IV). She has therefore forfeited any argument that her complaint identified a cognizable duty owed by defendants to Yednak to turn off the power to the third rail and call 911 for paramedics, as well as any argument that the trial court erred in dismissing counts III and IV. Ill. S. Ct. R. 341(h)(7); *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009) (finding that failure to properly develop an argument does "not merit consideration on appeal and may be rejected for that reason alone").

¶ 14 Plaintiff also fails to develop any argument regarding how Illinois courts determine the existence of a duty, the circumstances that give rise to a duty owed by a common carrier to its passengers, and the law surrounding trespassers and express or implied invitation. Although plaintiff's failure to comply with Rule 341 is grounds for this court to disregard her arguments on appeal (*Burmac Metal Finishing Co. v. West Bend Mutual Insurance Co.*, 356 Ill. App. 3d 471, 478 (2005)), we will attempt to consider the merits to the extent that we are able to understand the issues in light of these deficiencies (*Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 825 (2010) (citing *Lill Coal Co. v. Bellario*, 30 Ill. App. 3d 384, 385 (1975)).

¶ 15 On appeal, plaintiff argues that the trial court erred in granting defendants' section 2-619.1 motion because: (1) the statute of repose does not apply because: (a) the CTA has been repairing and replacing the Red Line railway during the previous two years; (b) the CTA breached an ongoing duty to maintain and upgrade the rail system's delivery of electricity; and (c) a subway is not an improvement to real property such that section 13-214(b) of the Code (735 ILCS 5/2-13-214(b) (West 2012)) does not apply; (2) the CTA owed Yednak the highest duty of care because he was a passenger of a common carrier; (3) the CTA owed decedent a duty of care

because he was not a trespasser; and (4) that plaintiff pleaded sufficient facts to support her claims.

¶ 16 Although the trial court did not specify under which section of the Code it was dismissing plaintiff's complaint, defendants' motion to dismiss was brought pursuant to section 2-619.1, which permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2012)) motion to dismiss based on a plaintiff's substantially insufficient pleadings with a section 2-619 (735 ILCS 5/2-619 (West 2012)) motion to dismiss based on certain defects or defenses. A motion to dismiss under section 2-615 attacks only the legal sufficiency of a complaint and does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). In comparison, a section 2-619 motion to dismiss allows for an involuntary dismissal of a claim based on certain defects or defenses. Section 2-619 provides that an action may be dismissed, on the motion of the defendant, based on various enumerated defenses (735 ILCS 5/2-619(a)(1)-(8) (West 2012)), including the defense that "the action was not commenced within the time limited by law" (735 ILCS 5/2-619(a)(5) (West 2012)). "It is proper for a court[,] when ruling on a motion to dismiss under either section 2-615 or section 2-619[,] to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party." *Edelman*, 338 Ill. App. 3d at 164 (citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998)). Our review is *de novo* for motions to dismiss brought under both sections 2-615 and 2-619 (*Edelman*, 338 Ill. App. 3d at 164), and we may affirm the circuit court's ruling on a motion to dismiss on any basis appearing in the record. *Perry v. Estate of Carpenter*, 396 Ill. App. 3d 77, 84 (2009).

¶ 17 We first consider whether plaintiff's complaint alleged that defendants had a duty to prevent Yednak from being placed in a position of further danger. In an action for negligence, a plaintiff is required to state facts from which a court can find a duty owed to the plaintiff. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 349 (2003). Here, plaintiff argues that defendants owed Yednak the highest duty of care because of a carrier/passenger relationship, and that at minimum, defendants owed Yednak an ordinary duty of care.

¶ 18 Plaintiff's appellant's brief fails to develop any legal argument as to how Illinois determines the existence of a duty. Instead, plaintiff merely argues, without citation to the record, that Yednak was a passenger on the CTA's platform when Woods "negligently force[d] *** Yednak *** off of the platform." Plaintiff's failure to develop any argument on appeal as to how Illinois establishes a duty or whether the uncontroverted facts establish a carrier/passenger relationship violates Rule 341(h)(7), and results in forfeiture.

¶ 19 Forfeiture aside, it is well-settled that every person "owes a duty of ordinary care to all others to guard against injuries that naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons." *Widlowski v. Durkee Foods*, 138 Ill. 2d 369, 373 (1990). "The touchstone of this court's duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). We consider four factors when determining whether a duty exists: (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. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010). If a course of action creates a foreseeable risk of injury, the

individual engaged in that course of action has a duty to protect others from such injury. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 19. Whether a duty exists in a particular case is a question of law. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

¶ 20 In a similar vein, even if an individual has not created a risk of harm to another, the relationship between a common carrier and a passenger gives rise to a duty to take affirmative action to aid a passenger. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 20. "[A] contractual relationship between passenger and carrier begins when the passenger has presented himself at the proper place to be transported with the intention of becoming a passenger and is then either expressly or impliedly accepted by the carrier for transportation." *Skelton v. Chicago Transit Authority*, 214 Ill. App. 3d 554, 572 (1991). The person "must have placed himself under the care of the carrier, so that the circumstances will warrant an understanding on the part of the company that he is a passenger and under its care." *Id.* "Whether the uncontroverted facts establish the relationship of carrier and passenger is a question of law for the court to determine." *Id.* at 573.

¶ 21 Plaintiff's complaint alleges that Yednak was a "paid passenger;" that the CTA "engaged in operating a railroad as a common carrier;" and that the CTA "owed its passengers *** a duty to exercise the highest degree of care to avoid injury to said passengers." These are merely legal conclusions devoid of factual support. The complaint offers no specific factual allegations as to the manner in which Yednak arrived on the platform, and no facts as to whether he entered the Harrison Street subway station after paying his fare. Plaintiff offers no facts as to where Yednak situated himself on the platform after his arrival on the platform, the length of time that he spent on the platform, or what conduct he engaged in prior to the arrival of Woods' train. Furthermore, plaintiff's own complaint admits that Yednak was partially obstructing the train's right of way, and contains no facts from which we might infer that he intended to board any train. Even

accepting as true the allegation that Yednak was a paid customer, we find that the well-pleaded facts alleged in the complaint fail to demonstrate that Yednak presented himself on the platform with the intention of becoming a passenger. Plaintiff cites no authority stating that a person's presence on a train platform is, on its own, sufficient to establish a carrier/passenger relationship that would give rise to a heightened duty of care. Plaintiff's complaint fails to set forth sufficient facts that, if true, would establish a carrier/passenger relationship, and therefore fails to establish that defendants owed Yednak the highest duty of care owed by a carrier to a passenger.

¶ 22 Plaintiff's only remaining duty argument is that defendants owed Yednak a duty of ordinary care because he was not a trespasser when he entered the train track bed, and even if he was, defendants knew or should have known that he was trespassing. Plaintiff argues that a landowner owes a duty of ordinary care to trespassers who are known or should be known to the owner (*Lee v. Chicago Transit Authority*, 152 Ill. 2d 432 (1992)), and that by grabbing Yednak, forcing him to his feet, and then dropping him, causing him to fall on to the track bed where he came into contact with the third rail, Woods gave an express or implied invitation to Yednak to enter the track bed. Once again, plaintiff fails to cite to the record in support of her claim on appeal, and fails to set forth any organized or coherent legal argument related to duty, trespassing, and express or implied invitation. Once again, plaintiff has forfeited her argument.

¶ 23 Forfeiture aside, plaintiff's argument relies on several factual allegations from her complaint that are simply not well-pleaded. Her complaint alleges that Woods "forced *** Yednak to his feet," "failed to adequately control *** Yednak after initiating contact and control" of him, "grasping him [and] walk[ing] him across the platform to a point of danger," and "causing *** Yednak [to] stumble and fall off of the platform." Even accepting as true that Woods forced Yednak to his feet, plaintiff's factual allegation that Woods failed to adequately

control Yednak while walking him to a place of danger lacks adequate factual detail. Plaintiff fails to allege sufficient facts as to where Woods was "grasping" Yednak, where this "place of danger" was on the platform, or the amount of time that passed between Woods letting go of Yednak and him falling from the platform. Furthermore, plaintiff fails to allege any specific facts as to how Woods "caused" Yednak to stumble and fall from the platform. These allegations are vague and conclusory, and we therefore disregard them for the purpose of reviewing the trial court's dismissal of plaintiff's complaint. The only well-pleaded facts are that Woods "forced' Yednak from the edge of the platform to his feet and that Yednak fell into the track bed.

¶ 24 These well-pleaded facts do not establish that Woods gave any express invitation to Yednak to enter the track bed, and plaintiff fails to develop any meaningful argument that Woods gave an implied invitation to Yednak to enter the track bed by "forcing" him to his feet. Nor does plaintiff offer any argument or citation to support an assertion that Yednak had authority to leave the platform and enter the track bed. Regardless, we need not decide whether Yednak was a trespasser when he left the platform because plaintiff alleges no well-pleaded facts suggesting that it was objectively foreseeable that Yednak, after being "forced" to his feet, would then enter the track bed on the opposite side of the platform. See *Schmid v. Fairmont Hotel Co.*, 345 Ill. App. 3d 475, 485 (2003) (observing an occurrence is reasonably foreseeable "if a reasonably prudent person could have foreseen as likely the events which did transpire" and that "highly extraordinary," "tragically bizarre," or "unique" events are not reasonably foreseeable). We have nothing before us that suggests how likely it is for someone to come into contact with the third rail after falling from the platform, and nothing to suggest how burdensome it would be to guard against such an injury. Given that CTA platforms, by their very nature, must provide access to

the trains, we believe that imposing a burden on the CTA to prevent all instances of entry to the track bed would be substantial.

¶ 25 Lastly, we affirm the dismissal of counts III and IV wherein plaintiff alleged the theory of negligent hiring and training for the same reasons set forth above as it relates to forfeiture and the failure to present a cogent argument supported by authority regarding the validity of this theory of liability and any argument that the trial court erred in dismissing these claims. We also note that the CTA admitted Woods was acting as its agent at the time of the incident thereby negating this theory of recovery. *Gant v. L.U. Transport, Inc.,* 33 Ill. App. 3d 924 (2002).

¶ 26 Simply put, none of the well-pleaded facts in plaintiff's complaint, even if true, establish that defendants owed Yednak a duty of care under these circumstances. The trial court did not err in dismissing plaintiff's fourth amended complaint with prejudice.

¶ 27 Given our analysis and conclusions above, we need not address the parties' arguments that the statute of repose barred plaintiff's complaint.

¶ 28 CONCLUSION

¶ 29 Despite the deficiencies in plaintiff's appellant's brief and her forfeiture of her duty arguments due to a failure to cite to the record and present any authority in support of the issues on appeal, we reached the merits of her arguments after a review of the record and consideration of the well-pleaded facts as we understand them. Our review of the plaintiff's complaint shows it was properly dismissed for failure to allege sufficient facts that, if true, establish the existence of any duty owed by defendants to the decedent under the circumstances of this case. Based on the foregoing, we affirm the judgment of the trial court.

¶ 30 Affirmed.