FIRST DIVISION
November 23, 2015

No. 1-14-2066
2015 IL App (1st) 142066-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MERAM TAHIR, as Administrator of the Estate of Friehiwet Tahir, deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 09 L 175
CHICAGO TRANSIT AUTHORITY, a municipal corporation,	)	
Defendant-Appellee.	)	Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

ORDER

¶ 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.

[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.

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

¶ 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."

¶ 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.

¶ 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 38½ 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 2½ 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."

¶ 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, 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.

¶ 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 (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. Both the structure and content of plaintiff's argument section fall short of the requirements of Rule 341(h)(7) (eff. Feb. 6, 2013).

¶ 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 (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). 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 (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).

¶ 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.

¶ 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 (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 (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. 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 (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. 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 (1992). We review a grant of summary judgment *de novo*. *Id*. at 102.

¶ 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 (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. See also *Filliung v. Adams*, 387 Ill. App. 3d 40, 50-51 (2008); *Jackson v. Graham*, 323 Ill. App. 3d 766, 773-74 (2001). But see *Xeniotis v. Satko*, 2014 IL App (1st) 131068, ¶ 68 (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.

¶ 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."

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. 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 (1993). See also *Kosten v. St. Anne's Hospital*, 132 Ill. App. 3d 1073, 1079 (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 (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. 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 (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 (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.

¶ 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 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. "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. 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.

¶ 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. "[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. 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.

¶ 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 (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 ("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.

¶ 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 (2010) (citing Restatement (Second) Torts § 343A, Comment *f* (1965)).

¶ 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 (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. 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 (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 (evidence raised issue of material fact about whether deliberate encounter exception applied where exit with condition was closer to where plaintiff performed his duties, time was of the essence, and a witness stated that she never saw anyone taking the other exit).

¶ 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. 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))—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 (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.

¶ 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.