

To be Argued by:  
SCOTT A. CHESIN  
(Time Requested: 15 Minutes)

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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.*

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**REPLY BRIEF FOR PLAINTIFF-APPELLANT**

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ANDREW L. FREY  
SCOTT A. CHESIN  
MAYER, BROWN, ROWE & MAW LLP  
*Attorneys for Plaintiff-Appellant*  
1675 Broadway  
New York, New York 10019  
(212) 506-2500

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## PRELIMINARY STATEMENT

In its nearly 60 pages of briefing, including a statement of facts that stretches almost 20 pages, NYCTA nowhere confronts this court's standard of review in an appeal from a directed verdict. As the Authority must be aware, its burden in this appeal is to show that no rational person could possibly have shared the jury's conclusion, even if all disputed factual questions were resolved in the Plaintiff's favor. See *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978); *Reis v. William & John Street Assocs., LLC*, 17 A.D.3d 558 (2d Dep't 2005). NYCTA has completely failed to do that. Instead, the Authority insists from the opening sentences of its brief that this court resolve disputed factual questions (like the size of the platform gap) in its own favor, or in some instances, ignore inconvenient facts (like the contents of the court's charge) altogether. Far from showing that it would be "utterly irrational" for a jury to have found in the plaintiff's favor, NYCTA's brief does little more than distort the record, misstate the law, lob irrelevant *ad hominem* attacks at the plaintiff's expert, and invite this court to substitute its own factual conclusions for the jury's.

NYCTA's distortion of the record is breathtaking. For example, we argued in our opening brief (at 15-18) that Williams had presented sufficient evidence to permit the jury to conclude that the Transit Authority had breached its duty to warn her of the unsafe gap into which she fell. Such evidence, we contended, was

sufficient by itself to sustain the jury's verdict. NYCTA's response (at 53-56) is to claim that Williams waived her contention regarding failure to warn by failing to object to the court's charge. "Nothing in the charge hints at any breach by the Authority of its purported duty to warn departing passengers to watch their step," NYCTA asserts (Br. 53). This is not true. The court *did* give a charge on failure to warn – on the very transcript pages NYCTA cites (see p. 4, *infra*) – and the jury correctly applied the court's instructions when it found the defendant liable. NYCTA should not be allowed to rewrite history on this point.

But NYCTA's misunderstanding of the record is far more pervasive than its apparent failure to notice Justice Kramer's instructions on warning. At its heart, NYCTA's brief in this case is a passionate defense of a simple proposition Williams has never disputed: that sometimes, gaps between subway trains and their platforms are necessary. Williams has also never disputed that NYCTA may set its own rules to determine when such gaps are needed, or that those rules are due great deference from the courts. Our argument – which has not been effectively rebutted by NYCTA's brief – is that NYCTA has a duty to protect its passengers from hazardous gaps *even when those gaps are necessary*. In other words, whether or not the gap at 8th Avenue was essential to the train's safe operation (and the evidence showed that it was not), the jury was permitted to conclude that NYCTA was still required to do *something* to protect riders from

injury. The evidence was undisputed that NYCTA did *nothing*. It did not bridge the gap, it violated its own guidelines by failing to warn of the gap, and it apparently had no standards (“velo-bound” [NYCTA Br. at 49] or otherwise) for determining when a gap is so wide as to constitute a hazard.

The evidence was more than sufficient to sustain the jury’s verdict. The order granting judgment to NYCTA should be reversed.

## **ARGUMENT**

### **I. NYCTA HAS NOT SHOWN THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A JURY VERDICT.**

#### **A. The Duty to Warn**

The simplest and most straightforward argument in our opening brief concerned the Transit Authority’s violation of its own guidelines calling for a verbal warning of hazardous platform spaces. We contended (Br. 15-18) that the evidence of a lack of proper warning was enough by itself to sustain the jury’s verdict. Indeed, even the trial judge recognized that a lack of proper warning could have sustained a negligence verdict in this case (see RA 6-7), but he mistakenly thought that such a theory was not argued during the trial.

Such blatant – and, frankly, perplexing – errors have continued on appeal. Rather than seriously contest the merits of Williams’s warning argument, NYCTA has chosen instead to assert in its brief that the jury was never charged that a lack

of warning could serve as a basis for a negligence finding. Because Williams did not object to the court's charge, NYCTA argues, she is precluded from claiming that the jury's verdict can be sustained on a failure-to-warn theory.<sup>1</sup>

The problem with this assertion is that it is simply incorrect. The jury *was* charged on lack of warning, despite NYCTA's inexplicable insistence that it wasn't:

Now, in order to find that the Authority was negligent, let's find that they knew – you must find that they knew of the condition long enough before the accident to have permitted it in the use of reasonable care to have it corrected or to take other suitable precautions, or *to give adequate warning* and it didn't do so. [Or], they didn't know of the condition but in the use of reasonable care, should have known of it in time to have it corrected, or taken other suitable precautions, *or given an adequate warning*.

RA 278 (emphasis added). Justice Kramer's instruction could not have been clearer. The jury was well aware that it was permitted to base a negligence verdict on a finding that the Authority breached its duty to warn Ms. Williams of a hazardous gap.

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<sup>1</sup> NYCTA's actual argument (at 54) is that Williams has "surrender[ed] the right to complain of the charge on appeal." This is, of course, wholly beside the point: Williams has never "complain[ed]" about the charge that led the jury to find in her favor. We assume that NYCTA's point, however awkwardly delivered, is that Williams may not ask this court to presume that the jury based its verdict on a theory not included in the court's charge. That may or may not be legally sound in the abstract, but it is certainly irrelevant here.

Our present argument needs little elaboration. One way that the plaintiff could have prevailed at trial was to prove, by a preponderance of the evidence, that the space between the train and the platform was hazardous enough to require the Transit Authority to warn passengers about the gap. Plaintiff provided more than sufficient evidence to prove that point. A lack of warning was charged in the complaint. RA 13. It was argued in the plaintiff's opening. RA 41. Three separate witnesses provided testimony on the subject. RA 70-71, 81-82, 116. With NYCTA's assent, the jury was charged that it could find negligence if it determined that there was a breached duty to warn. RA 278. The jury found such negligence. It was error to discard the verdict.

In a throwaway point on the second-to-last page of its brief, NYCTA takes a swipe at the substance of the failure-to-warn argument by asserting, contrary to law and fact, that the Authority had no duty to warn of the space at 8th Avenue because the space was "readily observable" by Ms. Williams. This argument is simply another example of NYCTA's unwillingness to confront this court's standard of review.

We do not dispute that a landowner or common carrier has no duty to warn of an "open and obvious danger." *Cupo v. Karfunkel*, 1 A.D.3d 48, 51 (2d Dep't 2003). But *whether* the hazard at 8th Avenue was "open and obvious" is a classic

question of fact for the jury. See, e.g., *Tagle v. Jakob*, 97 N.Y.2d 165, 169 (2001) (“[T]he issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question.”); *Pemberton v. New York City Transit Auth.*, 304 A.D.2d 340, 342 (1st Dep’t 2003) (“Plaintiff has also submitted sufficient evidence to raise a factual issue as to whether, assuming the prevailing conditions to be as claimed, the Authority had a duty to warn.”). NYCTA’s burden in this appeal is not to show that the jury *could* have concluded that there was no duty to warn because the space was “readily observable.” Instead, NYCTA must show that there was no jury question at all – no “valid line of reasoning and permissible inferences” that could have led the jury to its conclusion. Merely asserting in its appellate brief that Ms. Williams “could readily have spotted” the gap is not nearly enough to satisfy this burden, even if the facts were as NYCTA disingenuously claims them to be.<sup>2</sup> NYCTA had its chance to make these arguments to the jury, and the jury returned a verdict in the plaintiff’s favor.

Moreover, whether the plaintiff “could readily have spotted” a hazard (had she looked for it) is not the test for whether that hazard was “open and obvious.” A hazard is only considered “open and obvious” if it was “reasonably apparent” to the plaintiff under the circumstances of the case. See, e.g., *Liriano v. Hobart*

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<sup>2</sup> Contrary to NYCTA’s characterizations, the accident did not take place in “broad daylight,” nor was the gap “5-7 inches” wide. NYCTA Br. at 55. The accident occurred during a snowstorm, as NYCTA acknowledges elsewhere in its brief (Br. 9), and the gap could have been found on the evidence to have been over eight inches wide. See Wms. Br. at 20-22.

*Corp.*, 92 N.Y.2d 232, 242 (1998). People leaving subway cars can reasonably be expected to be looking forward, not down to see if there is a dangerous gap. In such circumstances, the fact that the gap might be seen if one looked at it does not make it “open and obvious” as a matter of law. See, e.g., *Cohen v. Empire City Subway Co.*, 2003 NY Slip Op 51477U, 2 (Sup. Ct. N.Y. Cty. Nov. 26, 2003) (“Merely because a one-inch height differential may be observable if one looks directly at the elevation, or perceptible if one steps on it, does not make it open and obvious as a matter of law. Rather, the issue is whether a reasonably prudent pedestrian would have noticed it while walking in plaintiff’s steps under the same circumstances. This presents a classic jury issue.”).

Indeed, the cases cited in Williams’s and NYCTA’s briefs establish quite clearly that the Authority may be held liable for failing to warn its passengers of large gaps in situations nearly identical to this one. See, e.g., *Boyce v. Manhattan Ry. Co.*, 118 N.Y. 314, 318 (N.Y. 1890) (evidence “required the submission of the case to the jury” where plaintiff was unfamiliar with the station, the gap was “open and unguarded,” and no warning was given); *Iorio v. Murray*, 256 A.D. 512, 514-15 (1st Dep’t 1939) (sufficient evidence to send negligence question to jury where plaintiff testified he was unaware of the gap); *Woolsey v. Brooklyn Heights R.R. Co.*, 123 A.D. 631, 633-34 (2d Dep’t 1908) (plaintiff “presented a question for the

jury” where there was evidence of “an open space varying with the different widths of cars, a crowded platform, and failure to give adequate warning”).

**B. The Width of the Gap**

NYCTA’s brief also distorts the evidence and misapplies the standard of review in service of the contention that the platform gap was not hazardous as a matter of law. The most noteworthy example of this is NYCTA’s claim (Br. 40-44) that the plaintiff could not make out a prima facie case of negligence because the evidence was equally consistent with the Authority’s non-liability as it was with its liability. Because Ms. Williams displayed “uncertainty” in her testimony about the width of the gap, NYCTA argues, she *cannot* make out a prima facie case.

The problem with this argument is that it is based on a faulty factual premise. Throughout its brief (indeed, from the first sentence), NYCTA claims that Ms. Williams fell into a gap that was either 5.5 or 7.25 inches wide. NYCTA draws this ironclad pair of alternative conclusions from two pieces of evidence: (1) Ms. Williams testified that she exited the train through the last door of either the third or the fourth car; and (2) the Authority’s space measurements, taken 11 months before the accident, showed gaps outside those doors of 7.25 and 5.5 inches, respectively. Thus, NYCTA concludes, Ms. Williams *must* have fallen into a space bearing one of those two measurements. Indeed, it claims, the “likelihood”

is that the space was only 5.5 inches (Br. 4). At most, NYCTA concludes, the two widths were “equally plausible.” Because the Authority would likely escape liability if the gap were less than six inches wide, it asserts that the verdict was properly set aside.

This argument is, of course, another example of NYCTA’s desire to have disputed factual questions resolved in its own favor. But it is more than that: Its central factual premise that the gap could *only* have been 5.5 or 7.25 inches wide requires NYCTA to ignore more than half the relevant evidence. Indeed, there was a great deal more evidence about the width of the gap than Ms. Williams’s recollection and NYCTA’s gap chart. There was also (1) the 10.5-inch length of Ms. Williams’s shoes (RA 68); (2) the fact that she became wedged “to the thigh, over [her] knee” (*Id.*); and most importantly, (3) Flander Julien’s testimony (at RA 224-25) that the space outside a particular door varies from day to day, based on where, exactly, the motorman stops the train. As we explained in Williams’s opening brief (at 20-22), a rational juror could easily have concluded from this evidence that Ms. Williams fell into a gap that far exceeded eight inches. Indeed, on the day of NYCTA’s measurements, there was an 8.25-inch gap outside the door directly between the two doors identified by Ms. Williams. See RA 310. Had the motorman stopped the train in a slightly different spot, that 8.25-inch gap could have been outside either of those doors.

Why all this quibbling about a couple of inches? For one thing, NYCTA’s own argument is that it is insulated from liability – indeed, from suit – because Ms. Williams fell into a gap that conformed to the Authority’s guidelines. Our position, of course, is that these guidelines are not relevant because they represent calculations of *minimum* widths necessary for passage along a curve, not *maximum* widths allowable for passenger safety (see *infra* at 12-15). But even if that were not the case – that is, even if the guidelines applied just as NYCTA claims they do – the evidence was *still* sufficient to show that the gap exceeded, if only by a small amount, the 7.9-inch tolerance NYCTA (and the lower court) claims is allowable under the guidelines. The excess is small, admittedly, but it is not insignificant, particularly in light of the fact that NYCTA’s self-imposed guidelines already include ample allowances for wear and tear.

### **C. The Requirements For A Prima Facie Case**

NYCTA devotes nine pages of its brief to an exegesis of the New York courts’ “view of gaps.” The initial conclusion it draws from this study is unremarkable and not challenged by either party to this appeal: “[A] passenger who got caught between the train and the platform [cannot] point to the *mere existence* of a gap and expect to recover.” NYCTA Br. at 26 (emphasis added). That is true. It is also true, as NYCTA explains at length, that curved platforms sometimes require wider gaps than straight ones.

But NYCTA’s survey of subway-gap jurisprudence omits a key rule: “Even if [an] open space [is] necessary,” a common carrier 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.” *Boyce v. Manhattan R.R. Co.*, 118 N.Y. 314, 318 (1890). The “mere existence” of a gap may not be enough to send a case to the jury, but this was an unusually large gap, not just any gap – and evidence that the Authority breached its duty of due care satisfies the plaintiff’s burden. And as we explained in our opening brief (at 26-27), Williams submitted more than sufficient evidence to show that under the circumstances, (1) the gap was dangerous, and (2) NYCTA failed to take available steps to narrow it or warn of its existence.

**D. The Credibility of Plaintiff’s Expert**

NYCTA devotes over ten pages of its brief to summarizing the testimony of Williams’s expert witness and mocking his conclusions – not just in this case, but in another, entirely unrelated case as well (NYTCA Br. 36-37). These attacks are no more persuasive than the trial justice’s criticism of the plaintiff’s expert. Like the IAS justice, NYCTA faults Dr. Cantilli for failing to visit the site of the accident or to base his conclusions on his own measurements of the station. (Br. 38). But as we explained in our opening brief (at 23-25), none of this matters. Such criticism goes to the *weight* of Cantilli’s testimony, not its admissibility. The

jury was certainly permitted to conclude that Cantilli was not credible – though, the fact that he based his conclusions on NYCTA’s measurements rather than his own is hardly a reason to do so – but it was not *required* to. NYCTA’s long attack on Cantilli’s credibility is yet another example of its misunderstanding of the standard of review.

## **II. QUALIFIED IMMUNITY DOES NOT APPLY.**

Predictably, given the weakness of its claim that Williams’s evidence was insufficient to sustain the jury’s verdict, NYCTA falls back on its ill-conceived lower-court attempt to shoehorn this case into the *Weiss v. Fote* line of qualified immunity decisions. Indeed, the Authority devotes considerable space in its brief to “justification” and explanation of the immunity rule, but, unsurprisingly, it breezily ignores the fact that Williams’s case does not fit the mold. NYCTA’s argument, supported by the “Gunn Memo,” is that qualified immunity applies because “the Authority demonstrated that it had considered the issue of gaps, and had done so at the highest level.” NYCTA Br. at 48. Because the MTA considered and passed upon the “issue of gaps,” NYCTA argues, a civil jury may not second guess its conclusions.

NYCTA’s error here is exactly the one it made below and exactly the one we discussed on pages 30 and 31 of our opening brief: There is no one, singular “issue of gaps.” We do not dispute that NYCTA promulgated rules designed to

address *a* safety question involving platform gaps. But the safety question the MTA “entertained and passed on” (*Weiss v. Fote*, 7 N.Y.2d 579, 588 (1960)) is *not* the question that this case presents and that was sent to the jury.

The evidence at trial was very clear: The only rule NYCTA has with respect to gaps at curved platforms is that the gaps should be “*large enough* to assure adequate moving car clearance.” RA 300A (emphasis added). In other words, however wide the gap must be in order to prevent a collision, that is how wide the gap is permitted to be. There is *no* evidence of *any* rule – “velo-bound” or not – prescribing when, how, or whether NYCTA will take action to protect passengers from the hazard of a wide, albeit necessary gap. If an eight-inch gap is necessary to prevent collisions between car and platform, that may show that an eight-inch gap is allowable, but that does *not* address in any way whether there should be any precaution (such as verbal warnings, warning signs, or sliding grates) to protect passengers from falling in. If a 15- or 20-inch gap were necessary, there is no evidence that NYCTA has any guideline that would call for any protection. The matter of precautions where a larger than usual gap is necessary for safe operation of the train was simply not the subject of any policy or rule considered by NYCTA – apart from the warning requirement that it breached – and therefore no question of qualified immunity arises.

Williams has never disputed that the gap at 8th Avenue was “large enough” to allow the train to pass through the station. Certainly, if a plaintiff were injured by a collision between a train and a subway platform, and if NYCTA demonstrated at *that* trial that the gap between the train and platform conformed to its guidelines, *that* plaintiff would have a difficult time overcoming the qualified-immunity hurdle. But this is not remotely that case.

NYCTA’s incredible response on appeal (at 49-51) is that it may assert qualified immunity even if there is no evidence that it has ever *considered* the safety question being posed to the jury. NYCTA purports to base this conclusion on *Hartford v. City of New York*, 194 A.D.2d 519 (2d Dep’t 1993) and *O’Brien v. City of New York*, 231 A.D.2d 698 (2d Dep’t 1996), which hold no such thing. *Hartford* and *O’Brien* stand for the unremarkable proposition that a municipal agency can claim qualified immunity if it has considered a safety question but not yet come to a conclusion at the time of a plaintiff’s accident. That is not what happened here. There is no evidence in the record that NYCTA ever considered how wide a curved-platform gap must be before efforts are made to protect passengers from falling in. Our argument is not the parody NYCTA presents: that qualified immunity is unavailable unless there is a “formal conclave” (51) or “velobound glossy” (49) reflecting government policy. Our argument is much simpler: NYCTA presented no evidence during this trial – and has pointed to no

evidence in its appellate brief – that indicates that *any* government official *ever* considered the question posed to the jury. At the very least, the evidence was sufficient for the jury to conclude that there had been no such consideration.

In any case, as we argued in our opening brief and as NYCTA steadfastly ignores, qualified immunity is not available to a municipality that fails to adhere to its own guidelines. See *Wms. Br.* at 28; *Waddingham v. State*, 90 A.D.2d 855, 856 (3d Dep’t 1982). The undisputed evidence demonstrated that NYCTA has a policy of warning passengers about gaps. The evidence also showed that NYCTA violated this policy on the morning of Ms. William’s accident. Even if qualified immunity were otherwise available, it would not apply in this case.

### **III. THE IMPLICATIONS OF THIS APPEAL**

NYCTA ends its brief by picking up on a theme that has pervaded its arguments throughout this litigation: Application of *Weiss*-style qualified immunity “allows government to function.” NYCTA Br. at 57. The implication is the same one NYCTA’s counsel made at trial: An intact liability finding in this case would require “massive upgrade of hundreds of stations in the City of New York.” NYCTA Br. at 19 (quoting RA 184).

To be clear, the implications of this case are far more modest than that. At its root, this is a simple case of the Transit Authority negligently failing to follow

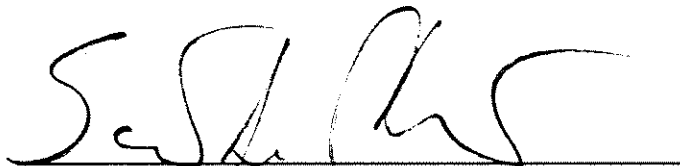
its own entirely reasonable requirement that conductors warn passengers of unusual or hazardous gaps outside subway cars. A reversal would not require structural upgrades at 8th Avenue or any other subway station. To defend against similar allegations in the future, NYCTA would simply have to show either (a) that it warned of a hazardous gap; (b) that some official considered whether the gap was so wide as to constitute a hazard to passengers; or (c) that some other precaution was taken to protect passengers from falling into the gap. NYCTA has made none of these showings here.

### 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  
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MAYER, BROWN, ROWE & MAW LLP



Andrew L. Frey  
Scott A. Chesin  
1675 Broadway  
New York, N.Y. 10019  
(212) 506-2500

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