2016 IL App (1st) 15-1688-U

THIRD DIVISION
March 30, 2016

No. 1-15-1688

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MARTIN JONATHAN MORENO,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois,
Plaintiff-Appellant	)	County Department,
	)	Law Division.
v.	)	
	)	No. 2012 l 013934
CHICAGO TRANSIT AUTHORITY,	)	
	)	
Defendant-Appellee.	)	The Honorable
	)	Daniel Gillespie,
	)	Judge Presiding.
	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justice Lavin concurred in the judgment.
Presiding Justice Mason dissented.

ORDER

¶ 1 *Held*: The circuit court properly granted summary judgment in favor of the CTA only as to paragraph 8(b) of the plaintiff's complaint, which alleged that the CTA failed to properly construct the platform at the Clinton el stop so as to create a gap between the stopped train and the platform, since that allegation was barred by the applicable statue of repose for construction defects (735 ILCS 5/13-214 (West 2010)). However, summary judgment on the remaining allegations in the plaintiff's complaint was improper because there remained genuine issues of material fact as to whether the gap, whose physical nature and visibility were disputed, was an open an obvious danger, and whether the plaintiff encountered that danger deliberately or as a result of a distraction foreseeable to the CTA.

¶ 2 The plaintiff, Martin Jonathan Moreno (hereinafter Moreno) appeals from the circuit court's order granting summary judgment in favor of the defendant, Chicago Transit Authority (CTA) in his one-count negligence action. The plaintiff contends that summary judgment was improper for several reasons. First, he argues that his complaint was not time barred by the statute of repose for construction design claims (735 ILCS 5/13-214 (West 2010)), since his theory of liability was not premised on a design defect, but rather on the CTA's ongoing negligent failure to inspect, maintain, and repair the dangerous gap created between its trains and the platform, as well as its duty to warn passengers of this danger. Second, the plaintiff asserts that as a common carrier, the CTA owed him a duty of "the highest degree of care," and there remained a genuine issue of material fact as to whether the gap between the train and the platform posed an open and obvious danger so as to preclude that duty. The plaintiff also asserts that there remained genuine issues of material fact as to whether he was more than 50% contributorily negligent for his injuries. For the reasons that follow, we affirm in part and reverse and remand in part.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following facts and procedural history. The parties agree that on November 13, 2012, the plaintiff was riding a CTA pink line elevated train (hereinafter the train) towards downtown Chicago. Because the train was crowded, the plaintiff temporarily disembarked at the Clinton Street station (hereinafter the Clinton station or the Clinton el stop) to allow other customers to depart and board the train. As the plaintiff attempted to reboard, he took a step towards the train and his foot got wedged in the gap between the train and the platform, resulting in injury.

¶ 5 Consequently, on December 12, 2012, the plaintiff filed the instant cause of action against

the CTA in circuit court. In his one-count negligence complaint, the plaintiff alleged that because the he was a fare paying passenger of the CTA, as a common carrier, the CTA owed him a duty to exercise "the highest degree of care in the operation, maintenance, care and control of the el train" he rode on. The plaintiff asserted that in violation of that duty the CTA, failed to: (1) properly maintain its property, allowing for dangerous conditions to exist--namely large gaps between the train and the platform; (2) properly construct the platform, creating the large gaps between the train and the platform; (3) properly inspect the platforms to ensure that large gaps did not exist; (4) properly detect and repair the large gaps between the train and the platform; (4) protect its passengers from these dangerous conditions; (6) notify its passengers of the dangerous conditions; and (7) otherwise act with due care. The plaintiff asserted that as a direct and proximate result of the aforementioned negligent acts and/or omissions by the CTA, he fell and caught his leg between the train and the station platform, thereby sustaining serious, painful, disfiguring and permanent personal injuries, and incurring medical expenses, and loss of normal life and wages in the total amount of $50,000.

¶ 6 On March 27, 2014, the CTA filed its answer and affirmative defense. The CTA admitted that it owed a duty of care to the plaintiff but denied that the duty was that of a common carrier. The CTA denied the remaining allegations in the plaintiff's complaint. With respect to affirmative defenses, the CTA asserted that the plaintiff was contributorily negligent in that he carelessly and negligently: (1) exited the train in a manner which he should have known, in the exercise of due care would cause him to fall; (2) failed to take proper precautions to avoid an open and obvious danger, when he knew or should have known in the exercise of due care that such a danger existed while exiting the train; (3) failed to hold onto handrails available on the

train for passengers' safety; and (4) failed to keep a proper and sufficient lookout and maintain his balance while exiting the train.

¶ 7 After the plaintiff responded to the CTA's affirmative defense, the parties proceed with discovery. During discovery, in response to the plaintiff's production request for "all photographs *** relevant to the occurrence in question," the CTA indicated that it was in possession of five photographs of the location. The record before us contains only four photographs, which were attached as an exhibit to the CTA's motion for summary judgment. These photographs are not dated. Two of the photographs show a pink line train stopped at an unidentified train station. The other two photographs are of a measuring tape placed between an unidentified train door and an unidentified station platform. The measurement of the gap in that photo is a little over four inches.

¶ 8 In addition, as part of discovery, four individuals (the plaintiff, an occurrence witness, and two CTA inspectors) were deposed, and the following facts were adduced.

¶ 9 A. The Plaintiff

¶ 10 In his deposition, the plaintiff testified that on November 13, 2012, he travelled on a CTA pink line train heading eastbound towards downtown Chicago to attend a class at Harold Washington College, where he had been enrolled as a student since August 2012. [1] When the

[1] We note that after the incident, the plaintiff telephoned the CTA on November 20, 2012, to report what had happened. A transcript of that telephone conversation was made by the CTA. During his deposition testimony, the plaintiff, who averred that he had never seen the transcript before was given the transcript to refresh his recollection of events. The transcript itself was not admitted as deposition evidence, nor is it part of the record on appeal.

plaintiff boarded the train at the 18th Street station, he entered the first train car. The train stopped at the Clinton station at about 8:10 to 8:20 a.m. The plaintiff testified that at this point he was already late for his class, which was supposed to end between 8:50 and 9 a.m.

¶ 11 The plaintiff, who was standing next to the door, explained that the train was so crowded, that when it stopped he stepped onto the platform to permit other passengers to exit the train. The plaintiff testified that there were many people waiting on the platform to board the train and that they were "rowdy and pushy," so that he moved aside to let them board the train before trying to reboard himself. He stated that he "could not see as much" because of the crowd. When the plaintiff finally tried to step back onto the train, with his left foot, his left leg fell into the gap between the train and the platform "up to his knee." When asked if he was pushed, the plaintiff testified that "he could not recall" but that "there was a big mob of people waiting to board the train."

¶ 12 The plaintiff admitted that he never looked down at the platform or the gap between the train and the platform when he exited the train to permit the other passengers to disembark. He also acknowledged that he did not look down at the gap or the platform when he attempted to reboard the train.

¶ 13 The plaintiff testified that he wears size 11 shoes, and that his entire foot went into the gap. He also averred that an occurrence witness, Pedro Gonzalez (hereinafter Gonzalez), witnessed his fall. When asked where Gonzalez was when he observed the fall, the plaintiff testified that Gonzalez was on the platform, and that he recalled this because Gonzalez had also stepped off the train to permit other passengers to exit the train at the Clinton station.

¶ 14 The plaintiff testified that when his leg got stuck in the gap, he tried to extricate himself by

putting one hand on the platform and the other on the train to pull himself up. Gonzalez approached and helped him by pulling him up. The plaintiff testified that his foot was stuck for about 30 to 40 seconds. After he was able to extricate himself, the plaintiff boarded the train.

¶ 15 The plaintiff testified that once the train pulled into the next station at Clark and Lake Streets, Gonzalez approached a train operator, after which the train operator came to speak with the plaintiff. The train operator asked the plaintiff if he was alright and the plaintiff indicated that he was. He explained, however, that he had said this because he was "in shock and in excruciating pain," and felt like he was "about to faint." The plaintiff admitted that the train operator asked him if he should call an ambulance but that the plaintiff told him he should not. The train operator then went back into his cabin and the plaintiff did not see him again.

¶ 16 The plaintiff continued riding on the train until the next stop at State and Lake Streets, where he disembarked. The plaintiff admitted that he had to use a staircase to get to street level from the station platform, but explained that he did so by "hopping." After that the plaintiff walked to Harold Washington College, which was across the street, and then used an escalator to get to his class on the third floor. The plaintiff spoke to his professor about what had happened, and the professor suggested that they speak to campus security. However, because no one from security was available, the professor instructed the plaintiff to call his family. The plaintiff's family arrived and transported him to Stroger Hospital.

¶ 17 The plaintiff was subsequently treated by Dr. Ronald Silver (hereinafter Dr. Silver) at Northshore Orthopedics and underwent physical therapy at Accelerated Rehabilitation in Bridgeport. The plaintiff was last seen by Dr. Silver on February 1, 2013. He also had his last rehabilitation therapy session on that date. The plaintiff admitted that his discharge note from Accelerated Rehabilitation dated February 1, 2013, states that "the patient reports knee feels 100

percent since starting physical therapy." The plaintiff, however, testified in his deposition that his knee is not functioning 100 percent. He stated that he cannot run, squat, or kneel as much as he could before the accident. He explained that when he attempts any of these activities, he feels pain in his knee. In addition, the plaintiff testified that if he attempts to walk for longer than an hour, his knee starts "failing" and he needs to rest.

¶ 18 The plaintiff admitted that on the date of the accident he had ridden the same train to downtown on numerous occasions on his way to school and that he often stepped off the train to permit passengers to disembark when the train was crowded. He explained, however, that before this date he had never stepped off a train at the Clinton station.

¶ 19 B. Curtis Hudson

¶ 20 In his deposition, CTA track inspector, Curtis Hudson (hereinafter Hudson) testified that he has been employed with the CTA for nine years: two years, as a track repairman, and the next seven as a track inspector. Hudson explained that as a track repairman, he was responsible for repairs and new construction on the tracks. As a track inspector, he became the one responsible for identifying the defects for other repairmen to repair. To become inspector, Hudson completed a mandatory three-day, eight-hour training session, after which he was given a standards book and necessary equipment.

¶ 21 Hudson explained that as an inspector he is trained and responsible for visually and physically checking for any defects in the train tracks. According to Hudson, inspectors walk on the tracks, facing the train, and looking down at the rails for anything that might indicate problems, such as misalignment of the rails, and obvious signs of wear and tear. The inspectors work in pairs, and each morning, they are assigned a starting and ending point for their inspection. Hudson explained that if an inspector believes that a section of the track has a defect

and needs repairs, he will note this down on a handheld machine, called a PDA. The machine will generate a report which will be downloaded into a central computer system, and forwarded to repairman informing them about what needs to be repaired. The inspectors will make sure that the repairs are made, and if they are not, they will note that on their next inspection using the PDA. Hudson explained that the two-inspector team carries only one PDA. He further testified that in addition to taking notes on the PDA, the inspectors may file a written report at the end of a day if they believe there are more serious issues on the tracks that can cause "discomfort to the customers," *i.e.*, any type of malfunction that would cause the train to derail.

¶ 22 Hudson next averred that he is familiar with and has inspected the Clinton station. Hudson explained that typically in inspecting this station he walks the whole length of the track that covers the station, and visually checks the alignment of the tracks for any obvious signs of wear and tear. Specifically, Hudson checks to see if the tracks are parallel with one another, or if there has been a misalignment, evidenced by any loose or missing spikes or clips, defective ties (split tie, rotted tie, missing hook bolt), or any other indications that the rail might have moved from left to right. Hudson also checks for safety issues on the catwalk, as well as any indication of contact between the train and the platform. For such contact, Hudson looks for scraping on the blue fiberglass on the platform closest to the tracks. According to Hudson, scraping reflects that the track itself is out of alignment and has moved closer to the platform.

¶ 23 Hudson acknowledged that the entire inspection of the Clinton station is done while the train is not in the station. He further averred that it is standard procedure not to perform an inspection when the train is actually in the station.

¶ 24 Hudson further admitted that as part of his job as CTA inspector he was not expected to

inspect the size of the gap between the train and the station platform. He testified that this duty would fall to the foreman and engineer installing the train tracks at the station. The foreman and engineer would check the alignment of the train between the platform and the train at the time of installation. Hudson also testified that he does not know if anyone is responsible for checking the size of the gap after the platform is installed. In addition, Hudson admitted that he is not familiar with the CTA's standard for the distance (*i.e.*, the gap) between the train and the station platform.

¶ 25 Hudson testified, however, that in his view, a safe distance between the train and the platform would be three to four inches. Hudson explained that if the gap is smaller than three to four inches, there is a risk that the train will come in contact with the platform. If the gap is larger than four inches, according to Hudson, it could pose a risk to the riders.

¶ 26 Hudson next acknowledged that on November 7, 2012, six days prior to the incident wherein the plaintiff was injured, he and another inspector, Datrick Tisdale, were assigned to and performed an inspection of the Clinton el stop. Hudson acknowledged that he does not know whether this was the closest inspection of the Clinton station to the date of the incident or whether another inspection of that station was performed afterwards.

¶ 27 Hudson identified a printout of the defects that were noted in the PDA for November 7, 2012, including: (1) a loose bolt at a joint between the two tracks; (2) a missing screw spike; (3) a missing rail fastener; and (4) a missing joint belt. Hudson testified that all of the aforementioned defects were located on the track itself, and that there were no defects noted that would have caused there to be a widening of the gap between the train cars and the platform.

¶ 28 Hudson admitted, however, that when he performed the inspection on November 7, 2012, he

neither observed nor inspected the gap between any stopped train and the platform, and therefore would not know if the gap was two or eight inches wide.

¶ 29 Hudson acknowledged that the CTA has been using newer train cars, but did not know whether there was a difference between the width of those cars and the old train cars.

¶ 30 C. Datrick Tisdale

¶ 31 In his deposition, CTA inspector, Datrick Tisdale (hereinafter Tisdale), testified that he has worked for the CTA for eight years. He was a "trackman," responsible for heavy construction and track maintenance for the first four years before being promoted to a track inspector.

¶ 32 With respect to training, Tisdale averred that he completed two weeks of classroom training when initially joining the CTA to become a flagman. In order to become an inspector Tisdale took a one-day class, after which he received on-the-job training by working with an experienced inspector. Tisdale averred that as an inspector he was also given a book with a set of CTA guidelines, a PDA and a ruler to measure the tracks.

¶ 33 Tisdale testified consistently with Hudson as to the responsibilities of a track inspector. Next, he averred that together with Hudson, on November 7, 2012, he performed an inspection of the Clinton el stop, by walking along the train tracks and looking down at them, inspecting the rails, the ties, the bolts, and everything else on the tracks. Tisdale testified consistently with Hudson that all of the defects they reported in the PDA for that day were related to the train tracks. According to the PDA report, they did not find any movement of the ties, plates, screw spikes, or clips, one of which would have had to move in order for there to have been rail movement left or right. Tisdale also testified that there were no scrapes along the side of the track wall that would indicate that the tracks had somehow moved towards the platform.

¶ 34 On cross-examination, Tisdale admitted that any scrapes on the side of the train tracks would

occur only if the gap was too small, but that there would be no scrapes, or any indication whatsoever if the gap was wider. Also Tisdale admitted that while in his career as track inspector he has never had a situation where the gap has widened at the platform, this certainly was possible.

¶ 35 In addition Tisdale acknowledged that on November 7, 2012, he and Hudson never inspected the Clinton station platform or anything other than the train tracks themselves. Tisdale averred that it is not his responsibility, as track inspector, to inspect the gap between a stopped train and the station platform. He acknowledged that he has never received any training on inspecting that gap, and has never performed such an inspection of the gap in his career as track inspector. Tisdale testified that he did not know whose responsibility or job it would be to inspect the gap.

¶ 36 Tisdale testified, however, that the appropriate length of that gap is "maybe three to five inches." When asked how he knew this, Tisdale stated that he could not remember but that it was "just something we've learned over the years."

¶ 37 Tisdale next testified that when not on duty as a CTA inspector, he has had occasion to visit the Clinton el stop and look down at the gap between the platform and the train standing at the station. He averred that he had done so most recently on April 10, 2014, a week before and in lieu of his deposition. Tisdale stated that the gap he observed was "a standard gap," which he believed should be three to five inches. He stated that gaps at every el station should fall within three to five inches, but admitted that he does not know if they do.

¶ 38 On cross-examination, Tisdale admitted that he performed this off-duty inspection after speaking with CTA's attorney. He also admitted that he did not have a ruler or any sort of measuring device with him when he performed this measurement of the gap. He also admitted that he did not get down on his knees to measure the gap, but, if anything, just "looked" down.

Tisdale further acknowledged that he checked the gap only at the train door he was entering and not on every door of every train car. Accordingly, he admitted that he really did not have any precise measurement of the gap between that one train door and the station platform, and that he therefore does not know the standard gap size for the Clinton el stop. In addition, Tisdale admitted that he never measured the size of the gap at the Clinton el stop on the date that the plaintiff's foot fell into the gap and therefore does not know what the size of the gap was on that date.

¶ 39 On cross-examination, Tisdale acknowledged that if the rail track itself was placed too far from the platform, and then during his inspection, none of the indicators of rail track movement were observed (*i.e.*, no loose bolts, ties, etc.) because everything was where it was supposed to be, there would be no indication that the rail was further than where it should be, and he would have no idea if the gap was larger. In addition, Tisdale admitted that if the platform had any defects (such as erosion or a piece missing in the plastic etc.) he would not know if the gap had widened due to those issues. Tisdale explained however that if he noticed a piece missing from the edge of the platform, or any erosion of the platform, as part of the inspection, he would have reported that in his PDA. Tisdale averred that he observed no such defects in the platform on November 7, 2012, six days prior to the incident, but reiterated that he did not perform an inspection of the Clinton station on the date of the incident.

¶ 40 C. Pedro Gonzalez

¶ 41 In his deposition, occurrence witness, Pedro Gonzalez testified that at about 8:30 a.m. on the day of the incident he was on the CTA pink line train on his way to work. Gonzalez entered either the first or the second car from the front. Gonzalez testified that the train car was one of the new CTA cars, with no seats on one side.

¶ 42 During the train ride, Gonzalez stood near the train door leaning on one of the partitions next to the door, and facing the plaintiff. Both of them were standing sideways in relation to the door. According to Gonzalez, the train was crowded, with about seven or eight people standing in the area next to the door. Accordingly, when the train stopped at the Clinton station, he had to exit it, to permit other passenger to step off. Gonzalez averred that because he was near the door, he "sidestepped" onto the platform with his left foot, followed by his right foot, before backing away from the train. The platform was wet because it had been drizzling that day. At that point, several other passengers got off the train. Then Gonzalez heard a loud "ahh" sound and observed a commotion. He saw the plaintiff with his foot stuck in the gap between the train and the platform up to his knee. Gonzalez admitted that he did not observe the plaintiff slipping but only observed him once his foot had already fallen through the gap. Together with the help of a young woman, Gonzalez helped the plaintiff get his foot out from the gap and then helped him back onto the train.

¶ 43 According to Gonzalez, the plaintiff's face looked almost green and he seemed to be in a lot of pain. When Gonzalez asked him if he wanted to talk to the conductor, the plaintiff said he had to get to school. As the train ride continued, Gonzalez noticed that the plaintiff could not stand on his foot, but had to lean on the other one. Accordingly, at the next stop, Gonzalez exited the train and approached the train conductor. After he told the conductor what had happened, the conductor followed him back to where the plaintiff was standing. The plaintiff told the conductor he was ok. Gonzalez had to ext the train at the next stop to go to work, but before he did so, he gave the plaintiff his card and told him that if anything "came up to call him." Gonzalez also approached the conductor a second time, and told him that the plaintiff was "in really bad shape," but the conductor just "kind of shrugged his shoulders and put his arms up."

¶ 44 After discovery, on February 27, 2015, the CTA filed a motion for summary judgment. Therein, the CTA argued that: (1) the plaintiff's claim was time-barred by the statue of repose for construction design claims (735 ILCS 5/13-214(b) (West 2010)); (2) the CTA owed no duty of care to the plaintiff because the risk of harm was not reasonably foreseeable, the gap was open and obvious, and the burden on the CTA in imposing a duty of providing entrances without gaps would far outweigh the benefits; and (3) the plaintiff was barred from any recovery because he was more than 50% contributorily negligent. In support, the CTA attached copies of the four depositions and the undated and unidentified photographs.

¶ 45 After briefing and oral argument, on May 7, 2015, the circuit court granted the CTA's motion for summary judgment. After the court informed the counsels of his ruling, the parties asked for clarification setting forth the basis of the decision. The court then stated that it was basing its ruling on all of the briefs submitted. The plaintiff now appeals.

¶ 46 II. ARGUMENT

¶ 47 On appeal, the plaintiff argues that summary judgment was improper where: (1) the statute of repose is inapplicable to the plaintiffs' claims for failure to inspect, maintain, or warn; (2) the CTA, as a common carrier, owed the plaintiff a duty of highest degree of care; and (3) there remains a genuine issue of material fact as to whether the "gap" that existed on the day the plaintiff was injured constituted an open and obvious danger. For the reasons that follow, we agree with the plaintiff.

¶ 48 We begin by noting the well-established principles regarding grants of summary judgment. "Summary judgment is a drastic measure of disposing of litigation" (*Bruns v. City of Centralia*, 2014 IL 116998, ¶12) 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)). See also *Schade v. Clausius*, 2016 IL App (1st) 143162, ¶ 18. Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2012); see also *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 21; *Fidelity National Title Insurance Company of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)); *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record, in the light most favorable to the nonmoving party and strictly against the moving party. *Schade*, 2016 IL App (1st) 143162, ¶ 17; see also *Happel v. Wal-Mart Stores, Inc*., 199 Ill. 2d 179, 186 (2002). "Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law." *Morissey v. Arlington Park Racecourse, L.L.C.,* 404 Ill. App. 3d 711, 724 (2010). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co*., 165 Ill. 2d 107, 114 (1995) ("[W]here reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to the material fact, summary judgment should be denied and the issue decided by the trier of fact."). Our review of the trial court's entry of summary judgment is *de novo*. See *Village of Palatine v. Palatine Associates, LLC*, 2012 IL App (1st) 102707, ¶ 43; see also *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998); *Outboard*

Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 102 (1992).

¶ 49 A. Statute of Repose

¶ 50 Before addressing the merits of the plaintiff's negligence claim, we must first address the applicability of the construction statute of repose. 735 ILCS 5/13-214(b) (West 2010). Section 13-214(b) of the Illinois Code of Civil Procedure (Code) provides in pertinent part:

> "No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, of construction of an improvement to real property after 10 years have elapsed from the time of such act or omission." 735 ILCS 5/13-214(b) (West 2010).

¶ 51 "Statutes of repose 'stem from the basic equity concept that a time should arrive, at some point, that a party is no longer responsible for a past act.' " *Ryan v. Commonwealth Edison Co.*, 381 Ill. App. 3d 877, 882 (2008) (quoting W. Prosser et al., Torts ch. 12, at 607 (8th ed. 1988)). Accordingly, statutes of repose differ from statutes of limitations. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 61 (2006). While statutes of limitations govern the time within which a lawsuit may be commenced after a cause of action has accrued, statutes of repose extinguish the action itself after a fixed period of time, regardless of when the action accrued. *DeLuna*, 223 Ill. 2d at 61. "Although a statute of repose is to be interpreted liberally to fulfill its designated purpose, it must not be expanded to encompass circumstance that are beyond the legislature's intent." *Eskew v. Burlington Northern and Santa Fe Ry. Co.*, 2011 IL App (1st) 093450, ¶ 56 (citing *Ryan*, 381 Ill. App. 3d at 883).

¶ 52 With respect to the construction statute of repose at issue in this case, our courts have held

that it " 'was enacted for the express purpose of insulating all participants in the construction process from the onerous task of defending against stale claims.' " *Eskew*, 2011 IL App (1st) 093450, ¶ 56 (quoting *MBA Enterprises, Inc. v. Northern Illinois Gas Co.*, 307 Ill. App. 3d 285, 288 (1999)). The construction statute of repose represents a "legislative balancing act between the rights or persons harmed by [the] allegedly faulty construction and the rights of those responsible for such construction." *Ryan*, 381 Ill. App. 3d at 883. In other words, after the statutory period has passed, " 'the right to be free of stale claims comes to prevail over the right to prosecute them.' [Citation.]" *Ryan*, 381 Ill. App. 3d at 883 (*Ocasek v. City of Chicago*, 275 Ill. App. 3d 628, 633 (1995)).

¶ 53 As such, the construction statute of repose applies only when (1) the structure at issue is an improvement to real property; and (2) the defendant's activities fall within the scope of the statute's enumerated activities (*i.e.*, "design, planning supervision, observation or management"). *Ryan*, 381 Ill. App. 3d at 882; see also *Eskew*, 2011 IL App (1st) 093450, ¶ 56 ("The plain language of the statute differentiates construction activities from other types of activities and protects against only those claims that are based on conduct falling within the enumerated construction-related activities."); see also *Trtanj v. City of Granite City*, 379 Ill. App. 3d 795, 801 (2008) ("To determine whether a party is protected by section 13-214(b), it is necessary to determine whether the party claiming protection under the statute engaged in activities that are enumerated in the statute. [Citation.] It is not enough that the party seeking the protection of the statute is a landowner. [Citation.] A landowner is only protected by the statute if he or she engages in the enumerated activities. [Citation.] The plain language of the statute bars only those claims relating to specified activities related to the construction of an improvement to real property."); see also *MBA Enterprises, Inc. v. Northern Illinois Gas Co.*, 307 Ill. App. 3d 285,

288 (1999). Therefore, although "a design professional receives the protection of the statue of repose for design and installation-related activities, it does not receive protection for other activities [such as inspection and maintenance] that are not within the purview of the statue." *Ryan*, 381 Ill. App. 3d at 887.

¶ 54 In the present case, the plaintiff concedes that the Clinton el stop was built in 1996, so that any claims of faulty construction of that station brought ten years after the fact would have been time-barred by the statute of repose. Nevertheless, he asserts that the trial court erred in granting summary judgment because the majority of the allegations in his complaint do not fall within the requisite scope of the statute's enumerated activities, so as to trigger its application. In fact, according to the plaintiff, all but one, of his allegations of negligence specifically pertain to the CTA's ongoing duties of maintenance, inspection, and operation of its station and trains, and therefore do not fall within the scope of the ten-year construction statue of repose. For the reasons that follow, we agree.

¶ 55 The facts in this case are analogous to *Eskew*, 2011 IL App (1st) 093450, and *Trtanj*, 379 Ill. App. 3d 795. In *Eskew*, the plaintiff, who was blind, was waiting on the platform of a train station when he heard an announcement that his train would be departing from another set of tracks. *Eskew*, 2011 IL App (1st) 093450, ¶ 2. As the plaintiff crossed the tracks in an attempt to get to the other side for his train, he was struck and killed by an oncoming train. *Eskew*, 2011 IL App (1st) 093450, ¶ 2. At trial, the plaintiff prevailed and was awarded substantial damages. *Eskew*, 2011 IL App (1st) 093450, ¶ 29. The defendant railroad appealed, arguing, *inter alia*, that the plaintiff's allegations regarding an insufficient public address system to warn of oncoming trains, and the lack of sufficient barriers at the train station platform to prevent pedestrians from crossing the tracks while a train was proceeding through the station, were time-

barred by the 10-year construction statue of repose. *Eskew*, 2011 IL App (1st) 093450, ¶ 55. The appellate court disagreed with the railroad, and found that the plaintiff's claims were not based on faulty construction or installation of real property. Rather, the court held they "were predicated on the defendant's ongoing duty to maintain and operate the platform and the public address system in a safe manner that would protect against the risk of injury," and were therefore "not time-barred by the [construction] statute of repose." *Eskew*, 2011 IL App (1st) 093450, ¶ 57.

¶ 56 Similarly, in *Trtanj*, the plaintiffs, property owners, sued the municipality to recover damages to their residence as a result of sewage backing up into their basement. *Trtanj*, 379 Ill. App. 3d 797. In their complaint, the plaintiffs alleged, *inter alia*, that the city's negligent operation and maintenance of the city's sewer system proximately caused the damages to their residence. *Trtanj*, 379 Ill. App. 3d 798. The city filed a motion for summary judgment, arguing, *inter alia*, that the plaintiffs' claims were barred by the 10-year construction statute of repose. *Trtanj*, 379 Ill. App. 3d 799. The trial court granted summary judgment in favor of the city and the plaintiffs appealed. *Trtanj*, 379 Ill. App. 3d 799. On appeal, we reversed the trial court's order, finding that the 10-year statue of repose for construction defects did not bar most of the plaintiffs' negligence allegations against the city, since they were not predicated on the city's construction, installation or design of the sewer system, but rather on the city's ongoing duty to properly operate and maintain it. See *Trtanj*, 379 Ill. App. 3d 802 ("The express language of the statue of repose does not protect [the city] against negligent maintenance or negligent operation of the sewer system or lift station after their construction"). As we explained:

> "The statue of repose protects only those who engage in the enumerated activities protected by the statue: " 'design, planning, supervision, observation or management of construction, or

construction. ' " [Citations.] The statue separates out construction activities from other activities, and only the enumerated construction activities fall within the statue's protection. [Citation.]." *Trtanj*, 379 Ill. App. 3d 802.

¶ 57 In the present case, just as in *Eskew* and *Trtanj*, the record reveals that the CTA cannot use the construction statute of repose to protect itself against all of the plaintiff's claims. A review of the plaintiff's complaint reveals that six of his seven allegations do not seek recovery based on any construction defect or installation of an improvement to real property; rather, they are based on alleged acts or omissions by the CTA in its operation, maintenance and inspection of that property. Specifically, the plaintiff alleged that the CTA failed to properly maintain, properly inspect, properly detect, properly repair, and properly protect its passengers from dangerous conditions, as well as notify them of the same. Contrary to what the CTA would have us believe, five of these allegations are predicated on the CTA's ongoing duty to inspect, maintain and operate the Clinton station platform and the different types of trains stopping at that station, in a safe manner that would protect against injury to passengers. The remaining allegation is predicated on the CTA's additional duty to notify its passengers of the risk of injury from any gaps that exist or are created between the platform and the different types of trains, when those trains pull into the station. As such, only one of the plaintiff's allegations falls within the purview of the design, installation and construction of the Clinton train station, so as to trigger the application of the design construction statue of repose (735 ILCS 5/13-214(b) (West 2010)). Specifically, paragraph 8(b) of the plaintiff's complaint alleges that the CTA failed to properly construct the platform so as to cause the gap between the platform and the train. As such, applying the rationale of *Eskew* and *Trtanj* to the facts before us, we conclude that aside from paragraph 8(b), the remaining six allegations contained in the plaintiff's complaint (namely,

paragraphs 8(a) and 8(c) through 8(g)) are not time-barred by the construction statute of repose set forth in section 13-214(b) of the Code (735 ILCS 5/13-214(b) (West 2010)). See *Eskew*, 2011 IL App (1st) 093450, ¶ 57; see also *Trtanj*, 379 Ill. App. 3d 802; see also *Ryan*, 381 Ill. App. 3d at 887-88 ("[I]f an installer of an improvement to real property violates a duty arising from its activity as an inspector, rather than its activity as an installer, then it can be held liable for breach of that duty regardless of the statue of repose.").

¶ 58 In coming to this conclusion, we have considered the decisions in *CITGO Petroleum Co., v. McDermott International, Inc.*, 368 Ill. App. 3d 603, 607 (2006), and *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864 (1996), cited to by the CTA, and find them inapplicable to the cause at bar. Both of those decisions relied on the status of the defendants (as the initial installers of the improvement to property), rather than the activities that they were later involved in and had control over, to hold that the statute of repose applied to bar the plaintiffs' causes of action, even though the plaintiffs' allegations were framed in terms of independent duties to inspect, maintain and operate. See *O'Brien*, 285 Ill. App. 3d at 870 (holding that the construction statute of repose applied to the plaintiff's claim against the city that alleged that the existing median was dangerous and that the barrier should have been installed to prevent the accident in which her mother was killed, even though the plaintiff did not use the term "design defect" in her complaint but rather couched her claim in terms of negligent maintenance); see also *CITGO*, 368 Ill. App. 3d at 604 (holding that the ten-year construction statute of repose applied to bar pipefitting manufacturer's third-party claim against the former owner of an oil refinery arising out of a fire at the refinery caused when the pipefitting supplied by the manufacturer failed, even though the manufacturer alleged ongoing negligent inspection, maintenance, and operation of the refinery's piping equipment). However, in *Ryan*, this appellate court explicitly rejected the reasoning of the

aforementioned cases, and relying on the plain language of the statue held that to determine whether the statue of repose applies, one must look to the specific activity in question, rather than the fact that the negligence was perpetrated by the same party that installed the system in question. See *Ryan*, 381 Ill. App. 3d at 885. In other words, "if an installer of an improvement to real property violates a duty arising from its activity as an inspector [or one who undertakes a duty to maintain], rather than its activity as an installer, then it can be held liable for breach of that duty regardless of the statue of repose." *Ryan*, 381 Ill. App. 3d at 885. Several courts since have adopted the rationale in *Ryan*. See *Eskew*, 2011 IL App (1st) 093450, ¶ 56 ("The plain language of the statute differentiates construction activities from other types of activities and protects against only those claims that are based on conduct falling within the enumerated construction-related activities."); see also *Trtanj*, 379 Ill. App. 3d at 801. We too agree with that rationale and see no reason to depart from it here.

¶ 59 For these same reasons we give little weight to the holdings in *Gavin v. City of Chicago*, 238 Ill. App. 3d 518, 521 (1992) and *Wright v. Board of Education of City of Chicago*, 335 Ill. App. 3d 984, 957-58 (2002), relied upon by the dissent, since both were decided prior to *Ryan*. Accordingly, for all of the aforementioned reasons, we find that the statute of repose poses no obstacle to all but one of the allegations in the plaintiff's complaint.

¶ 60 B. Negligence

¶ 61 Having disposed of the preliminary issue, we next turn to the merits of the plaintiff's negligence claim. It is axiomatic that to prevail on a negligence claim, a plaintiff must establish that the defendant owed him a duty of care, that the defendant breached that duty, and that the breach of the duty proximately caused the plaintiff's injury. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12; see also *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 42, (2009).

¶ 62 In any negligence action, a court must first determine as a matter of law whether the defendant owed a duty to the plaintiff. *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 21. Duty is determined by asking "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). In determining whether a duty exists, we look to four factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden on the defendant to guard against the injury; and (4) the consequences of placing a burden on the defendant. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 14. The question of whether defendant owed plaintiff a duty of care is a question of law to be determined by the court. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 422 (2004).

¶ 63 In the present case, the parties dispute whether the CTA owed plaintiff any duty of care. The CTA contends that as a property owner it owed no duty of care to the plaintiff because the risk of harm and the likelihood of injury were not reasonably foreseeable since the "uncontroverted" facts established that the gap was open and obvious. The plaintiff, on the other hand, asserts that as a common carrier, the CTA owed him the highest duty of care, and that even if the gap was an open and obvious danger, which he contends it was not, the distraction exception and deliberate encounter exceptions apply so as to foreclose any applicability of the open and obvious doctrine. At the very least, the plaintiff asserts there remains a genuine issue of material fact as to whether the gap was an open an obvious danger. For the reasons that follow, we agree with the plaintiff and hold that the pleadings and submissions before us, taken in light most favorable to the plaintiff, reveal such an issue of fact, so as to preclude our ability to affirm the trial court's grant of summary judgment in favor of the CTA.

¶ 64 We begin our analysis by first resolving the parties' dispute as to the type of relationship they stood in, since this will necessarily define the level of care one owed to the other. In that respect, we note that the duty of care owed by common carriers to their passengers is different from the duty of care owed by a landowner to its invitees. A common carrier owes its passengers the highest duty of care "consistent with the practical operation of its conveyances." *Krywin v. Chicago Transit Authority*, 391 Ill. App. 3d 663, 666 (2009); see also *New v. Pace Suburban Bus Service*, 398 Ill. App. 3d 371, 382 (2010); *Browne v. Chicago Transit Authority*, 19 Ill. App. 3d 914, 917 (1974)); see also *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 24 ("Although a common carrier's degree of care is not capable of a precise formulation, and its application will depend upon the factual situation in each case, '[i]t has been said that the obligation of a common carrier is to do all that human care, vigilance and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road, to convey its passengers in safety to their destination.' ") (quoting *McNealy v. Illinois Central R.R. Co*., 43 Ill.App.2d 460, 465 (1963)). On the other hand, a landowner generally owes a duty of reasonable care for the state of its premises. *McDonald v. Northeast Illinois Regional Commuter R. R. Corp*., 2013 IL App (1st) 102766-B, ¶ 22.

¶ 65 Citing to *Skelton v. CTA*, 214 Ill. App. 3d 554, 573 (1991), *Davis v. S. Side Elevated R. R. Co*., 292 Ill. 378, 381 (1920) and *Darda v. CTA*, 100 Ill. App. 2d 94, 96-98 (1968), the CTA argues that in the present case we should hold that it owed the plaintiff only an ordinary duty of care because the incident was not related to the CTA's operation of its trains, but merely to its maintenance of the station platform (*i.e.*, its premises). We disagree.

¶ 66 Contrary to the CTA's position, subsequent to the decisions cited by the CTA, our

supreme court has explicitly held that a common carrier's duty to its passengers does not end when the carrier reaches the passengers ultimate destination; rather the carrier must still provide its passengers an opportunity to safely alight. See *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010) ("This court has long held that a common carrier has a duty to its passengers to exercise the highest degree of care, not only to carry them safely to their destinations, but to provide them with a reasonable opportunity to leave the conveyance safely."); see also *Katamay v. Chicago Transit Authority*, 53 Ill. 2d 27, 29-30 (1972) ("The relation of carrier and passenger does not terminate, until the passenger has alighted from the train and left the place where passengers are discharged, and the duty of the carrier to its passenger continues, until the passenger has had a reasonable time in which to leave the *** alighting place." (Internal quotations omitted).) The rationale has been that while they are under the control of the common carrier, passengers must rely wholly on the carrier for their safety. *Fillpot v. Midway Airlines, Inc.*, 261 Ill. App. 3d 237, 243 (1994) ("[The] defendant's duty of highest care applies when passengers entrust the common carrier to protect them from dangers to which they may not otherwise have been exposed and from which they cannot otherwise protect themselves"). Accordingly, our courts have repeatedly held that where the passenger was in a location under the control of the carrier, such as a train platform, the carrier must exercise the highest degree of care towards the plaintiff. See *Eskew*, 2011 IL App (1st) 093450, ¶ 33 (holding that the highest duty of care applies to a person who is "some place which is under the control of the carrier and provided for passengers, such as the waiting room or platform at [a train] station"); *Fillpot*, 261 Ill. App. 3d at 243 (holding that an airline had the duty to exercise highest standard of care in protecting passenger who had disembarked from plane and was walking on tarmac towards the terminal where the passenger had no control over where the defendant placed her on the tarmac

as she deplaned, she had no choice but to exit the plane where it stopped and proceed, on foot, to the terminal, and as she did so, she slipped, fell, and injured herself); see also *Sheffer v. Springfield Airport Authority*, 261 Ill. App. 3d 151, 154 (1994)); see also *Katamay*, 53 Ill. 2d at 30 (holding that the evidence established a passenger-carrier relationship where a passenger caught her heel in the planks of a train platform as she moved to board a train).

¶ 67 Applying the principles articulated above to the undisputed facts of this case, we are compelled to conclude that when the plaintiff, who was a fare-paying passenger, attempted to reboard the train, from the Clinton station platform, which was completely under the control of the CTA, onto a CTA operated train, the CTA and the plaintiff stood in a common carrier-passenger relationship.

¶ 68 Nevertheless, while it is true that as such the CTA would have owed the plaintiff the highest degree of care, it is also axiomatic that no legal duty arises unless the harm is reasonably foreseeable and the injury likely. *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34, 42 (2004). In the duty analysis, whether a condition is open and obvious directly relates to the first two factors of the duty-analysis, namely the likelihood and the reasonable foreseeability of the injury. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1051-51 (2010); see also *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 19 ("Application of the open and obvious rule affects the first two factors of the duty analysis; the foreseeability of injury, and the likelihood of injury.") Accordingly, we must next turn to the parties arguments regarding the open and obvious nature of the gap.

¶ 69 Under the open and obvious doctrine, in the present case, the CTA would not be liable for physical harm to the plaintiff caused by the gap if the gap's danger was open and obvious, unless the CTA should anticipate the harm despite the obviousness of the condition. *McDonald*, 2013

IL App, 1027766-B, ¶ 22. In this context, "obvious" means that both the condition and the risk were apparent to and would be recognized by a reasonable person, in the position of the plaintiff, exercising "ordinary perception, intelligence, and judgment." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 16; see also *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996) ("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 risk."). Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of duty. *Bruns*, 2014 IL 116998, ¶ 19.

¶ 70 Normally, where there is no dispute about the physical nature of the condition, the determination as to whether a dangerous condition is open and obvious will be a legal one. *Bruns*, 2014 IL 116998, ¶ 18. However, where there is a dispute as to the physical nature of the condition, such as its visibility, the question becomes one of fact, better resolved by a jury. *Bruns*, 2014 IL 116998, ¶ 18; see also *Alqadhi v. Standard Parking Inc*., 405 Ill. App. 3d 14, 18 (2010) ("Where a court cannot conclude as a matter of law that a condition poses an open and obvious danger " 'the obviousness of the danger is for the jury to determine.' " ") (quoting *Duffy v. Togher*, 382 Ill. App. 3d 1, 8 (2008)) (citing cases).

¶ 71 In the present case, the record before us reveals that there remains a dispute about the physical nature of the gap between the train and the platform at the Clinton station on the date of the incident. While neither the plaintiff nor Gonzalez looked at the gap as they were exiting the train, because the train was so crowded, they both testified that the plaintiff's foot, which was a size 11, fell through the gap "up to his knee." The CTA offered no testimony to negate the plaintiff's position that the gap was not visible because of the crowd, or that the gap was

somehow narrower than one that would allow a person, with a size 11 foot, to drop through the gap "up to his knee" as he was stepping forward from the platform to the train.

¶ 72 Although the CTA proffered photographs that showed a measurement of a gap between a pink el line train and a train platform, indicating that the gap was a bit over four inches long, it failed to provide a date and place for the photographs or in any way establish that the photographs were taken at the Clinton el stop. What is more, the CTA failed to identify the type of train car (old or new) that was used in the measurement of the gap in the photographs, even though Gonzalez testified that the train that he and the plaintiff rode on was one of the newer ones with seats only on one side of the car. In addition, the CTA's own inspectors admitted that they had never measured the gap at the Clinton el stop, and particularly not on the date of the accident. In fact, the inspectors admitted they did not perform any inspection of the Clinton station on the date of the accident, and the record contains no evidence whatsoever as to the condition of the Clinton station (tracks, platform, etc.) on that date. Moreover, the CTA inspectors could not agree as to what they believed would be a standard-sized and safe gap at any CTA station. While Tisdale averred that a gap should be between three and five inches wide, Hudson averred that a gap should not be more than four inches, and affirmatively stated that if a gap was wider than four inches it could pose a danger to passengers.

¶ 73 Under this record, and taking as we must the pleadings and evidence before us in the light most favorable to the plaintiff, we find that there remains a genuine issue of material fact as to the physical nature of the gap between the train and the platform at the Clinton el stop on the date of the incident. See *e.g.*, *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, (2000) (holding that there remained an issue of fact as to whether danger posed by raised portion of a rubber mat in a gym was an open and obvious danger that the patron

should have seen had she been looking at the mat rather than staring ahead, precluding summary judgment for gym in patron's negligence action to recover for injuries sustained when she tripped over the mat); *Simmons v. American Drug Stores, Inc*., 329 Ill. App. 3d 38, 44 (2002) (holding that there remained genuine issues of material fact as to whether a "cartnapper" barrier in front of an Osco drug store presented an open and obvious danger to customer, who was injured as he tripped over the barrier and fell, precluding the entry of summary judgment in favor of the store owner); *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d at 18 (holding that there remained a genuine issue of material fact as to whether raised concrete of wheelchair accessible ramp near exit of parking garage, on which patron tripped and fell, injuring her knee, was an open and obvious condition, such as would negate any alleged duty owed by the parking garage owners to the patron, thus precluding summary judgment in favor of the owners). Accordingly, we find that summary judgment was improper.

¶ 74 In that respect, we note that contrary to the CTA's position, the fact that the plaintiff had successfully stepped off the train on the date of the incident, and boarded the train without any problems on many previous occasions, does not positively resolve the fact issue concerning the physical nature of the gap, so as to permit the grant of summary judgment. See *e.g.*, *Simmons v. American Drug Stores, Inc*., 329 Ill. App. 3d at 44 (holding that "[w]here the defendants themselves were unable to appreciate 'any danger' presented by the [condition] and plaintiff had encountered [the condition] previously without incident, a question of fact exists as to whether a reasonable person in plaintiff's position would likewise have failed to appreciate the risk presented by [the condition] at the time plaintiff fell"). If anything, this fact supports the plaintiff's position that the condition of the gap, and the risk of danger posed by stepping from

the platform and into the train (over the gap), would not have been apparent to a reasonable person in the plaintiff's shoes.

¶ 75 Moreover, even assuming *arguendo* that we could conclude as a matter of law that the gap presentenced an open and obvious danger, the plaintiff correctly notes that there would remain genuine issues of material fact as to whether the CTA would nevertheless have owed him a duty of care under either the distraction of the deliberate encounter exceptions to the open and obvious doctrine.

¶ 76 The distraction exception applies where the defendant has reason to expect that the "invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." (Internal quotations omitted) *Bruns*, 2014 IL 116998, ¶ 20. The distraction exception applies only if there is evidence from which a court can infer that the plaintiff was actually distracted. *Bruns*, 2014 IL 116998, ¶ 22. In addition, our courts have typically applied the distraction exception to impose a duty upon a defendant, in circumstances where the evidence showed that the defendant created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition and, thus, was charged with reasonable foreseeability that an injury might occur. See *Bruns*, 2014 IL 116998, ¶¶ 28-29.

¶ 77 Similarly, the deliberate encounter exception applies where the defendant "has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantage of doing so would outweigh the apparent risk." *Bruns*, 2014 IL 116998, ¶ 20. Although this exception has most often been applied in cases involving some economic compulsion, as where workers are compelled to encounter dangerous conditions as part of their employment obligations, it is certainly not limited to such situations.

See *Morrissey*, 404 Ill. App. 3d at 726 (citing *LeFever v. Kemlite Co., a Div. of Dyrotech Industries, Inc.*, 185 Ill. 2d 380, 392 (1998)).

¶ 78 In the present case, the plaintiff and Gonzalez both testified that on the date of the accident the train was so crowded that they had to exit the train to permit other train passengers to disembark before they could reboard the train to continue the ride. Gonzalez specifically testified that there were about seven or eight people standing near the area of the door. The plaintiff also testified that he was on his way to school, and late, thereby providing a reason for not choosing to wait for another less crowded train. The CTA presented no evidence to counter the testimony of either the plaintiff or Gonzalez regarding the crowds near the train door, nor the visibility of the gap. Under this record, and taking as we must the pleadings in the light most favorable to the plaintiff, we would have to conclude that there remained a genuine issue of material fact as to whether the two exceptions to the open and obvious rule applied here, so as to foreclose summary judgment in favor of the CTA. See *e.g.*, *Morrissey*, 404 Ill. App. 3d at 724 (holding that there remained a genuine issue of material fact as to whether the deliberate encounter exception to the open and obvious rule applied to owner and operator of a horse racing track, on the basis that the owner could have anticipated that an exercise rider would use the exit from the training track despite the presence of soap and water, which created an open and obvious dangerous condition, precluding summary judgment); see also *Ward*, 136 Ill.2d at 156 (holding that the plaintiff's injury was reasonably foreseeable where the defendant-store placed a post right outside the doors to be accessed by customers, and the plaintiff was focused on carrying large and bulky items outside of the store when he hit the post).

¶ 79 The same issues of material fact (*i.e.*, the actual size of the gap on the date of the incident, the

gap's visibility, the plaintiff's ability to reasonably appreciate both its danger and the risk it posed, and his subsequent actions in light of that dangerous condition and risk) equally pertain to the remaining elements of the plaintiff's negligence claim—namely, whether the CTA breached its duty of care to the plaintiff, and whether that breach proximately caused the plaintiff's injury.

¶ 80 III. CONCLUSION

¶ 81 Accordingly, for all of the aforementioned reasons, we find that the circuit court properly granted summary judgment only as to that portion of the plaintiff's complaint alleging a defect in construction of the Clinton el stop. Summary judgment in favor of the CTA on the remaining allegations, however, was improper. We therefore affirm in part and reverse in part for further proceedings.

¶ 82 Affirmed in part; reversed and remanded in part.

¶ 83 PRESIDING JUSTICE MASON, dissenting.

¶ 84 Thousands of commuters use light rail transportation in the City of Chicago every day. They commute to and from work, school or other activities. They board or alight in droves from rail cars in stations that are deliberately designed to allow the train to pass through the station without grazing the platform. This necessitates that the stations be constructed so that while the train makes its way through the station, its cars clear the platform, thus requiring a "gap" between the car and the platform. The gap which Moreno alleges was the cause of his injury was there of necessity and by design and because that "defect," if it was one, had existed for more than 10 years prior to the filing of his complaint, his claims are time-barred. 735 ILCS 5/13-214(b) (West 2010). The trial court correctly found that the CTA was entitled to summary judgment I, therefore, respectfully dissent from my colleagues' decision reversing summary judgment on all but one ground of plaintiffs' complaint.

¶ 85 The majority points out that only one allegation of plaintiff's single-count complaint concerns a failure to properly construct the train platform (and triggers the 10-year statute of repose). The remaining allegations, without any supporting facts, cite the CTA's failure to "maintain," "inspect," and "repair" the platform, and a failure to protect and notify passengers of "dangerous conditions," and thus, the majority concludes those allegations are not governed by the statute of repose for construction or design defects. *Supra*, ¶ 57. But regardless of how plaintiff characterizes the CTA's acts and omissions, he has failed to produce evidence that the gap between the train car and the platform, if it was a defect, was due to anything other than a defect in design and construction.

¶ 86 To be sure, CTA inspector Tisdale testified that it was "possible" for the gap between the train car and the platform to widen; however, he had never encountered that scenario in his 8-year career, and plaintiff produced no evidence supporting the conclusion that such a phenomenon was the cause of his injury. And while plaintiff suggests that new cars put into service within the past 10 years may have contributed to the widening of the gap, he likewise produced no evidence that the new cars were narrower than the cars in use when the platform was constructed in 1996. Instead, plaintiff improperly relied solely on the allegations of his complaint to contest summary judgment. See *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 43 ("[A] party may not rely solely on her complaint to oppose a properly-supported motion for summary judgment."). The record discloses no genuine issue of fact as to whether a failure of maintenance and inspection, rather than a design defect, caused plaintiff's injury. See *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 584 (2007) ("Mere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment.").

¶ 87 This case is analogous to *Gavin v. City of Chicago*, 238 Ill. App. 3d 518, 521 (1992), where the plaintiff alleged that the defendant maintained a "traffic light pole" in such a way as to obstruct traffic, failed to illuminate the pole, obstructed the pole from view, and failed to warn motorists of the presence of the pole, causing her injury. This court affirmed summary judgment in favor of the defendant based on the statute of repose, holding that the allegations concerned the "improper design of the traffic light fixture, not [defendant's] failure to properly maintain the fixture." *Id*.; see also *Wright v. Board of Education of City of Chicago*, 335 Ill. App. 3d 948, 950, 957-58 (2002) (finding that statute of repose barred plaintiff's claims arising out of condition of step on which she tripped where step had remained unchanged since date of construction).

¶ 88 *Ryan* does not, as the majority concludes, compel a different result. In Ryan, a component of a transformer installed by ComEd at O'Hare airport shorted out, causing injury to a city employee. *Ryan*, 381 Ill. App. 3d at 879. Plaintiff produced testimony of an expert that the component failure was not discovered in the course of ComEd's ongoing maintenance duties. *Id*. at 880. This court concluded that it is "well established that power suppliers have an ongoing duty to inspect and maintain the equipment through which that power is transmitted." *Id*. at 888.

¶ 89 Here, in contrast, not only has plaintiff failed to provide any expert testimony as to the nature of the defect, he has likewise failed to identify any ongoing maintenance activities by the CTA vis-à-vis the platform or the gap between the platform and train cars that proximately caused his injuries. Instead, the only activity he identifies is inspection of the tracks themselves, but articulates no relationship between that activity and the gap between the train car and the platform.

¶ 90 Like the traffic light pole in *Gavin* and the step in *Wright*, the platform at issue here is an

inert fixture that did not undergo any substantial change since it was constructed 20 years ago. As the gap between the platform and the train car stemmed from the design of the station, and plaintiff's claims are all premised on the existence of the gap, the complaint is barred by the statute of repose. I would therefore affirm summary judgment in favor of the CTA.

¶ 91 Further, because I believe plaintiff's claims are time-barred, I would not reach the issue of whether defendant was also entitled to summary judgment based on a lack of duty of care and plaintiff's contributory negligence.

¶ 92 For these reasons, I respectfully dissent.