

To be Argued by:
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New York Supreme Court
Appellate Division – Second Department

Docket No.:
2004-11031

FRANCES WILLIAMS,

Plaintiff-Appellant,

– against –

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

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1. The index number of the case in the court below is 24666/94.
2. The full names of the original parties are as above. There have been no changes.
3. The action was commenced in Supreme Court, Kings County.
4. The action was commenced on or about July 19, 2004, by service of a Summons and Verified Complaint. The Verified Answer was served thereafter.
5. The nature and object of the action is as follows: personal injury action.
6. The appeal is from an order of the Hon. Herbert Kramer, entered on November 5, 2004.
7. The appeal is being perfected on a full reproduced record.

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QUESTIONS INVOLVED

1. In a tort case against a train operator alleging injury sustained after the plaintiff's fall into a wide gap between a subway car and the platform, did the court err by setting aside the jury's verdict in favor of the plaintiff and granting judgment NOV, where the plaintiff presented evidence that

- (a) the defendant failed to warn of the existence of the gap;
- (b) the defendant failed to take any precautions to protect passengers from the gap; and
- (c) the defendant maintained no system to determine when a gap was unreasonably hazardous?

2. Did the trial court err by granting judgment NOV based on a determination that the plaintiff's expert witness was less credible than the defendant's?

3. Is a municipal defendant immune from liability for negligence when the evidence was sufficient to show that it had caused the plaintiff's injuries by violating its own regulations?

PRELIMINARY STATEMENT

This is a case about a woman who was seriously injured on the New York City subway when her leg was caught between the train and the station platform in a gap as wide as the paper on which this brief is printed. Undisputed evidence at trial showed that the New York City Transit Authority (“NYCTA” or “Transit Authority”) knew of the existence of this gap and had the means to reduce or eliminate it, but instead ignored the problem. As NYCTA’s own witnesses admitted, the Transit Authority maintained no process – no system – for determining whether platform gaps at stations like the site of the accident are safe. Despite clear requirements in state law, no city official or designated committee or other municipal body ever “entertained and passed” on the safety of this station, and NYCTA has no standards for determining how wide gaps must be before they pose unreasonable hazards to riders and must be remedied.

The undisputed evidence also showed that the one safety measure NYCTA *does* mandate at stations like the accident site – warnings to passengers to “mind the gap” – was not followed on the day of the plaintiff’s accident. While the train’s conductor repeatedly used the intercom to urge passengers to exit the crowded rush-hour train and wait on the platform for the next train, he never once warned those passengers – as the Transit Authority’s own guidelines mandated –

that the unfamiliar platform onto which they were urged to step sits as far as nine inches from the train doors.

Faced with this evidence, the jury in this bifurcated trial returned a liability verdict in favor of the plaintiff, finding unanimously (1) that the city had been negligent, (2) that this negligence was a substantial factor in the cause of the plaintiff's accident, and (3) that the plaintiff herself bore no responsibility for the accident. However, before the plaintiff was given an opportunity to present evidence of damages, the trial court set aside the jury's liability verdict and dismissed the claim.

The court's decision, which was based on a gross misunderstanding of the record and clear misapplication of the law, cannot stand because it constitutes nothing more than the trial court's bald disagreement with the jury's factual findings. Far from holding that the plaintiff's evidence was insufficient to sustain her burden of proof, the trial court instead asserted that the plaintiff's witnesses were less believable than the defendant's. This was a clear usurpation of the jury's right to evaluate the credibility of witnesses and a misapplication of the judge's obligation to draw all reasonable inferences in favor of the plaintiff.

The trial court also ignored substantial evidence that the Transit Authority had failed to warn passengers of the unsafe gap, asserting incorrectly that such evidence was neither adduced at trial nor argued in post trial motions. These

assertions were simply mistakes. The duty-to-warn evidence was sufficient by itself to support the jury's verdict, and the plaintiff argued as much during post-trial motions.

This Court should reverse and remand for a damages trial.

STATEMENT

I. THE ACCIDENT

On the morning of January 4, 1994, Frances Williams stepped out of a north-bound "N" train and fell into a wide gap between the train and the edge of the platform at the 8th Avenue Station in Brooklyn. RA 64, 67.¹ The gap into which she fell was wide enough to allow this 230-pound woman (RA 63-64), wearing nursing shoes measuring over 10.5 inches (RA 216), to become lodged up to the middle of her thigh. Another passenger came to her rescue, dislodging Ms. Williams from the gap and helping her to a nearby bench, as the conductor attempted to close the subway doors. RA 71.

On the morning of the accident, Ms. Williams was returning home from her overnight job as a private nurse. RA 65. It was the height of the morning rush – between 8:30 and 9:00 on the Tuesday morning after the New Year's holiday. The train was very crowded (RA 75), and many passengers, including Ms. Williams, were unable to sit down. RA 67. The train conductor was aware of the

¹ Citations to "RA__" refer to the Record on Appeal.

overcrowding, and for several stops, he used the intercom system to urge passengers to exit the train and wait for the less-crowded one that was following directly behind. RA 67, 70. After several such announcements, Ms. Williams decided to exit the train at 8th Avenue, an elevated station located at the corner of 8th Avenue and 62nd Street in Bensonhurst. Ms. Williams had never been to this station before that morning. RA 69.

Other than the repeated entreaties to exit the crowded train and wait for the next one, the conductor made no additional announcements. RA 70. Significantly for present purposes, the train conductor did not warn the passengers to be alert to the sizeable gaps between train doors and the elevated platform at the 8th Avenue station. This station, which sits above the street and conforms to the contour of the road below, is built on a slight but noticeable curve. As a result, when a straight train car pulls into the station, the gap between the car and the platform can be as wide as nine inches, depending on the train's exact stopping point and the particular door through which a passenger enters or exits the train. RA 310. In addition, because the tracks are curved and not precisely aligned with each other, the train cars sit between 1 and 2 inches higher than the level of the platform at this station. Despite the obvious dangers posed by these wide gaps – particularly to passengers on an overcrowded rush-hour train traveling on a snowy Tuesday

morning – the conductor gave no warnings. Nor were there any signs warning passengers to exercise caution as they stepped from the train. RA 70-71.

As the train pulled into the station, Williams stood inside the rear door of the car in which she was traveling – either the third or fourth from the front – and looked straight ahead so she could maneuver her way through the several passengers attempting to embark. RA 69. When the doors opened, she stepped forward on her left foot toward the door, then stepped off the train with her right. RA 67. When she did, her right foot went straight down into the space outside the car door, and her left foot was stuck underneath her body. RA 73. As a result of this accident, Ms. Williams sustained significant injuries to her right leg and lower back.

II. THE TRIAL

Williams filed suit against NYCTA on July 29, 1994, alleging that the defendant had been negligent by allowing a wide platform gap to exist at the 8th Avenue station and failing to warn of or otherwise remedy this hazard. After extensive pre-trial delays, the case came to trial in June 2004. The proceedings were bifurcated into two phases: Liability was to be determined during the first phase, and damages would be determined, if necessary, during the second phase. The case was tried before Justice Herbert Kramer.

A key witness at trial was Flander Julien, a Transit Authority engineer responsible for monitoring gaps between trains and station platforms. RA 88. Julien testified that in February of 1993 – less than 11 months before the accident, he personally visited the 8th Avenue station with a team of track engineers in order to measure the gaps surrounding the platform edges. His team measured the gaps outside each door on a train stopped at the north-bound platform, recording that those gaps varied in width from two inches (outside the first door of the first car) to 8.25 inches (outside the second door of the fourth car). RA 97-99, 310. Gaps on the south-bound side measured as much as 9 inches. RA 310. Mr. Julien also testified that these measurements were not precisely reproducible. Although the size and shape of the platform does not change with time, gap width outside any particular door will vary based on the exact spot where the motorman stops the train and the individual characteristics of particular train cars. RA 224-25. (Ms. Williams testified that she exited the train through the rear door of either the third or fourth car. RA 69. Julien’s measurements for these doors were 7.25 and 5.5 inches, respectively, and each of these exits is only two doors away from second door on the fourth car, which Julien determined to be the farthest away from the platform on the date of his measurements. RA 310.)

Julien also testified about the Transit Authority’s standards for allowable gap widths. Where the track is straight, NYCTA guidelines allow a maximum of

six inches between the train and the platform. RA 223. Where the platform edge is curved, however, Julien testified that there is no fixed restriction on the allowable space. Instead, NYCTA guidelines permit gaps as wide as necessary to accommodate the train's unimpeded movement through a particular curved station. RA 100-101, 224. Where the curve of the platform results in a large space outside the train, such spaces are permitted to exist. Julien testified that he was "not aware" of "any NYCTA program [to] determine[] whether or not gap widths were longer than acceptable for the safety of * * * passengers." RA 122-23. Julien also testified that neither he nor anyone else employed by NYCTA ever attempted to "determine the minimum gap that was necessary to permit the train to go through the subway station in question." RA 123.

Julien testified at length about the calculations NYCTA engineers perform to determine how wide a platform gap must be in order to accommodate the movement of a train through a curved station. He explained that three factors comprise this measure: the "center excess" (that is, the space that naturally exists between the center of a rectangular train car and the apex of a curved platform); the "end excess" (the extra space necessary to prevent the ends of the car from hitting the platform); and the "super-elevation" (the extra space necessary to account for variations in track height.) Julien testified that these measurements for the 8th Avenue station, considering the degree of curve involved and the length of the

train cars, were approximately 4.5 inches, 1.53 inches, and .375 inches, respectively. RA 219-23. In total, therefore, Julien's testimony established that a train cannot pass through the 8th Avenue station without hitting the platform unless there is a space outside the center of the car measuring approximately 6.405 inches – the sum of the center excess, the end excess, and the super-elevation. NYCTA guidelines, Julien testified, allow a space somewhat greater than 6.4 inches, to accommodate the lateral swaying motion of a train car brought on by wear and tear on the car and the tracks. RA 223-24.

Plaintiff presented the expert testimony of Dr. Edmund Cantilli, a former professor of Transportation Engineering and Safety at the Polytechnic Institute of Brooklyn. Dr. Cantilli testified that in his opinion, the platform from which the plaintiff fell was “not safely and reasonably maintained,” (RA 136) and that the gap between the train and the platform posed an “unreasonable risk to [Ms. Williams's] safety.” (RA 145). In addition, Cantilli testified that NYCTA had at its disposal a number of methods for bridging or reducing the risk of even *necessary* platform gaps. Specifically, Cantilli testified that NYCTA has, in the past, used mechanical gap-fillers, or “grilles,” to bridge large gaps between trains and platforms. RA 136. These devices, known as “sliding platforms,” (RA 102) open to fill the gap between the train and the station platform after a train has stopped. RA 137. They then retract before the train begins to move out of the

station. *Id.* According to Dr. Cantilli, the Transit Authority has used such devices for over 50 years. *Id.* Currently, the devices are used in at least three stations: Union Square, South Ferry, and Times Square. (RA 141, 233). NYCTA's expert Flander Julien acknowledged that these devices are used at other stations and have been for many years. RA 103.

Finally, Dr. Cantilli opined that the gaps at the 8th Avenue station were so large that the absence of any warning to passengers to exercise caution constituted an unsafe practice. RA 143-44. Indeed, Flander Julien conceded that NYCTA "guidelines" require train conductors to warn of unsafe gaps. RA 116.

After less than a day of deliberation, the jury returned a special verdict in favor of the plaintiff, finding unanimously that (1) NYCTA was negligent; (2) this negligence was a substantial factor in the cause of the accident; and (3) Williams bore no contributory fault. RA 293-94. Before a damages trial could take place, however, the trial court granted the defendant's motion, made pursuant to CPLR 4404(a), to set aside the jury's verdict and grant judgment NOV.

In so ruling, the court (1) characterized Dr. Cantilli's opinions as "speculative" and "not grounded in fact" because Cantilli "did not visit the site or take any measurements of his own" (RA 5); (2) noted that gaps measuring approximately the same as the gap at the 8th Avenue station had been "deemed non negligent" in certain in some other cases (RA 6); and (3) stated that the gap at

the 8th Avenue station fell within NYCTA guidelines (*Id.*). The court also stated that “[o]ther issues, such as a duty to warn which in some instances might independently demonstrate a defendant’s negligence have not been presented to this Court on this motion and to this Court’s best recollection were not evidenced or argued at this trial.” RA 6-7.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO PERMIT A RATIONAL JURY TO CONCLUDE THAT THE TRANSIT AUTHORITY HAD NEGLIGENTLY CAUSED THE PLAINTIFF’S INJURY.

In order to set aside the jury’s verdict and grant judgment to the defendant, the trial court had to find that there was “no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury.” *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499 (1978). This is a demanding standard. It goes without saying that a trial judge may not set aside a jury’s verdict merely because of disagreement with the jury’s findings, or because of a belief that the evidence preponderates in favor of the losing party. Instead, the plaintiff’s evidence must be so lacking as to be insufficient to permit *any* rational juror to conclude that the plaintiff had met her burden of proof. Otherwise, if “it would not be *utterly irrational* for a jury to reach the result it has determined * * * the court may not conclude that the verdict is as a matter of law not supported by the evidence.” *Cohen*, 45 N.Y.2d at 499 (emphasis added); see also *Johnson v.*

New York City Tr. Auth., 7 Misc.3d 42, 45 (App. Term 2d Dep't 2005) (same). Of course, when reviewing a grant of a defendant's motion to set aside the verdict as a matter of law, the evidence must be viewed in a light most favorable to the plaintiff. *Reis v. William & John Street Assocs., LLC*, 17 A.D.3d 558 (2d Dep't 2005).

This was not even a close case. Indeed, the plaintiff's proof far *exceeded* the very permissive "not utterly irrational" standard followed consistently in New York courts. The plaintiff presented evidence – much of it undisputed – that there were sizeable gaps between the train she exited and the platform; that these gaps were wider than reasonably necessary to permit trains to pass safely through the 8th Avenue Station; and that the Transit Authority, despite its awareness of the gaps, did nothing to narrow them, warn passengers of their existence, or otherwise protect passengers from falling into them. Moreover, the evidence was sufficient to show that the Transit Authority has no standard for determining when a gap is so wide as to constitute a hazard, and that NYCTA actually *violated* what standards it *does* have by failing to warn passengers of the gap. Faced with this evidence, the jury was entitled to find for the plaintiff. The trial court erred by setting the verdict aside.

A. The Plaintiff's Burden

In order to prevail on her claim of negligence, the plaintiff had to show (1) that the Transit Authority had breached its duty of “reasonable care under the circumstances” (*Bethel v. N.Y. City Transit Auth.*, 92 N.Y.2d 348, 351 (N.Y. 1998)); and (2) that this breach proximately caused her injury. *Gaeta v. City of N.Y.*, 213 A.D.2d 509, 510 (2d Dep’t 1995).

There is no doubt, based on the evidence presented, that rational jurors could have concluded that Williams’s injury was proximately caused by the gap between the car and the platform. Aside from passing suggestions in the defendant’s closing statement that the plaintiff could have been more careful when exiting the train (e.g., RA 248-49), there was no real dispute at or after trial that the existence of the gap was at least a contributing cause of the accident.

The real question at trial, therefore, was whether the Transit Authority had breached its duty of reasonable care by maintaining a platform gap that was unreasonably risky to passengers. New York law very clearly defines NYCTA’s duties, as a common carrier, with respect to lateral gaps at subway stations. First, NYCTA must assure that such gaps are not “wider than necessary” to permit the train to pass safely through the station, and not so wide “as to produce danger to the passengers.” *Ryan v. Manhattan R. Co.*, 121 N.Y. 126, 132 (1890); see also

Johnson, 7 Misc.3d at 45 (relevant question is “whether the space between the platform and the car was necessary for the operation of the train”).

Second, where a sizeable gap *is* necessary to permit the safe operation of the train, the Transit Authority “is charged with the duty of using due care to provide proper and safe means of getting from the platform of the cars to the platform of the station.” *Johnson*, 7 Misc.3d at 45 (quoting *Boyce v. Manhattan R. Co.*, 118 N.Y.314, 318 (1890)). “Where the opening may present a danger, the carrier has the obligation to take some reasonable precautionary measures for the safety of the passengers.” *Id.* (citing *Ryan*, 121 N.Y. at 132; *Boyce*, 118 N.Y. at 318; *Woolsey v. Brooklyn Heights R.R. Co.*, 123 A.D. 631, 633 (2d Dep’t 1908)).

The evidence at trial was *more* than sufficient to permit rational jurors to conclude that the Transit Authority had breached these duties. Indeed, the evidence demonstrated (1) that the Transit Authority failed to take “due care” to provide a safe means of traversing the gap; (2) that the Transit Authority failed to take “reasonable precautionary measures for the safety of the passengers”; and (3) that the gap was “wider than necessary” to permit the safe operation of the train.

B. No Precautions Were Taken To Prevent Riders From Falling Into These Wide Gaps.

Even if the evidence had conclusively demonstrated that the gaps at the 8th Avenue station were *necessary* to the operation of the train (and we show below that it did not), the evidence was more than sufficient to support the jury’s verdict.

As New York courts have recognized for over a century, even necessary gaps may still be dangerous, and in such a case, “the carrier has the obligation to take some reasonable precautionary measures for the safety of the passengers.” *Johnson*, 7 Misc.3d at 45 (citing *Ryan*, 121 N.Y. at 132; *Boyce*, 118 N.Y. at 318; *Woolsey*, 123 A.D. at 633). The evidence presented at trial was sufficient to permit the jury to conclude that NYCTA had not fulfilled this obligation.

1. No Warnings Were Given.

It has long been recognized by New York courts that common carriers (including NYCTA) have an obligation to warn passengers of wide gaps outside train doors, and that such carriers may be held liable for negligence if they fail to provide such warnings. See, e.g., *Pemberton v. N.Y. City Transit Auth.*, 304 A.D.2d 340, 342 (1st Dep’t 2003); *Iorio v. Murray*, 256 A.D. 512 (1st Dep’t 1939) (failure to warn of a platform gap may be negligence if the plaintiff is not aware of the gap); *Woolsey*, 123 A.D. at 635 (whether warning was sufficient is a factual issue for the jury).

In this case, the jury heard ample evidence to permit it to conclude that the Transit Authority had breached its duty to warn. Indeed, the evidence of a lack of proper warning was undisputed. Ms. Williams testified that the train conductor made multiple announcements over the intercom urging passengers to exit the train, but never once warned passengers that the train was stopping on a curved

platform or that unusual gaps existed at this station. RA 70-71. In addition, the plaintiff's expert witness, Edmund Cantilli, testified that the gaps at the 8th Avenue station were so wide that the absence of any warning to passengers to exercise caution as they got on and off the train constituted an unsafe practice. RA 81-82. Dr. Cantilli also testified that NYCTA does not post signs inside its train cars or on subway platforms warning passengers of large gaps. RA 144. (Ms. Williams testimony confirmed that there were no warnings signs inside the train or on the platform. RA 70-71.) Finally – and arguably most significantly – the jury heard NYCTA's own employee, Flander Julien, concede that Transit Authority "guidelines" called for conductors "to make * * * announcements concerning the hazards of spaces." RA 116. The jury was permitted to conclude, on the basis of this evidence, that the Transit Authority breached its duty to warn Ms. Williams of the existence of a hazardous gap at the 8th Avenue station. That conclusion alone was sufficient to sustain the verdict.

In its decision setting aside the verdict, the trial court did not even *consider* evidence of a failure to warn, asserting that

[o]ther issues, such as a duty to warn which in some instances might independently demonstrate a defendant's negligence, have not been presented to this Court on this motion and to this Court's best recollection were not evidenced or argued at this trial whose primary focus was the existence of a gap and the defendant's purported duty to mitigate it.

RA 6-7 (internal citation omitted).

With all due respect to Justice Kramer, this statement is mystifying. Not only did the plaintiff present ample evidence concerning the lack of proper warnings (described above), but she also summarized and relied upon this evidence in her relatively short trial-court submission in opposition to the defendant's motion to set aside the verdict. Indeed, the plaintiff's submission to the trial court made *six separate references* to the failure to warn, including three separate transcript citations directly calling the court's attention to testimony regarding the lack of warning. See RA 326 ("The jury is entitled to conclude that the NYCTA employees failed to see *and warn* what [they] should have seen, to wit * * * an unsafe gap width between the train and station platform.") (emphasis added); RA 330 ("Finally, there was testimony by Mr. Juli[e]n that *even though there was an intercom on the plaintiff's train, no warning announcement was made by the conductor.*") (emphasis added); RA 332 ("Before 1994 it was the practice of the T.A. [conductors] to make announcements concerning space hazards. NOTE.: There was no such evidence on the T.A.[']s] behalf to corroborate same. *The plaintiff testified there were no warnings.*") (emphasis added); *Id.* ("warnings" are "part of [train] maintenance"); RA 333 ("*No warnings given of spaces / gaps by conductor who had intercom not safe (absolutely not).*") (emphasis added); *Id.* ("Plaintiff[']s expert spoke of warnings to alert people of gaps."). The plaintiff

also requested a jury charge regarding the failure to warn. RA 30 (“The jury is entitled to conclude that the NYCTA employees failed to see and warn [of] * * * an unsafe gap width between the train and station platform.”).

The trial court was simply incorrect when it claimed that the plaintiff had never argued negligence on the basis of a failure to warn. In fact, the jury heard testimony from three separate witnesses (Williams, Cantilli, and Julien) regarding the lack of warnings, and the trial court itself heard argument based on this evidence.

This alone should have been enough to defeat the defendant’s motion to set aside the verdict, as the trial court itself recognized. See RA 6 (Justice Kramer noting that a lack of proper warnings “in some instances might independently demonstrate a defendant’s negligence”). Even if the platform gap was absolutely necessary to permit the safe operation of the train, the Transit Authority *still* had an obligation to warn passengers of the existence of such a dangerous, albeit necessary gap. Indeed, Transit Authority guidelines apparently recognize this obligation. The lack of such a warning is sufficient to support a finding of negligence. The trial court erred by ignoring this evidence, and that error alone requires a reversal.

2. NYCTA Could Have Installed Mechanical Grilles To Bridge The Gap.

The plaintiff's expert, Dr. Cantilli, testified that there are two methods available to NYCTA to bridge unsafe gaps: (1) increasing the size of the platform itself by installing over-sized wooden "rubbing boards"; and (2) installing mechanical "grilles" that fill the gap when the train is stopped but retract when the train is in motion. RA 140-41. The experts agreed that oversized rubbing boards might prove problematic at 8th Avenue because they might scrape against moving trains, but there was *no* testimony in the record – none at all – to indicate that mechanical grilles pose any considerable problem. What's more, the record is barren of any indication that NYCTA ever considered installing mechanical grilles, or that it even had a system-wide process for determining where and when such devices are necessary.

The experts – two of whom were Transit Authority employees – testified that mechanical grilles are currently used in at least three New York City subway stations. The devices open to fill the gap between the train and the station platform after a train has stopped, in order to let passengers safely disembark. RA 137. They then retract before the train begins to move out of the station. *Id.* According to Dr. Cantilli, the devices have been used in the New York City subway system for over 50 years. *Id.* Flander Julien and Antonio Cabrerias, NYCTA's witnesses, both acknowledged that these mechanisms are used at other stations and have been

used for many years – certainly before January of 1994 and possibly as far back as the 1950s. RA 103, 210-11. Neither NYCTA witness knew of any NYCTA procedure to determine when and where a sliding grate might be necessary.

The jury was entitled to conclude, based on this evidence, that the defendant had negligently failed to take a reasonable precaution – or even to *consider* taking such a precaution – in order to alleviate an unsafe condition at the 8th Avenue station. Even if the gap into which Ms. Williams fell was necessary for the safe operation of the train, the testimony was sufficient to show that NYCTA could have alleviated the danger to passengers posed by the gap through the use of well-placed mechanical grilles. Indeed, the evidence was more than sufficient – it was undisputed. No NYCTA witness testified that such grilles were impractical, or too expensive, or unnecessary.

C. The Gap Was Wider than Needed For Safe Operation Of The Train Through The 8th Avenue Station.

In any case, the evidence was sufficient to show that the gap at the 8th Avenue station was wider than necessary to permit trains to enter and exit the station without colliding with the platform.

1. The Evidence Was Sufficient To Permit The Jury To Conclude That The Gap Measured More Than Eight Inches.

The plaintiff presented evidence sufficient for a rational juror to conclude that the space outside the car door Ms. Williams exited was greater than eight

inches – far wider than necessary to permit the safe operation of the train, and wider than even the most generous interpretations of NYCTA guidelines would allow. This evidence came mostly from NYCTA documents and from the testimony of the Transit Authority’s own experts.

Less than one year before Ms. Williams’s accident, the Transit Authority measured the gaps outside the third and fourth cars on the northbound platform at the 8th Avenue Station and found that those gaps were as wide as 8.25 inches – the width of this piece of paper. Those same measurements showed that the third and fourth cars sat as high as 1.75 inches above the platform. NYTCA’s expert Flander Julian testified, moreover, that train cars do not always stop at exactly the same spot along the platform and that car components vary from train to train, so the measurements outside any particular door may vary from day to day. RA 224-25. A rational juror could certainly have inferred from this evidence that the gap outside the door Ms. Williams exited was at least 8.25 inches wide, if not wider. See also *Pemberton*, 304 A.D.2d at 341 (citing evidence that gap widths vary based on “where the motorman stopped the train.”).

Further, the fact of the accident itself provided sufficient proof for a jury to conclude that the space was greater than eight inches. The jury heard evidence that the plaintiff weighed 230 pounds at the time of the accident, that her shoes were longer than 10.5 inches, and that she was lodged in the gap “to the thigh, over [her]

knee.” RA 68. These facts, especially when combined with NYCTA’s own measurements, could easily permit a rational juror to conclude that the gap was at least eight inches wide, if not greater. See *Pemberton*, 304 A.D.2d at 342 (“Indeed, plaintiff’s testimony that the gap was wide enough to accommodate his leg above the knee lends credence to the claim that the gap was greater than six inches.”); *Johnson*, 7 Misc.3d at 45 (“There was also a rational basis for the jury to draw the inference that a dangerous condition was created, since plaintiff’s fall caused him to be wedged in-between the car and the platform up to his mid thigh . . .”).

2. A Gap Exceeding Eight Inches Is Far Larger Than Necessary To Permit The Safe Operation Of A Subway Train Through The 8th Avenue Station.

There was no dispute at trial that the arithmetic of station design requires some gap between the train and the platform where a station is built on a curve. Specifically, the experts agreed that the degree of curvature at the 8th Avenue station requires a 4.5-inch “center excess”; a 1.53-inch “end excess”; and a .375-inch “super-elevation.” See *supra* at 8-9. The experts agreed that without allowing for such spaces, train cars might collide with the edge of the station platform. These three measurements, added together, total just over 6.4 inches. The experts also agreed that wear and tear, or improper maintenance of train equipment, could cause train cars to sway laterally as they pass through a station, and that some

allowance for this lateral movement is also advisable to avoid collisions with the platform; this allowance was not quantified by the expert witnesses.

From the evidence presented, the jury was entitled to conclude that a gap exceeding eight inches was wider than reasonably necessary to permit trains to pass safely through the 8th Avenue station. Indeed, the calculations performed by NYCTA's own witnesses demonstrated that a 6.4-inch gap would most likely suffice to prevent the train from hitting the platform.

II. THE TRIAL COURT SET ASIDE THE VERDICT FOR IMPERMISSIBLE REASONS.

Faced with a jury verdict against NYCTA and a raft of evidence supporting that verdict, the trial court nonetheless granted the defendant's motion to set aside the verdict and grant judgment to the defendant. In so doing, the court invaded the clear province of the jury by re-weighing the credibility of the parties' expert witnesses. The court also mischaracterized the record and misapplied the law. The decision cannot stand.

A. The Court Improperly Weighed The Credibility Of Witnesses.

It is "well settled that the weight to be afforded the conflicting testimony of experts is a matter 'peculiarly within the province of the jury.'" *Rivera v. New York City Transit Authority*, 161 A.D.2d 132, 134 (1st Dep't 1990) (quoting *Sternemann v. Langs*, 93 A.D.2d 819 (2d Dep't 1983)); see also *Norfleet v. New York City Tr. Auth.*, 124 A.D.2d 715, 716 (2d Dep't 1986); *Chodos v. Flanzer*, 109

A.D.2d 771 (2d Dep't 1985). Nevertheless, the trial court discounted the opinions of Dr. Cantilli – particularly his opinion that a retractable mechanical grille could have been used to bridge the gaps safely – by making bald credibility judgments.

The trial court began its discussion by discounting Dr. Cantilli's opinions because he "did not visit the site [of the accident] or take any measurements of his own." RA 5. The court also faulted Dr. Cantilli for "not explain[ing] how to solve the problem of trains hitting the" mechanical grilles he suggested could have been installed. *Id.* Finally, the court criticized Dr. Cantilli because he "acknowledged that he was not concerned about the safety of riders on the trains or the trains themselves as they bumped into the device, but was only concerned with the safety of disembarking passengers." *Id.* Not only are these statements mischaracterizations of the record, but they are also well outside the province of the trial judge on a post-trial motion for judgment NOV.

In fact, the trial court's characterizations of Dr. Cantilli's testimony were dead wrong. Dr. Cantilli did *not* fail to explain away some purported problem of trains colliding with mechanical grilles. NYCTA's counsel asked him whether some gaps were too small to be bridged by mechanical grilles, and he said no. RA 188. He was asked no further questions about the feasibility of the devices. NYCTA's experts testified that enlarged *rubbing boards*, which are stationary and do not retract, might get in the way of oncoming trains. E.g., 220-21. But neither

witness discussed the feasibility of mechanical grilles, neither so much as hinted that such grilles would get in the way of oncoming trains, and NYCTA's counsel did not suggest during his cross examination of Dr. Cantilli that grilles might prove hazardous.

Further, Cantilli did *not* testify that he was unconcerned about the safety riders, or of the trains. Instead, he testified that his "starting point" (RA 181) or "first consideration" (RA 182) was the safety of passengers traversing the gaps. Indeed, when asked by NYCTA's counsel whether the safety of "people on board trains" figured into his analysis, Cantilli twice responded "of course." *Id.*

All of this is in any event beside the point. Certainly, the jury was entitled to conclude that Cantilli was not credible because he had not visited the 8th Avenue station, or that his opinions were far-fetched, incorrect, or contradicted by opposing testimony. Indeed, NYCTA's counsel argued as much to the jury in summation. RA 246-47, 253-54. But the jury did not do so, choosing instead to credit Cantilli's testimony (which, on the subject of mechanical grilles, was undisputed). The trial court may not overturn that choice simply because it disagrees. See, *e.g.*, *Rivera*, 161 A.D.2d at 134; see also *Commercial Casualty Ins. Co. v. Roman*, 269 N.Y. 451, 456-457 (1936) ("The weight to be given to opinion evidence ordinarily is entirely for the determination of the jury.") (citing *The Conqueror*, 166 U.S. 110 (1897); *Head v. Hargrave*, 105 U.S. 45 (1881); *Brooklyn*

Heights R. R. Co. v. Brooklyn City R. R. Co., 124 A.D. 896 (2d Dep’t 1908); *affd.*, 196 N.Y. 502 (1909); *People ex rel. Third Ave. R. R. Co. v. Tax Commrs.*, 212 N.Y. 472 (1914); *Tubiola v. Baker*, 225 A.D. 420 (4th Dep’t 1929)).

B. The Court Misapplied The Law.

The Court’s only other attack on the jury’s verdict was based on a misapplication of ancient precedent regarding negligence for unsafe platform gaps. The court cited five decades-old cases – ranging in age from 115 to 65 years – for the proposition that gaps measuring eight inches or less “have been deemed non negligent.” See RA 6 (citing *Ryan v. The Manhattan Railway Co.*, 121 N.Y. 126, 132 (1890); *Lang v. Interborough Rapid Transit Co.*, 193 A.D. 56 (1st Dep’t 1920); *Gibson v. New York Cons. R. Co.*, 173 A.D. 125 (1st Dep’t 1916); *Smith v. Brooklyn Heights R. Co.*, 129 A.D. 635 (2d Dep’t 1908); *Tomayo v. Murray*, 173 Misc. 728 (App. Term 1st Dep’t 1940)). But these cases do not stand for this proposition. The holding of each of these cases, as this court suggested only last year (see *Yarde v. New York City Transit Auth.*, 4 A.D.3d 352 (2d Dep’t 2004)), is that “the mere existence” of a gap is not *enough* to prove negligence *by itself*; instead, as explained above, a plaintiff must prove that the gap was wider than necessary, or that a wide gap created an unreasonable danger. See, e.g., *Gibson*, 173 A.D. at 126 (“[A] space of ten inches between a step and the platform was not negligence of itself, but * * * circumstances might arise to impose upon a company

the burden of giving warning of that space.”); *Ryan*, 121 N.Y. at 132 (“[T]he bare fact of [a gap’s] existence, is not and cannot be deemed negligence. But, if the necessary opening is so wide at a given station as to exceed the ordinary and natural step of a passenger, it may become a source of danger and require further precaution on the part of the company.”); *Tomayo*, 173 Misc. at 729 (gap “is not of itself evidence of negligence”; case dismissed because there was no crowding, plaintiff was familiar with the station, and plaintiff “had seen an illuminated ‘Watch Your Step’ sign”).

The court was certainly correct that these cases “have * * * retained their vitality and authority despite the passage of almost a century,” (RA 6) but their holdings do not favor NYCTA in this case. The plaintiff in this case did not rest her claim of negligence on the mere *existence* of a platform gap; rather, she presented evidence sufficient to demonstrate that the gap was dangerous, and that NYCTA failed to take available steps to narrow it or warn of its existence.

III. QUALIFIED IMMUNITY IS NOT AVAILABLE.

NYCTA argued below that the Transit Authority was entitled to qualified immunity because its purported decision to allow a large gap to exist at the 8th Avenue station was consistent with its own standards for the construction and maintenance of subway stations. The trial court’s decision granting the motion did not explicitly adopt this reasoning, but it did note in passing that the gap at 8th

Avenue “falls within the guidelines promulgated by the defendant.” RA 5. To the extent that NYCTA plans to assert this argument as a ground for affirming the trial court’s decision, it is deeply mistaken.

It is true that in certain circumstances a municipal actor may be immunized from tort liability if that liability is premised upon the “operation of a duly executed highway safety plan.” *Weiss v. Fote*, 7 N.Y.2d 579, 589 (1960). However, a municipality that fails to adhere to its own guidelines cannot claim immunity on this basis. *Waddingham v. State*, 90 A.D.2d 855, 855-856 (3d Dep’t 1982) (“evidence that the State had failed to adhere to its own specifications” sufficient to overcome claim of qualified immunity); *Warren v. New York State Thruway Authority*, 51 A.D.2d 679 (4th Dep’t 1976) (same). Here, accordingly, no claim of immunity could overcome the plaintiff’s evidence that NYCTA *violated its own guidelines* by failing to warn of the dangerous gap.

In any event, NYCTA would not be entitled to immunity even apart from its failure to warn. A municipality is entitled to qualified immunity only “‘where a duly authorized public planning body has entertained and passed on the *very same* question of risk as would ordinarily go to the jury.’” *Ernest v. Red Creek Centr. Sch. Dist.*, 93 N.Y.2d 664, 673 (1999) (quoting *Weiss*, 7 N.Y.2d at 588) (emphasis in original). However, where “[t]here is no evidence in the record that the defendant conducted a study, [or] considered and passed upon the matter [decided

by the jury], the doctrine of qualified immunity is not applicable.” *Santiago v. New York City Transit Auth.*, 271 A.D.2d 675, 677 (2d Dep’t 2000). Indeed, where “triable issues of fact exist as to whether the [governmental standards at issue] lacked a reasonable basis or [were] adopted without an adequate study,” judgment based on qualified immunity is inappropriate. *Dobin v. Town of Islip*, 11 A.D.3d 577, 579 (2d Dep’t 2004).

At trial, the defendant adduced evidence that it allows a maximum platform gap of six inches on straight track, to accommodate the lateral swaying of train cars. RA 223. On curved track, the evidence showed that there *is* no fixed standard; whatever space is necessitated by the curve is permitted to exist. RA 100-101, 224; see also *Pemberton*, 304 A.D.2d at 341 (“According to the Transit Authority’s standard guidelines, the maximum allowable horizontal gap on a straight platform is six inches. The only standard for curved platforms with respect to horizontal gaps is that the gap between the train and platform be large enough to accommodate a train’s passage without hitting the platform.”). A generous interpretation of the defendant’s evidence *might* indicate, as the trial court asserted in its decision setting aside the verdict, that NYCTA standards allow a 7.905-inch gap at 8th Avenue, but no witness actually testified as such. (The judge apparently arrived at the 7.905-inch figure by adding the end excess of 1.53 and the super-elevation of .375 to the six-inch standard for straight track. No witness performed

this calculation for the jury.) In any case, the evidence was sufficient to permit the conclusion that the gap exceeded even 7.905 inches.

Whatever the standard required, however, and even if the gap at 8th Avenue was permitted by NYCTA's standard, it was undisputed that the purpose of the Transit Authority's calculations was to determine how *wide* the gap needed to be in order to prevent the train from hitting the platform. This was *not* the question presented to the jury. The jury was asked to evaluate whether the gap at the 8th Avenue station – necessary or not – *posed unreasonable risk to passengers and needed to be remedied*. The evidence was sufficient to allow a rational jury to conclude that NYCTA had never even *considered* that question. Indeed, NYCTA's own witness testified that he was "not aware" of "any NYCTA program [to] determine[] whether or not gap widths were longer than acceptable for the safety of * * * passengers." RA 122. Certainly, the jury *could* have concluded that NYCTA never considered whether 8.25 inches was too wide a gap to be considered safe.

The jury was asked to determine whether the gap into which the plaintiff fell was so wide as to necessitate corrective action – not whether NYCTA correctly or incorrectly calculated the necessary distance to assure that trains do not collide with platforms. The evidence was certainly sufficient to permit the jury to conclude that NYCTA had never considered the passenger-safety question, either

with respect to the 8th Avenue station or any other.² Qualified immunity is therefore not available. See *Ernest*, 93 N.Y.2d at 673 (qualified immunity not available unless the defendant shows that it “entertained and passed on the *very same* question of risk as would ordinarily go to the jury”) (quoting *Weiss*, 7 N.Y.2d at 588) (emphasis in original); see also *Santiago*, 271 A.D.2d at 677 (“There is no evidence in the record that the defendant conducted a study, considered and passed upon the matter, or adopted a plan regarding the appropriate speed for a train entering a station. Therefore, based on the record before us, the doctrine of qualified immunity is not applicable.”); *Cordero v. City of New York*, 112 A.D.2d 914, 915 (2d Dep’t 1985) (“[S]ince a rational trier of fact could find, on the record considered as a whole, that the city and its agents had permitted the design and safety features of the subject located to evolve without adequate study, a judgment against the city may be sustained.”); *Zalewski v. New York*, 53 A.D.2d 781, 782 (3d Dep’t 1976) (“The immunity from review established by *Weiss* does not apply * * * where it can be shown that the plans of the bridge were approved without adequate prior study or lacked a reasonable basis and that subsequent

² There is only one item in the record that could even *suggest* such consideration by NYCTA, but it is hardly unambiguous. Defense witness Antonio Cabrerias was asked by NYCTA’s counsel whether “[t]he standards that you have talked about * * * take into account the safety of passengers,” and Cabrerias answered with an unadorned “yes.” RA 211. There were no follow-up questions. In light of the considerable testimony about the risk to passengers posed by trains slamming into platform edges, the jury could easily have interpreted this cryptic interchange to mean that NYCTA standards for gap minimums took into account the “safety of passengers” standing on the platform. Of course, on a motion for JNOV, the trial court and this court must view the evidence in the light most favorable to the plaintiff.

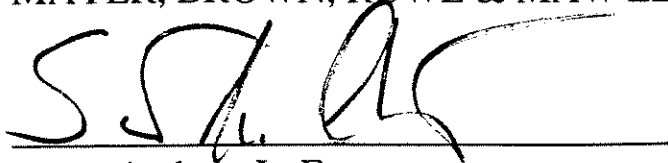
events demonstrated the existence of a dangerous condition known by the State.”); *Evans v. Stranger*, 307 A.D.2d 439, 441 (3d Dep’t 2003) (“[S]ummary judgment is inappropriate as there are questions of fact regarding Ithaca’s consideration of this intersection, specifically whether there was any particular reasoned determination or merely unwitting adherence to a questionable blanket policy.”).

CONCLUSION

The judgment should be reversed, the jury’s verdict should be reinstated, and the matter should be remanded for a damages trial.

Dated: New York, New York
 September 14, 2005

MAYER, BROWN, ROWE & MAW LLP

A handwritten signature in black ink, appearing to read 'S. Frey', is written over a horizontal line.

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