Superior Court of New Jersey

Appellate Division

Docket No. A-001882-23T4

DEVON COLLINS, Administratrix of the Estate of SHANNON FLOOD; DEVON COLLINS, Guardian Ad Litem for SHEA LULLA, an infant, *Plaintiff-Appellant,* vs. NEW JERSEY TRANSIT; NEW JERSEY TRANSIT RAIL OPERATIONS; THE HUDSON-BERGEN LIGHT RAIL; THE STATE OF NEW JERSEY; THE CITY OF JERSEY CITY, 21ST CENTURY RAIL CORPORATION; *(For Continuation of Caption See Inside Cover)*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-L-000134-21 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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Date Submitted: May 13, 2024

AECOM TECHNOLOGY CORPORATION; WASHINGTON GROUP INTERNATIONAL; URS CORPORATION; URS CORPORATION WASHINGTON DIVISION; ITOCHU CORPORATION; KINKISHARYO INTERNATIONAL LLC, JOHN DOE 1-10 (fictitious engineer/operator of light rail train); ABC CORPORATION 1-10 (fictitious light rail owner); DEF CORPORATION 1-10 (fictitious light rail designer); GHI CORPORATION 1-10 (fictitious light rail station designer); JKL CORPORATION 1-10 (fictitious engineering firm) MNO CORPORATION 1-10 (fictitious light rail car owner); PQR CORPORATION 1-10 (fictitious light rail car manufacturer); STU CORPORATION 1-10 (fictitious light rail car maintenance company); VWX CORPORATION 1-10 (fictitious light rail management company),	:
Defendants-Respondents.	

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PRELIMINARY STATEMENT

Plaintiff submits the following brief and appendix appealing the Order entered by Hon. Anthony D'Elia, J.S.C. on February 14, 2024, granting summary judgment on behalf of New Jersey Transit Corporation, improperly plead as New Jersey Transit, New Jersey Transit Rail Operations, and The Hudson-Bergen Light Rail; Twenty-First Century Rail Corporation, improperly plead as 21st Century Rail Corporation; AECOM Technology Corporation, improperly plead as Washington Group International, URS Corporation, URS Corporation Washington Division, Kinkisharyo International LLC and Alexander Bishop, hereinafter referred to as "Railroad Defendants", which ruled that the railroad defendants are immune from liability pursuant to N.J.S.A. 48:12-152.

This matter arises from a tragic train accident on the Hudson Bergen Light Rail. Shannon Flood, infant Plaintiff (and appellant) Shea Lulla's mother, was struck by a light rail train and killed. Shea's guardian, Shannon's beloved sister, Devon Collins, brought this case on behalf of the Estate of Shannon Flood for the decedent's conscious pain and suffering pursuant to New Jersey's Survivorship Statute on behalf of Shea Lulla individually for her pecuniary loss, pursuant to the New Jersey Wrongful Death Statute. Appellant's primary theories of liability are that the operator of the light rail

train, Alexander Bishop, was careless and negligent in the manner in which he operated the light rail vehicle. Further, his employer, AECOM, 21st Century Rail, is liable for his negligence and carelessness under the legal concept of *respondeat superior.* Bishop's employers were also negligent as a result of the inadequacy of the training program he went through prior to being given the enormous responsibility of driving a train through the busy streets of Hudson County.

Summary Judgement was granted on a basis of N.J.S.A. 48:12-152, commonly referred to as the Railroad Immunity Statute. This immunity statute provides Railroads with immunity in certain circumstances where individuals are either improperly in a train's right of way, or on railroad property. The Appellant asserts that Summary Judgement was erroneously granted based on an overly broad, misinterpretation of this immunity statute. The statute was carefully written and provides certain exceptions for circumstances where the immunity does not apply. The plain language of this statute dictates that the Defendants, under the undisputed facts, are not entitled to the benefit of this Railroad Immunity Statute. There is no dispute that Shannon Flood was walking in a crosswalk when she was struck by the train. The plain language of the statute states that "This section shall not prohibit…a person from using a crossing established by the railroad". A crosswalk on the corner of York Street

and Hudson Street in the middle of the busy business district of Jersey City, New Jersey, certainly is a "crossing established by the railroad". Based on this plain language, the instant motion must be denied.

Within the Railroad Immunity Statute, a clear distinction is made between railroad "Property" and railroad "Right of Way." Different protections and exceptions are provided for each classification. In granting Summary Judgment, The Honorable Anthony D'Elia, J.S.C. committed error in using these two location descriptions interchangeably as if they are synonyms. They are not. A railroad "right of way" is where a railroad runs track on another party's real estate and the railroad secures a legal right to use the property. Shannon Flood was crossing a railroad right of way in downtown Jersey City, New Jersey. "Railroad property" is real estate. An example might be a railroad yard or a maintenance facility or a railroad station. The failure to appreciate the distinction between these two terms, which were carefully written in the statute by our legislature led to reversible error in that our legislature never intended the railroads to be immune from civil liability when their negligence resulted in an injury or death to someone crossing a railroad right of way, in a crossing established by the railroad.

PROCEDURAL HISTORY

Plaintiff, Devon Collins, in her capacity as Administratrix of the Estate of Shannon Flood filed a Complaint with Jury Demand on January 11, 2021, against New Jersey Transit, New Jersey Transit Rail Operations, The Hudson-Bergen Light Rail, State of New Jersey, City of Jersey City Et Al. The filed complaint is appended hereto at Pa31[1]. The Complaint alleges negligent operation of the light rail train, as well as negligent design, construction and maintenance of dangerous conditions at the light rail station and dangerous light rail car conditions.

Defendants, URS Corporation, URS Corporation Washington Division, New Jersey Transit, Washington Group International, and The Hudson-Bergen Light Rail Et Al., through Ruprecht Hart Ricciardulli & Sherman, LLP, filed an Answer with Cross-Claim and Jury Demand on April 5, 2021. The filed Answer is appended hereto as Pa61. Subsequently, Defendants, Kinkisharyo International LLC, URS Corporation, URS Corporation Washington Division, New Jersey Transit, and Washington Group International Et Al., through Ruprecht Hart Ricciardulli & Sherman, LLP, filed an Answer with Cross-

[1] "Pa_" refers to Plaintiff's Appendix.

Claim and Jury Demand on May 28, 2021. This filed answer is appended hereto as Pa79.

An Amended Complaint was filed on behalf of Plaintiff, Devon Collons, on October 8, 2021. A copy of the amended complaint is appended hereto as Pa95. Defendants, Alexander Bishop, Itochu Corporation, Kinkisharyo International LLC, URS Corporation, and URS Corporation Washington Division Et Al., through Ruprecht Hart Ricciardulli & Sherman, LLP, filed a Response to Plaintiff's Amended Complaint on May 5, 2022. The Response is appended hereto as Pa123.

On December 22, 2023, Defendants URS Corporation, URS Corporation Washington Division, Alexander Bishop, Kinkisharyo International LLC, and New Jersey Transit Et Al. filed a Motion for Summary Judgment alleging in relevant part that Plaintiff cannot recover from the 'railroad defendants' because Plaintiff violated *N.J.S.A.* 48:12-152. The Motion for Summary Judgment is appended hereto as Pa148.

Plaintiff filed opposition to Defendant's filed Motion for Summary Judgment on January 23, 2024. The submission is appended hereto as Pa761.

On January 30, 2024, Defendant filed a Reply Brief in response to Plaintiff's Opposition.

On February 2, 2024, Hon. Anthony D'Elia heard Oral Arguments on Defendant's filed Motion for Summary Judgment. A copy of the transcript of the Oral Argument is appended hereto as T[2]. After hearing Oral Arguments, On February 5, 2024, Hon. Anthony D'Elia entered an Order Granting Defendant's Motion for Summary Judgment and dismissing the claim. A copy of this Order is appended hereto as Pa1. After a request for a more detailed Order, Judge D'Elia signed an Order vacating his February 5, 2024 Order (Pa3) and entered an updated Order Granting Summary Judgment on February 14, 2024. A copy of the February 14 Order is appended hereto as Pa4.

Plaintiff filed a Notice of Appeal on February 20, 2024. A copy of the Notice is appended hereto as Pa6. The Notice was subsequently amended to correct deficiencies. The Amended Notice of Appeal is appended hereto as Pa11.

STATEMENT OF FACTS

Shannon Flood was killed when she was struck by a Hudson Bergen Light Rail train on December 24, 2019, at approximately 4:33 PM. Pa774.When she was fatally struck, Shannon Flood was walking in a crosswalk near the southeast corner of the intersection of York Street and

[2] "T_" refers to Oral Argument Transcript, dated February 2, 2024.

Hudson Street in Jersey City, New Jersey. Pa777. This was drawn by detective Bavosa depicting the "point of impact" with an "x" within the crosswalk. Pa777. Detective Bavosa testified in his deposition taken March 31, 2022, that Shannon Flood was within the crosswalk when she was struck. Pa850-51. Photography extracted from the Outside Cabin Camera of the Light Rail train that struck Shannon Flood depicts Shannon walking within the crosswalk immediately before being struck by the train. A copy of Plaintiff's liability expert report authored by Brandon Ogden and Douglas Gibson is appended hereto as Pa514. The referenced photograph appears at PA525.

The entire Cabin Camera video is appended. This video contains an Outside Cabin Camera view which shows what the operator sees outside the train and an Inside Cabin Camera that shows the operator driving the train. The impact between the Hudson Bergen Light Rail train and Shannon Flood happened at 4:33 and 35 seconds PM which is displayed as 16:33:35 on the Outside Cabin Camera. Appended video and Pa521-22.

At 16:33:28, approximately seven seconds prior to impact, defendant Alexander Bishop, the light rail train operator sounded the light rail vehicle's horn. Appended video, Pa521-22. Defendant Alexander Bishop sounded the train horn because he saw Shannon Flood walking near the tracks. Pa962.

Below is the deposition transcript of defendant Alexander Bishop. Alexander Bishop's deposition at Pa962 read as follows:

> *Q: Okay. And you sounded the horn when you first observed her walking, Shannon Flood walking near the track That's your testimony?*
>
> *A: Yes, I sounded the horn because I saw someone walking towards the intersection*

Rule 632 of the Hudson Bergen Light Rail Rules and Instructions for Conducting Transportation Operations, which is quoted in Pa522 states:

> ***632** While in Street running territory, the LRT horn may only be used in the event of emergency or to prevent an accident.*

Defendant Hudson Bergen Light Rail safety officer Steven Vecerina testified in his March 23, 2023 deposition that the horn, in the area where the accident happened, is prohibited unless it is an emergency. A copy of Steven Vecerina's deposition is appended hereto at Pa611. See Pa661.

A Hudson Bergen Light Rail train operator accelerates, decelerates and brakes his train by operating a master controller. Pa945-46. The operator uses this master controller with his left hand. Pa945-46. The operator moves his or her left hand forward to accelerate the light rail train and moves his or her left hand backwards to decelerate or brake the train. Pa945-46. Immediately after defendant Alexander Bishop sounded his horn at 16:33:28, he moved his left

hand forward, thus accelerating the train. This can be seen in the cabin view of the provided video. Defendant Bishop did not use his brakes until 16:33:34, one second prior to impact. This can be seen in the provided video. Defendant Bishop never applied his emergency brake. Pa942.

Defendant Bishop testified that if he was travelling 22 or 23 miles per hour and had he applied his emergency brake the train would stop in 10 feet. Pa960. Defendant Bishop testified that if he was going 10 miles per hour and he applied his emergency brake the train would stop in 5 feet. Pa960.

On December 24, 2019, the date of this incident, defendant Alexander Bishop was employed by defendant AECOM 21st Century Rail. Pa932. Defendant Alexander Bishop has never been employed by defendant New Jersey Transit. Pa932.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

An Appellate Court's review of rulings of law and issues regarding the applicability, validity or interpretation of laws, statutes, or rules is de novo. See In re Ridgefield Park Bd. Of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute); State v. Courtney, 243 N.J. 77, 85 (2020) (interpretation of sentencing provisions in the Criminal Code); State v. G.E.P.,

243 N.J. 362, 382 (2020) (retroactivity of statute); State v. Hemenway, 239 N.J. 111, 125 (2019) (constitutionality of a statute); State v. Hyland, 238 N.J. 135, 143 (2019) (appealability of a sentence); Kocanowski v. Twp. Of Bridgewater, 237 N.J. 3, 9 (2019) (statutory interpretation); Green v. Monmouth Univ., 237 N.J. 516, 529 (2019) (applicability of charitable immunity); State v. Fuqua, 234 N.J. 583, 591 (2018) (statutory interpretation); State v. Dickerson, 232 N.J. 2, 17 (2018) (interpretation of court rules).

II. Immunity statutes, which relieve a party from tort liability, must be plainly read and narrowly construed. Pa4.

N.J.S.A 48:12-152 is an immunity statute which relieves a railroad from civil tort liability under certain circumstances and in certain locations. There is longstanding, well established jurisprudence in New Jersey regarding statutory construction and interpretation, specifically with regard to immunity statutes. New Jersey law requires strict construction and adherence to the plain meaning of the words of the statute.

Cohen v W.B.Assocs, Inc, 380 N.J. Super 436 (App Div. 2005) held "in a proceeding in derogation of the common law, strict compliance with the terms of the statute is a sine qua non to jurisdiction." This is because these provisions "affect the liberty and property of the individual, are highly penal in

character, a strict construction must be given to them." Cohen involved a real estate transaction where the seller of the property sought protection from an immunity statute called the New Residential Construction Off-Site Conditions Disclosure Act. Under this statute there is very precise disclosure language that must be communicated from the seller to the buyer of a new home about the neighborhood surrounding the real estate. In Cohen the seller provided the required disclosure but then added some potentially deceiving or inaccurate language which may have misled the purchaser. The Seller's deviation from the strict language of the Disclosure Act made the seller unable to avail itself to the immunity under the statute. The Court in this case interpreted the immunity statute very narrowly, based on a plain meaning interpretation of the statute and took care to not broaden the immunity.

In Velazquez ex rel Velazquez v Jimenez, 172 N.J. 240 (2002) our Supreme Court analyzed another immunity statute, the New Jersey Good Samaritan Act and held that "it is our tradition of giving 'narrow range' to statutes granting immunity from tort liability because they leave 'unredressed injury and loss resulting from wrongful conduct'." The Court went on to write "[t]hat narrowly tailored interpretation does the least violence to our citizens' common law right to institute tort actions against those whose negligence injures them." In Velazquez, the defendant tried to broaden the interpretation

of the New Jersey Good Samaritan Statue in a very similar way as the railroad Respondents attempt to broaden the interpretation of N.J.S.A 48:12-152 in the instant case.

New Jersey has a Good Samaritan statute that immunizes medical professionals from tort liability when they render emergency care to a patient **at the scene of an accident or emergency or while transporting a patient to a hospital**. (emphasis added) The defendant doctor in Velazquez was called in to assist another obstetrician, in the hospital, on a difficult labor and delivery case. He alleged that the Good Samaritan statute applied to him because the plaintiff was not his patient and the medical situation was an emergency. In ruling against the doctor, The Supreme Court strictly interpreted the plain language of the statute. Their plain meaning interpretation of the statutory language, specific to location where the emergency treatment is rendered, "at the scene of an accident or emergency" led them to hold that a doctor who rendered treatment at a hospital, was not entitled to the benefit of the immunity. The Court was unwilling to interpret this location language as broadly as the doctor seeking the immunity had argued for.

In the instant case, the railroad Respondents sought a broad interpretation of the statutory language, relevant to location in N.J.S.A. 48:12-152. The relevant location language of N.J.S.A. 48:12-152 a reads: "This

section shall not prohibit a passenger for hire from utilizing those parts of the railroad particularly intended for passenger use nor shall it prohibit a person from **using a crossing established by the railroad**. (emphasis added) Shannon Flood, when she was tragically killed was crossing a busy street in Jersey City, New Jersey in the crosswalk—a crossing established by the railroad. A plain meaning interpretation of N.J.S.A. 48:12-152 would determine this immunity to be inoperative in the instant case as Shannon Flood was struck by a train while she was walking in a crossing established by the railroad. The railroad Respondents seek to broaden this railroad immunity statute in much the same way as the defendant in Velazquez attempted to and failed.

The Supreme Court in 2021 once again held that immunity statutes must be narrowly construed and be based on a plain reading of the statutory language in Coleman v Martinez 247 N.J. 319 (2021). In this case, there was a statutory immunity that protected Licensed Clinical Social Workers and some other medical professionals from tort liability under certain circumstances. The defendant who sought immunity from the statute was a Licensed Social Worker but not a Licensed Clinical Worker. The Court held that a narrow interpretation, based on a plain reading of the statutory language did not

immunize the defendant. Once again the Supreme Court refused to broaden an interpretation of an immunity statute.

III. The Trial Court Erred in its statutory interpretation of N.J.S.A. 48:12-152 in that it considered the terms Railroad "Property" and Railroad "Right of Way" as interchangeable terms. Pa4.

The Trial Court granted Respondent's Motion for Summary Judgment relying specifically on N.J.S.A. 48:12-152 b(5). Section b(5) of this immunity statute specifically refers to trespassers "using the property of any railroad" The relevant parts of The Court's opinion follows and can be reviewed at T17 – T19:

> Subparagraph B deals with liability for people that are on railroad property. I read that to include, even though you don't want me to, if you read Paragraph A it deals with prohibiting people from using railroad property, or any right-of-way of any railroad. Subparagraph A brings them both together. You can't walk on the right-of-way, you can't walk on property owned by a railroad, except you could use a crossing, or where we intend you to be. So now that's only dealing with trespassing.
>
> Subparagraph B then deals with those who are utilizing the property of the railroad. It's part of the same statute, 48:12-152. The only logical way to read it is Subparagraph B then it's trying to clarify Subparagraph A which applies on its face to property owned by a railroad and rights-of-way. And maybe it could've been phrased a little better in Subparagraph 5. . .
>
> Since the right-of-way is involved here . . . I'm finding at a minimum, even if it's only a right-of-way, then Subparagraph B(5) applies to the conduct of the plaintiff. That's the only way this – this – Subparagraphs

A & B, which are intended to be read together, that's why there's Subparagraphs A & B, make any sense.

It is apparent from the above transcript excerpts that the motion Judge used the terms "right of way" and "railroad property" or "property" interchangeably. In order to appreciate how this creates legal error worthy of reversal, it is necessary to analyze the immunity statute.

N.J.S.A. 48:12-152. Prohibition on entering upon the right of way of a railroad or coming into contact with equipment, machinery, wires, or rolling stock of railroad; restrictions on recovery for injury or death.

a. No person other than those connected with or employed upon the railroad who are acting within the scope of their employment shall enter upon the **right of way** of any railroad or come into contact with any equipment, machinery, wires or rolling stock of any railroad. **This section shall not prohibit** a passenger for hire from utilizing those parts of a railroad particularly intended for passenger use **nor shall it prohibit a person from using a crossing established by the railroad.**

b. No person shall recover from the company owning or operating the railroad or from any officer or employee of the railroad, any damages for death or injury to person or property as a result of contact with any equipment, machinery, wires or rolling stock of any railroad, if death or injury occurred while that person was:

(1) under the influence of alcohol as evidenced by a blood alcohol concentration of 0.10% or higher by weight of alcohol in the person's blood; or

(2) under the influence of drugs, other than drugs medically prescribed for use by that person and used in the manner prescribed; or

(3) engaging in conduct intended to result in personal bodily injury or death; or

(4) engaging in conduct proscribed by subsection a. of this section; or

(5) **using the property** of any railroad in a manner in which it was not intended to be used or in violation of posted regulations.

In the absence of proof to the contrary, any person injured while attempting to board or disembark from a moving train shall be presumed to have used the property in a manner in which it was not intended to be used.
This subsection shall apply notwithstanding the provisions of P.L.1973, c. 146 (C.2A:15-5.1 et seq.).

c. This section shall not preclude recovery for injury or death of a person who was, at the time of the injury, less than 18 years of age.

Clearly, the intention of this statute is to protect railroads from liability in certain situations, some dependent upon the location of the individual who comes into contact with railroad equipment and some that are not dependent on their location. Being that total immunity is an expansive power which in turn affects individual rights, the Legislature carefully crafted its language to construct the statute which explicitly lays out the situations in which immunity is proper.

N.J.S.A. 48:12-152 a states that only employees of the railroad who are acting within the scope of their employment are permitted to enter a railroad right of way or come into contact with railroad equipment. There are two

exceptions when a non-employee can be on a railroad right of way: 1) when they are a passenger using parts of railroad meant for passenger use; and 2) when they are using a crossing established by the railroad. It is noteworthy in N.J.S.A. 48:12-152a that the only location described is "upon the right of way".

Railroad "rights of way" are defined by the Federal Transit Administration as those "shared with vehicles or pedestrians: Rail right-of-way over which motor vehicle and/or pedestrian traffic moving in the same direction or cross directions may pass." Pa1071. This FTA manual makes the distinction between a railroad right of way and railroad property. Relevant to the instant case, the railroad defendants had a right of way to run their light rail tracks through the city streets of Jersy City, New Jersey.

Nowhere in N.J.S.A. 48:12-152a is railroad property or the word property used. Had the legislature intended section A to apply to other locations, for example, railroad property, that location certainly would have been included in this section of the statute. Thus, a plain language reading of the statute would conclude that section A applies only to railroad rights of way and not to railroad property.

New Jersey case law has also made the distinction between railroad right of way and railroad property in the context of a railroad crash resulting in injuries. In *Ruggiero v. Central Railroad Co.,* 112 N.J.L. 163 (1934), plaintiff's vehicle became stuck in the railroad crossing. *Id.* at 164. Defendant argued that "because plaintiff allowed the right hind wheel of his car to get off the planking of the crossing, the plaintiff was a trespasser . . ." *Id.* at 166. The Supreme Court disagreed. It explained that "the law . . . is fully settled that where a railroad crosses a highway, the railroad company does not take the land of the highway as real estate. . . , and acquires the right to use only the crossing in common with the public traveling on the highway," *Id.* Thus, "the right of crossing within road lines remained in the public" and "there was nothing to show that the plaintiff was a trespasser on property of the railroad company." *Id.* at 167-68.

Similarly, in *Miller v. Pennsylvania-Reading Seashore Lines, Inc.,* 120 N.J.L. 172 (1938), plaintiff was injured when he contacted an electrified third rail of the defendant railroad while crossing at a public highway intersection. *Id.* at 172-73. The issue before the Court was "whether the plaintiff was actually on the turnpike crossing, or on the private right-of-way of the railroad company, when the accident occurred." *Id.* at 172-73. The railroad argued that the incident occurred in its right of way and plaintiff was a trespasser. As in

Ruggiero, the Court disagreed. It explained that "if the plaintiff was within the boundaries of said highway at the time of accident, even though on the unimproved part, he was within his rights and not a trespasser." *Id.* at 176; *see also Barsel v. Woodbridge Tp. Zoning Bd. Of Adjust., 189 N.J. Super. 75,* 81-82 (App. Div. 1983) (relying upon *Miller* and observing that "the entire space [of highway] becomes devoted to public use for all purposes of a highway, and the right of the public to use such highway extends to the whole breadth thereof, and not merely to the part which is worked or actually travelled").

N.J.S.A. 48:12-152b lists the five circumstances where a railroad is immune from tort liability for injury or death as a result of contact with railroad equipment.

Section B(1) immunizes railroads when the injured party is intoxicated. There is no language specific to location in this clause. This means that if a person is intoxicated and is injured or killed by railroad equipment anywhere—on railroad property, on a right of way, if they are a passenger utilizing parts of railroad designated for passenger use or in a crossing established by the railroad, the railroad is immune.

Section B(2) immunizes railroads when the injured party is under influence of drugs. Similar to section B(1), there is no language specific to

location in this clause. This means that if a person is under the influence of drugs and is injured or killed by railroad equipment anywhere—on railroad property, on a right of way, or even if they are a passenger utilizing parts of railroad designated for passenger use or in a crossing established by the railroad, the railroad is immune.

Section B(3) addresses parties trying to harm or kill themselves and immunizes railroads in those situations. Similar to sections B(1) and B(2), there is no language specific to location in this clause. This means that if a person is trying to harm or kill themself and is injured or killed by railroad equipment anywhere—on railroad property, on a right of way, or if they are a passenger utilizing parts of railroad designated for passenger use or in a crossing established by the railroad, the railroad is immune.

N.J.S.A. 48:12-152b(4) addresses immunity for a violation of section N.J.S.A. 48:12-152a. It reads:

(4) engaging in conduct proscribed by subsection a. of this section

There is only one way to read section B(4) of the Railroad immunity statute. A plain language reading clearly suggests that this section only immunizes the railroad if someone engages in conduct in violation of section A. Section A is specific to location. A violation of section A can only occur on a railroad right

of way. Under section B(4), subject to exceptions, a railroad is immune when someone comes into contact with railroad equipment upon the railroad's **right of way**. (emphasis added) This section only applies to incidents that occur on a railroad right of way.

Considering the exceptions clearly articulated in section A, unless you are an employee, a passenger for hire utilizing those parts of a railroad intended for passenger use, **or a person using a crossing established by the railroad**, (emphasis added) pursuant to N.J.S.A. 48:12-152 b(4), if a person comes into contact with railroad equipment on a railroad right of way, and is injured, the railroad is immune from civil tort liability.

Applying the facts of the instant case to this analysis, as Shannon Flood was indisputably using a railroad crossing, within the crosswalk and using a crossing established by the railroad defendants, thus within an exception to the immunity statute, these defendants were not immune to civil tort liability pursuant to section B(4) of the statute.

The Motion Judge relied on N.J.S.A. 48:12-152b (5) to grant Summary Judgement to the railroad defendants. The Judge rendered his opinion for granting Summary Judgment on the record, immediately following oral

argument. The Judge stated on the record: "…Subparagraph B(5) applies to the conduct of the plaintiff." T19 1-2.

N.J.S.A. 48:12-152 b (5) reads as follows:

> (5) using **the property** of any railroad in a manner in which it was not intended to be used or in violation of posted regulations. (emphasis added)

Pursuant to section B(5) of the Railroad Immunity statute, the railroad is immune when someone is using the **property** (emphasis added) of any railroad in a manner in which it was not intended to be used or in violation of posted regulations. This sub-section is similar to N.J.S.A. 48:12-152b(4) as it is also specific to location. The distinction between this section and B(4) is that B(4) pertains to **right of way**, (emphasis added) and B(5) pertains to **property.** (emphasis added) Essentially, section B(5) provides immunity to railroads when individuals are using railroad property inappropriately or in violation of posted regulations. Railroad property refers to railroad real estate or real property. Examples of railroad property would be a railroad yard or a railroad maintenance facility or perhaps a railroad station.

Applying the facts of the instant case to this analysis, Shannon Flood was not using the property of the railroad when she was tragically struck by the train, she was upon a right of way of the railroad. Thus, based on a plain

meaning interpretation of the words of this immunity statute, N.J.S.A.b(5) cannot immunize the railroad defendants for Shannon Flood's death.

a. Specific examples of Motion Judge using terms "right of way" and "property" interchangeably. Pa4.

The Judge did not write a written opinion. His Order granting Summary Judgment date 2/14/24 stated "as explained on the record of 2/2/2024". Pa4. Thus, his opinion is contained in the transcript of the oral argument. The first time the Judge used these terms interchangeably in his opinion was:

> Subparagraph B deals with liability for people that are on railroad property. I read that to include, even though you don't want me to, if you read paragraph A it deals with prohibiting people from using railroad property, or any right of way of any railroad. (T17 22 – T18 1).

The first sentence of this excerpt suggests that section B of the Railroad Immunity statute is specific to instances where people are on railroad property. This is incorrect. Sections B (1), (2), and (3) are railroad immunities that are available to railroads anywhere where a person would be contacted by railroad equipment, regardless of the location. This is obvious in the language of those sections. Section B(4) applies to incidents that occur on railroad "rights of way" and not on railroad property. This is apparent on a plain language reading of this section which immunizes railroads for violations of section A

of the statute. Section A of the statute expressly only refers to "rights of way" and not railroad property.

In fact, the only clause of section B that immunizes a railroad for conduct that occurs on railroad property is section B(5). A plain reading of this unambiguously immunizes a railroad from certain conduct that occurs on railroad property. Thus, the Motion Judge was incorrect when he stated that the entirety of section B deals with liability on railroad property.

The second sentence in the above referenced excerpt states that "Paragraph A it deals with prohibiting people from using railroad property, or any right of way of the railroad." This is one of the instances where the Judge referred to right of way and railroad property as if they were the same. They are not. Ruggiero v Central Railroad, Co. 112 N.J.L.163 (1934) specifically held that a railroad right of way was not railroad property. Finally, the words "railroad property" do not appear in Section A. They only appear in section B(5) as detailed above. Using these two location describing terms interchangeably, as if they were synonyms is the source of the reversible error in this case.

Subsequently, the Judge stated in his opinion:

> Subparagraph B then deals with those who are utilizing the property of the railroad. It's part of the same statute, 48:12-152. The only logical

> way to read it is Subparagraph B then it's trying to clarify Subparagraph A which applies on its face to property owned by the railroad and rights-of-way. (T18 7-12).

In this excerpt the Judge once again stated that Section B applies to railroad property. My argument as to why this an inaccurate interpretation of N.J.S.A. 48:12-152 is the same as my argument regarding the previous excerpt. Thus, I will not repeat it. In the second sentence of the excerpt the Judge describes how section B of N.J.S.A. 48:12-152 is that it is "trying to clarify Subparagraph (section) A". Nowhere in the legislative history of this statute is there a statement suggesting this clarification. There is no case law which suggests this either.

The clarification that the Judge infers from his reading of the relationship between section A and Section B of the statute is that the immunity in 48:12-152 b(5) applies to injuries that occur on railroad rights of way. This type of inference, instead of interpreting the plain language of the statute as dictated by Cohen, Velazquez, and Coleman is the source of the reversible error in this case and the reason that the Summary Judgment Order must be reversed. A plain language reading of the statute clearly suggests that 48:12-152 b(5) does not apply to injuries on a railroad right of way. Shannon Flood's tragic death unquestionably occurred on a railroad right of way.

When the Motion Judge granted Summary Judgement, he once again articulated that it was based on an immunity in N.J.S.A. 48:12-152 b(5). An excerpt of his remarks are below:

> I'm finding at a minimum, even if it's only a right-of-way, then Subparagraph B(5) applies to the conduct of the plaintiff. That's the only way this – this – Subparagraphs A & B, which are intended to be read together, that's why there's Subparagraphs A & B, make any sense. (T18 25 – T19 5).

In this excerpt the Judge once again made it clear that his Order was based on an immunity contained in section B(5) of the statute. Not to belabor the point that I have made previously in this argument, but section B(5) is specific to conduct that occurs while using the property of a railroad. Shannon Flood was not using the property of a railroad, she was lawfully upon a railroad right of way.

Later in this excerpt the Judge makes reference to how "Subparagraphs (sections) A & B which are intended to be read together…make any sense." T19 3-5). It can be surmised from the Court's analysis that what the Judge meant as to how sections A and B were to be read together were that "right of way" and "property" are synonyms.

A plain language reading of the N.J.S.A. 48:12-152 suggests that sections A and B should be read together, but differently than the Judge did when he granted Summary Judgement. This misunderstanding resulted in

reversible error. N.J.S.A. 48:12-152a is a prohibition on entering onto a railroad right of way. It describes three exceptions to that prohibition, when entering upon a right of way is permissible. These exceptions are for railroad employees, passengers for hire in areas of the right of way where passengers are permitted and a person who is in a crossing established by the railroad.

N.J.S.A.48:12-152b articulates the railroad's civil tort immunity. The railroad is immune when a person, regardless of location, is intoxicated, under the influence of drugs, or is attempting to injure or kill themselves. If a person is on a railroad right of way in a manner not subject to an exception to N.J.S.A. 48:12-152a, the railroad is immune. Finally, If a person uses railroad property in a manner it was not intended to be used or in violation of a posted regulation the railroad is immune. Based on a plain language reading, this is how sections A and B of the statute are intended to be read together.

The Motion Judge concluded his opinion with a hypothetical example which made it clear that he had misinterpreted the statute:

> Otherwise you could, as counsel just argued, be drunk beyond belief, oblivious to the world, stumble on this crosswalk in violation of huge blinking red lights, horns going off left and right, the train driver doing everything he's supposed to be doing, and get killed by train and then say it was only a crosswalk you only had the right of way so I can sue, Subparagraph B doesn't prevent me from suing. That's a ridiculous reading of the statute. This Court will not do that. I'm going to grant

> the motion based upon the finding that the immunities as to all railroads companies, under N.J.S.A. 48:12-152. (T19 5-13).

In the hypothetical example provided by the Court, that railroad would be immune from civil tort damages. The railroad just wouldn't be immune for the reason that the Court articulated. That railroad would be immune pursuant to N.J.S.A. 48:12-152 b(1) as the hypothetical plaintiff was intoxicated. This section of the immunity applies notwithstanding location. If a person is intoxicated and comes into contact with railroad equipment on a right of way, in crossing established by the railroad, or anywhere else, the railroad is immune. They are just not immune pursuant to N.J.S.A. 48:12-152 b(5) as the Motion Judge suggested in his oral opinion. This misinterpretation of the statute lead to the Court granting Summary Judgement in the instant case based an N.J.S.A. 48:12-152 b(5) and thus, is reversible error.

IV. The N.J.S.A. 48:12-152 immunity statute was intended to protect railroads from lawsuits filed by trespassers, not from lawsuits filed by people legally within crossings established by railroads. Pa4.

The Motion Judge ignored the plain language of N.J.S.A. 48:12-152 which led to an overly broad application of this immunity statue which has resulted in an outcome that the legislature never anticipated or intended. N.J.S.A. 48:12-152a reads as follows:

> a. No person other than those connected with or employed upon the railroad who are acting within the scope of their employment shall enter upon the **right of way** of any railroad or come into contact with any equipment, machinery, wires or rolling stock of any railroad. **This section shall not prohibit** a passenger for hire from utilizing those parts of a railroad particularly intended for passenger use **nor shall it prohibit a person from using a crossing established by the railroad.** (emphasis added)

A plain language reading of wording of this immunity statute cannot lead a reader to any conclusion other than that this statute was not intended to grant tort liability immunity to a railroad involved in a crash with a person who while on a railroad right of way, is "using a crossing established by the railroad." Shannon Flood, at the time of her tragic death was certainly using a crossing established by the railroad in that she was undisputable walking in a crosswalk.

The legislative history of this statute supports this plain language reading as evidenced by the Assembly Transportation and Communications Committee Statement to the Assembly No.1788 (Pa1022) and the Senate Transportation Committee report which is identical. Pa1027. These committee reports state that this immunity statute is intended to "affect recovery when a person engages in prohibited behavior and not when a person is injured only because of the railroad's negligence". Shannon Flood was not engaging in "prohibited behavior". The statute explicitly states that she was not engaging

in prohibited behavior. The statute shall not **prohibit a person from using a crossing established by the railroad**. (emphasis added).

If the committee was not clear enough in this preceding assertion, it went on to state that "it is not the intent of the statute to prohibit a person from using a crossing established by the railroad". Once again, Shannon Flood was in a crosswalk when she was killed. A crosswalk is a crossing established by the railroad. The legislature was crystal clear in communicating that it did not intend N.J.S.A. 48:12-152 to immunize a railroad from negligence for hitting a person who is walking in a crosswalk.

From its original enactment in 1869 to its more recent amendments in 1998 the purpose of the Railroad Immunity statute has been, "to absolve a railroad company from a duty to a trespasser". Egan v Erie R. Co. 29 N.J. 243 (1939) Egan at 247-248 (quoting a prior version of the statute which was amended for reasons that do not bear on the instant point) stated that the "limited railroad immunity never protected railroads from lawsuits occurring at public crossings."

An exhaustive search of New Jersey case law regarding the application of N.J.S.A. 48:12-152 and the predecessor Railroad Immunity statute at a crossing established by a railroad did not yield one reported or unreported case

where the immunity was granted when the plaintiff was at a crossing established by the railroad. The one and only case that my search uncovered involving a crossing established by the railroad is David v West Jersey& S.R.Co. 84 N.J.L. 685. (June 18, 1913) In this case the immunity was held not to apply. The Court wrote, "A reading of the proviso, without more, shows that the section has no application to the decedent who was engaged in crossing the railroad at a lawful public crossing."

Defendants will likely argue that any case law predating the 1998 statutory amendment is inapplicable. But that is incorrect. The 1998 amendment does not affect any of the arguments raised above as the exemption of persons on railroad crossings is still present in the latest amendment of this statute. The 1998 amendment merely codified the contributory negligence standard which was eroded via prior caselaw which implemented a comparative negligence standard. That contributory negligence standard is not in dispute. The preceding Railroad Immunity statute and the current statute, N.J.S.A. 48:12-152, both explicitly articulate that persons should not deemed to be trespassers if they are crossing a right of way at a crossing established by the railroad.

V. Even if the Court was to determine that N.J.S.A. 48:12-152b(5) is the appropriate controlling law, the Court improperly granted summary judgment as there are genuine issues of material fact related to the intended use of railroad property and posted regulations. Pa4.

The instant appeal is from a Superior Court, Law Division order that granted summary judgment based on N.J.S.A. 48:12-152. Pa4. Pursuant to Rule 4:46-2, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The Supreme Court of New Jersey evaluated the standards by which a court determines whether there is a genuine issue of material fact regarding summary judgment motions. Brill v. Guardian Life Insurance Company. 142 N.J. 520 (1995). The Court indicated that the focus should be placed on whether a disputed issue of fact is genuine or "of an insubstantial nature." Brill, 142 N.J. at 529 (citing Judson v. Peoples Bank and Trust Co. Westfield, 17 N.J. 67, 75 (1954)). Thus, a moving party will only be successful in a motion for summary judgment if there is no genuine issue of material fact. Id.

Summary Judgment is only proper if "no rational fact-finder could render a judgment in favor of [the plaintiff]." Gilhooley v. County of Union, 164 N.J. 533, 545 (2000). Further, "only when the evidence is utterly one-sided may a Judge decide that a party may prevail as a matter of law." *Id.*

In order to defeat a defendant's motion for summary judgment the plaintiff only has to show that a jury could potentially find in his or her favor. Cavanaugh v. Morris, 273 N.J. Super. 38, 41 (App. Div. 1994). Our Supreme Court clarified the role of the court in a defendant's summary judgment motion as being, "to determine whether there is a genuine issue as to a material fact, but not to decide the issue if he finds it to exist." Oswin v. Shaw, 129 N.J. 290, 307 (1992) (citing Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 73 (1954)). Furthermore, all favorable inferences must be granted to the plaintiff. Owens v. Kessler, 272 N.J. Super. 225, 233 (App. Div. 1994). "Only when the evidence is utterly one-sided may a judge decide that a party should prevail as a matter of law." Gilhooley v. County of Union, 164 N.J. 533, 545 (2000).

It is plaintiff's position that N.J.S.A. 48:12-152 B(5) was improperly applied as Shannon Flood was not using the property of the railroad at the time that she was struck and killed. Even if it were to be determined, as a matter of law, that Shannon Flood was using the property of the defendant

railroad, genuine issues of fact would exist as to whether she was using the property of any railroad in **a manner in which it was not intended to be used** or **in violation of posted regulations**. (emphasis to the exact statutory language added).

Shannon Flood, when she was tragically killed, was using the railroad right of way in exactly the manner in which it was intended to be used. She was walking across the street, a designated crosswalk. If there was an allegation that she was not using this railroad crossing in the manner it was intended, it would certainly be an issue of fact which should be determined by a jury. Considering all factual inferences in favor of Ms. Flood, the non-moving party would require denial of Summary Judgement and thus reversal of the Motion Judge's Order.

In much the same way, whether Shannon Flood violated posted warnings, this once again would be a question of fact. A jury should be presented with the alleged posted regulations (if there actually were any) and make a factual determination as to whether she violated any regulations. Once again, these genuine factual issues should be decided by a jury. For the purposes of Summary Judgement, as these issues exist, considering all factual inferences in favor of the non-moving party, Summary Judgement should have been denied.

VI. The overly broad interpretation of N.J.S.A. 48:12-152 is against public policy and dangerous for the citizens of New Jersey. Pa4.

The Motion Judge who decided the Summary Judgement Motion that gives rise to the instant appeal, applied N.J.S.A. 48:12-152, the Railroad Immunity statute in a way it has never been applied. He ruled that a person crossing a railroad right of way, in a crossing established by a railroad to be a trespasser and thus barred from seeking damages for the negligence of railroad defendants. The reason for this error was that instead of interpreting this statute in a narrow manner, by analyzing the plain meaning of the statute, the Judge used inference to conclude that one section of the statute was written to clarify the preceding section. This led the Judge to a decision that applied a very broad interpretation of the statute and led to a result that the legislators who passed the statute never anticipated or intended.

The Courts in the State of New Jersey have consistently held that immunity statutes should be narrowly construed and interpreted based on the plain meaning of the language of the statute. Velazquez ex rel Velazquez v Jiminez, 172 N.J. 240 (2002); Cohen v W.B. Associates, Inc. 380 N.J. Super. 436 (App. Div. 2005); Coleman v Martinez 247 N.J. 319 (2021) The legal reasoning underpinning each of these decisions is public policy. Generally, the line of cases hold that because it is unfair to a person who has sustained

damages to be prevented from pursuing their common law right to civil tort remedies, an immunity statute denying them the right to pursue those damages should be interpreted narrowly. The Supreme Court in Velazquez at 259 stated this point very articulately. "That narrowly tailored interpretation does the least violence to our citizens' common law right to institute tort actions against those whose negligence injures them."

Tort law has a long history of making the lives of American citizens safer. Asbestos litigation has made the manufacturers of building materials produce safer products and saved millions of lives. Civil lawsuits have altered the conduct of manufacturers of motor vehicles, pharmaceutical products and medical devices. In each of these industries and others, companies have been incentivized to design and manufacture safer products. This incentive was provided by the potential for civil tort liability if their product was unsafe or defective. Immunity statutes, when applied too broadly, can create disincentives to companies to conduct their businesses in a safer way, because they are not subject to the civil tort system that can call them into account for their unsafe practices. Thus, public policy must be considered when interpreting civil tort immunity statutes.

CONCLUSION

Because the Motion Judge committed reversible error in his interpretation and application of N.J.S.A. 48:12-152, the Appellant respectfully requests that the Order granting Summary Judgement in favor of defendants be reversed.

Dated: May 13, 2024

Respectfully submitted,

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FILED, Clerk of the Appellate Division, July 28, 2024, **A-001882-23**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Docket No.: A-001882-23T4

Devon Collins, Administratrix of the Estate of Shannon Flood; Devon Collins, Guardian Ad Litem for Shea Lulla, an infant, Plaintiff, v. New Jersey Transit; New Jersey Transit Rail Operations, Inc.; The Hudson-Bergen Light Rail; The State of New Jersey; The City of Jersey City; 21st Century Rail Corporation; AECOM Technology Corporation; Washington Group International; URS Corporation; URS Corporation Washington Division; Itochu Corporation; Kinkisharyo International LLC, Alexander Bishop, Defendants.	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY OF NEW JERSEY, LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L-134-21 Sat Below: HONORABLE ANTHONY V. D'ELIA, J.S.C.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

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Date Submitted: July 28, 2024

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[1] Plaintiff-Appellant asserted in her appendix and letter to the Court dated May 15, 2024, that Exhibits D and F to Respondent's Summary Judgment motion and Exhibit E to Plaintiff's Opposition to the motion were all the same video file and that she submitted them as Pa1152. *See* Pa-iv at note 2; Trans. Id. TE1629906-05152024. This is incorrect. Plaintiff did not submit Exhibit F to Respondent's Summary Judgment motion, which is a different video than Exhibit D and Plaintiff's Exhibit E. Therefore, Exhibit F is included as Da51. It was submitted to the Court via flash drive by Respondent on May 16, 2024 (previously identified as Da66). Trans Id. E1640741-07162024.

PRELIMINARY STATEMENT

This matter arises out of an incident in which plaintiffs' decedent, Shannon Flood, impermissibly entered onto New Jersey Transit Corporation's ("NJT") railroad right of way at its York Street pedestrian crossing for the Hudson Bergen Light Rail ("HBLR"). Two seconds later, she collided with HBLR Train 81, which was imminently approaching the crossing on Track 1, and lost her life. The entire incident was captured on multiple video cameras present on the head end of the train as well as at the station the train was approaching.

Ms. Flood never looked to see if a train was coming before she stepped onto the crossing. Additionally, it is undisputed that at the moment she stepped onto the crossing:

- Train 81 had the proceed signal and the right of way to enter and pass through the crossing; T8:4-9:1;
- the pedestrian signal was indicating that she was not permitted to enter the crossing, and she did not have the right of way; Ibid.;
- the traffic light for vehicles on York Street was red, indicating that they could not enter the crossing, and a car was stopped at the traffic light on the same side of the crossing as her; Compare Pa162, ¶¶69 and 70 with

Pa764, ¶¶69 and 70; Pa257-299; Pa344, 349, 354, 361 at ¶9, and 362 at ¶13; Pa679:16-683:5; and Pa1152 at 16:33:28 to 16:33:35; and

- another HBLR train travelling in the opposite direction on Track 2 had just left the Exchange Place station and was blocking her path across the crossing; Compare Pa163, ¶71 with Pa764, ¶71; Pa214-256; Pa257-299; Pa342-343; Pa1152 at 16:33:28 to 16:33:35; Da51.

N.J.S.A. 48:12-152 bars claims for injuries or death caused by contact with a train while the person was wrongfully present on "the right of way of any railroad" or "using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations", regardless of whether the railroad may also have been negligent. N.J.S.A. 48:12-152(b)(4) and (5). Id. There is no dispute that NJT owned the railroad right of way and the crossing. Furthermore, under the circumstances presented by the undisputed facts, a rational jury could only conclude that Ms. Flood collided with the train while she was using the railroad crossing and right of way in a manner in which it was not intended to be used. Therefore, the trial court below properly granted summary judgment dismissing Plaintiff's claims with prejudice because they are barred by N.J.S.A. 48:12-152 as a matter of law. In turn, Respondents respectfully submit that this Court should affirm the trial court's decision.

PROCEDURAL HISTORY

Plaintiff, Devon Collins, is the Administratrix of the Estate of Shannon Flood. Pa31. Plaintiff filed the Complaint on January 11, 2021, against New Jersey Transit, New Jersey Transit Rail Operations, The Hudson Bergen Light Rail, The State of New Jersey, The City of Jersey City, 21st Century Rail Corporation, AECOM Technology Corporation, Washington Group International, URS Corporation, URS Corporation Washington Division, Itochu Corporation, Kinkisharyo International, LLC, and a number of fictitious defendants, seeking damages from the defendants under the Wrongful Death Act N.J.S.A. 2A:31-1 et seq., the Survivor's Act, N.J.S.A. 2A:15-3. Pa31-58.

The Complaint contained seven counts and alleged the following theories of recovery. Count 1 alleged negligent design, construction and maintenance of dangerous conditions at the light rail station and dangerous light rail car conditions. Pa31-34. Count 2 alleged negligent operation of the light rail train and *respondeat superior* liability. Pa35-37. Count 3 alleged, negligent operation of the light rail train, premises liability due to a failure to design and maintain the property with adequate warnings of oncoming rail cars for pedestrians, and negligent training/hiring. Pa37-40. Count 4 alleged premises liability for the presence of "physical defects and deficiencies" and the "lack of warning devices and signs, absence of barriers to control

pedestrian traffic, high volume of trains and pedestrian traffic and/or history of prior near collisions and/or collisions, independently and combining, created a dangerous condition at the track, platform and station that existed at the time of Ms. Flood's death." Pa40-44. Count 5 again alleged negligent design, maintenance, and operation of the "Hudson-Bergen Light Rail tracks, platforms, stations, signals, equipment and rail cars premises and the rail car." Pa44-52. Count 6 applied only to defendants City of Jersey City and the State of New Jersey and sounded in premises liability. Pa52-53. Count seven alleged that Plaintiff was entitled to punitive damages. Pa53-54.

The following defendants filed their Answer to the Complaint with crossclaims and affirmative defenses on April 5, 2021: New Jersey Transit Corporation, improperly plead as New Jersey Transit, New Jersey Transit Rail Operations, and The Hudson-Bergen Light Rail; Twenty-First Century Rail Corporation, improperly plead as 21st Century Rail Corporation; and AECOM Technology Corporation, improperly plead as Washington Group International, URS Corporation, and URS Corporation Washington Division. Pa61. Each of these defendants, in addition to Defendants Alexander Bishop and Kinkisharyo International LLC, are collectively referred to as the "Railroad defendants".

On April 20, 2021, Plaintiff stipulated to dismiss Defendant the State of New Jersey without prejudice. Da1. On May 11, 2021, Defendant City of

Jersey City filed an Answer to the Complaint with crossclaims and affirmative defenses. Da3. On May 28, 2021, Defendant Kinkisharyo International LLC, filed its Answer to the Complaint with crossclaims and affirmative defenses. Pa79. On July 23, 2021, the Court dismissed the Complaint against Defendant Itochu Corporation without prejudice pursuant to R. 1:13-7. Da16.

Following the exchange of paper discovery, Plaintiff filed an Amended Complaint on October 8, 2021, adding Alexander Bishop, the operator of the light rail train, as a party to the lawsuit. Pa95. On October 27, 2021, Defendant City of Jersey City filed an Answer to the Amended Complaint with crossclaims and affirmative defenses. Da17. The Railroad defendants filed their Answer to the Amended Complaint with crossclaims and affirmative defenses on May 5, 2022. Pa123.

On March 3, 2023, the trial court granted the Railroad Defendant's motion for partial summary judgment and dismissed with prejudice all "professional negligent design claims (to the extent they are predicated upon the professional negligence of engineers employed by Rail Road Defendants)" regarding the crossing. Da29-30.

On December 22, 2023, the Railroad Defendants filed a Motion for Summary Judgment seeking dismissal of all of Plaintiff's claims because the undisputed material facts establish that Plaintiff's claims are barred by the

Railroad Immunity Act, N.J.S.A. 48:12-152 as a matter of law. The Railroad Defendants' argument was as follows. N.J.S.A. 48:12-152(b)(5) prohibits a Plaintiff from recovering damages for death or injury to a person as a result of contract with rolling stock of a railroad while that person was "using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulation." The undisputed material facts show that Shannon Flood collided with the train because she entered the crossing against the pedestrian signal and red traffic light, while she did not have the right of way, while the train had the right of way and was just two to three seconds from reaching the crossing, and while another train on the adjacent track was already present on the crossing and blocking her path across it. It was also undisputed that NJT owned the crossing and the right of way where the crossing is located and that the crossing was not intended to be used by pedestrians while trains were already on, or imminently approaching, it. Therefore, the Railroad Defendants argued that a rational jury could only find that Plaintiff's damages were caused by Ms. Flood contacting the train while she was using the crossing and right of way, both of which constitute "railroad property" owned by NJT under subsection (b)(5), in a manner in which they were not intended to be used or in violation of the posted regulations (the crossing signal and red traffic light). As such, summary judgment was

appropriate because Plaintiff cannot recover as a matter of law. Pa148, 153-155, 158-165.

The Railroad Defendant's motion also separately sought to dismiss all of Plaintiff's claims based on premises liability, dangerous condition of public premises, inadequate signs, signals, warnings or protections at the crossing, the speed of the train, failure to warn, and negligent design and construction because these claims were either barred by the immunities provided by the Tort Claims Act or Plaintiff failed to provide the necessary expert testimony to establish that the crossing or any part of it was negligently designed, constructed, or maintained at the time of the alleged incident. The motion also sought to dismiss the claims for negligent train operation because Alexander Bishop did not breach his duty of care owed to Ms. Flood, which did not require him to attempt to stop the train until it became apparent that Ms. Flood was going to ignore the train's right of way and cross or attempt to cross the crossing before the train arrived in a manner such that a collision would probably result. Last, the motion requested dismissal of all negligent training and hiring claims and the claims seeking recovery of punitive damages

because Plaintiff failed to adduce the evidence necessary to support each element of these claims.[1]

On January 9, 2024, Defendant the City of Jersey City ("Jersey City") filed a cross motion for summary judgment dismissing all claims and cross claims against it because Jersey City did not own or control the crossing. Jersey City asserted that the crossing was instead owned and controlled by NJT. Da33-34, ¶¶1-5, Da39-40, ¶¶6-9.

Plaintiff filed her opposition to the Railroad Defendants' motion for summary judgment on January 23, 2024. Pa761. Plaintiff conceded that "some of the causes of actions plead by plaintiff in her complaint have been abandoned as discovery developed", explaining that the following claims should be dismissed: negligent design, construction, and maintenance of dangerous conditions; failure to design adequate warnings; premises liability allegations regarding physical defects of the premises or lack of warning devices and barriers to control pedestrians; allegations of engineering negligence; and punitive damages.[2]

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[1] See Defendant-Respondents' Brief in Support of Summary Judgment, Trans Id. LCV20233704001 at Points III through VII.
[2] See Plaintiff-Appellant's Brief in Opposition to Defendant-Respondents' Motion for Summary Judgment, Trans Id. LCV2024198874 at 8, 10-11.

Plaintiff did not file a response or otherwise oppose Jersey City's cross motion for summary judgment. T5:9-6:10.

NJT filed its Reply Brief on January 30, 2024. Pa147.

The Honorable Anthony V. D'Elia, J.S.C. heard oral argument on the motions on February 2, 2024. T1. During the oral argument, Judge D'Elia confirmed that Jersey City's motion was unopposed and that there was no objection to the court entering an order granting the motion as unopposed. T5:9-6:10. The court adopted the unopposed factual and legal arguments made by Jersey City -- which includes the fact that NJT owns and controls the crossing -- and granted Jersey City's motion based on those facts and arguments. T5:9-6:10; Da33-34, ¶¶1-5, Da39-40, ¶¶6-9.

During the oral argument, the court found that it was undisputed that Shannon Flood was stepping through a crossing while a southbound train was already occupying track two and blocking her way across the crossing. T6:25-7:3. The court also confirmed that Plaintiff does not dispute the fact that the pedestrian signal was indicating that Ms. Flood should not go onto the crossing when she did, that she did not have the right of way, and that the train had the right of way and the proceed signal. T8:4-9:1. The court also confirmed that Plaintiff conceded that the Railroad Defendants owned, at a minimum, a right

of way where the crossing is located and the collision occurred. T13:22-14:1, 18:20-21.

Next, the court interpreted how N.J.S.A. 48:12-152 applies to the undisputed facts, concluding as follows. First, subsection (a) prohibits non-railroad employees from entering onto a railroad right of way, except it does not prohibit them from entering onto a railroad right of way at a crossing established by the railroad. T17:11-19:17, 22:15-23:1. Second, subsection (b)(5) clarifies subsection (a) by prohibiting a person from using "the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations." Ibid. Third, when reading subsection (a) and (b) together, the only logical conclusion is that the meaning of "the property of any railroad" in subsection (b) includes a railroad's "right of way". Therefore, Judge D'Elia concluded that the statute bars Plaintiff's claims because the collision occurred while Shannon Flood was using the railroad's property in a manner in which it was not intended to be used by entering the crossing on NJT's right of way when she was not permitted, while a train was already present on the crossing, and while the train she ultimately collided with had the right of way was imminently approaching the crossing. Ibid.

Judge D'Elia entered an Order dismissing Plaintiff's Amended Complaint with prejudice on February 5, 2024. Pa1. The same day, Plaintiff

requested a more detailed order stating that the motion was granted because the Railroad Defendants are immune from liability pursuant to N.J.S.A. 48:12-152. Da43. The court then entered an order vacating the February 5, 2024, order on February 14, 2024, and replaced it the same day with an order stating that summary judgment was granted because the Railroad Defendants are immune from liability pursuant to N.J.S.A. 48:12-152, as Plaintiff requested. Pa3-4.

Plaintiff filed a Notice of Appeal on February 26, 2024. Pa6. An Amended Notice of Appeal was filed on March 1, 2024. Pa11.

COUNTERSTATEMENT OF FACTS

Overview

At 16:33:33 (4:33:33 p.m.), Shannon Flood, impermissibly entered onto New Jersey Transit Corporation's ("NJT") railroad right of way at its York Street pedestrian crossing for the Hudson Bergen Light Rail ("HBLR"). T8:4-9:1; Compare Pa163, ¶73 with Pa765, ¶73; Pa361, ¶5 and 9; Pa582:20-23; Pa679:16-682:21. Two seconds later, she collided with an HBLR Train that was imminently approaching the crossing on Track 1. Compare Pa154, ¶17 with Pa762, ¶17; Pa222-235, 281-319[3]; Pa1152 at 16:33:30 to :35; Da51 at 4:33:10 to 4:33:14. Tragically Ms. Flood died as a result of the collision. The entire incident was captured on multiple video cameras present on the head end of the train as well as at the station the train was approaching. Pa1152, Da51.

The Accident Location

The collision occurred on Track 1 of NJT's York Street Pedestrian Crossing for the HBLR in Jersey City, New Jersey. Compare Pa154, ¶17 with

[3] These are screen shots taken from the videos recorded by the head-end camera on the train, the interior camera showing the operator of the train, and the security camera at the HBLR Exchange Place Station, located just north of the crossing. Each of the videos has a time stamp on the bottom, showing that two seconds elapsed from the moment Ms. Flood stepped onto the crossing until the moment of impact with the train.

Pa762, ¶17. The York Street Pedestrian Crossing is located just south of York Street and approximately one block north of Grand Street. Compare Pa154, ¶18 with Pa762, ¶18; See Pa392-396 (overhead images of the location) and Pa543-550 (photos of the area).

The train tracks in the area where the incident occurred run adjacent to Hudson Street and are located on NJT's dedicated railroad right of way for the HBLR, meaning cars and pedestrians may not enter onto the right of way except at a designated crossing. Compare Pa154, ¶19 with Pa762, ¶19; Pa338; Pa361; Pa543-550; 579:15-580:11. The movement of the train in the area of the incident, including the crossing, is governed by a system of bar signals. Compare Pa154, ¶20 with Pa762, ¶20. When the train has a proceed signal it has the right of way and is permitted to operate up to the track speed, regardless of whether it is going over a crossing. Compare Pa155, ¶21 with Pa762, ¶21. The operational design speed limit for HBLR Track 1 in the block prior to the crossing and the area including the crossing where the incident occurred is 25 mph and was approved by NJT when the HBLR was designed. Compare Pa156, ¶29 with Pa763, ¶29.

Access to the crossing for pedestrians and vehicles is controlled by pedestrian signals and traffic lights. Compare Pa155, ¶22 with Pa762, ¶22. Pedestrians are not permitted to enter the crossing against the pedestrian

signal. Compare Pa155, ¶23 with Pa762, ¶23. Pedestrians are not intended to use the crossing when a train is imminently approaching it, or when a train is already present on the crossing. Compare Pa155, ¶24 with Pa762, ¶24. "WATCH FOR TRAINS" was painted in large black letters on a yellow background on the pavement in the area where Ms. Flood entered the crossing on the right of way. Compare Pa155, ¶25 with Pa762, ¶25; See Pa543-550 (photos showing the warning signs).

Ownership of the Right of Way and Crossing

NJT owns and controls the entire HBLR system, including the stations, signals, right of way, the train tracks, track bed, and the pedestrian crossing where the collision occurred as well as the train involved in the collision. Pa178 at ¶¶1-2; Pa189 at ¶¶1-2; Pa500; Pa674:7-23; Da33-34, ¶¶1-5, Da39-40, ¶¶6-9. The entire system -- including the tracks, track bed, signals, warnings, protections, stations, crossings, and traffic control devices where the collision occurred -- was designed and constructed by NJT's contractors, with NJT's approval. Pa479-480; Pa579:20-580:11; Pa626:24-268:11.

Plaintiff did not dispute that NJT owns the physical elements that make up the crossing itself (the signals, the warning signs painted on the surface of the crossing, the track bed, or the materials comprising the surface of the crossing, etc.) in the record below. Compare Pa153, ¶12 with Pa762¶12; and

Pa154, ¶17 with Pa762¶17. Moreover, in its cross motion for summary judgment Defendant Jersey City confirmed that NJT owns and controls the crossing where the incident occurred, and that Jersey City does not. Da33-34, ¶¶1-5, Da39-40, ¶¶6-9. Jersey City's Director of Traffic Engineering, Division of Traffic Engineering, Department of Infrastructure for the City of Jersey City certified that, "[t]he crossing, the tracks, and track beds, within the NJT Light Rail System in the City of Jersey City are owned maintained and controlled by NJT, including the crossing, tracks at the crossing of York Street and Hudson Street as well as the track bed on Hudson Street." Da39-40, ¶¶1 and 9. Plaintiff did not dispute these facts or oppose Jersey City's cross motion, and the court adopted the unopposed factual and legal arguments made by Jersey City in granting the motion. T5:9-6:10.

The Incident

Shannon Flood was familiar with the incident location and knew that the area was an active train line prior to the incident. Compare Pa158, ¶45 with Pa763, ¶45; Pa430:5-431:1, 441:16-442:6. From 2015 up through the date of the incident on December 24, 2019, Ms. Flood, worked Monday through Friday, 9:00 a.m. to 6:00/6:30 p.m., at World Business Leaders, located at 101 Hudson Street, Jersey City, New Jersey, which was across the street from the Exchange Place train station and area where the incident occurred. Compare

Pa158, ¶46 with Pa763, ¶46. Approximately 5 minutes before the incident occurred, Ms. Flood walked through the intersection of York Street and Hudson Street and the same part of the pedestrian railroad crossing where the incident occurred. Compare Pa158, ¶47 with Pa763, ¶47.

HBLR Train 81, the train involved in the collision, was being operated by Defendant Alexander Bishop and was scheduled to arrive at the Exchange Place station at 4:34 p.m. on the day of the accident, approximately 25 seconds after the accident occurred. Compare Pa154, ¶16 with Pa762, ¶16; and Pa158, ¶48 with Pa763, ¶48.

Prior to the collision, Alexander Bishop was operating Train 81 with the headlights illuminated and travelling north on Track 1 in the same direction that Ms. Flood was walking. Compare Pa159, ¶50 with Pa764, ¶50. As Train 81 approached the crossing, it had the proceed signal and the right of way to proceed into and through the crossing. T8:4-9:1.

About 7 seconds before the collision, Mr. Bishop sounded the horn as the front of the train was just finishing crossing over Grand Street, which is one block prior to the crossing. Pb7; Pa1152 at 16:35:28/29 on the head end video. When Mr. Bishop sounded the horn at this time, Ms. Flood was walking forward (north) on the sidewalk adjacent to the right of way where Track 1 is located. Mr. Bishop sounded the horn at this time because he saw Ms. Flood

walking on the sidewalk and wanted to provide a warning of his approach. Compare Pa160, ¶¶53 and 54 with Pa764, ¶¶53 and 54.

Approximately 5 seconds before the collision (16:33:30 on the head end video), the train was travelling approximately 24.5 mph and Ms. Flood was still walking forward (north) on the sidewalk adjacent to the right of way where Track 1 is located. Compare Pa160, ¶56 with Pa764, ¶56. About 2 to 2.5 seconds before the collision, Ms. Flood changed direction and began to walk towards the pedestrian railroad crossing that was to her left. Pa1152 at 16:35:28/29 on the head end video; Pa521 (Plaintiffs' expert's analysis of the video evidence: "16:33:33 – Ms. Flood turns toward the crossing to cross over the tracks . . . 16:33:35 – LRV strikes Ms. Flood."[4]

Approximately 2 seconds before the collision, Ms. Flood stepped onto the railroad crossing in front of the oncoming train, which was imminently about to enter the crossing. Pa1152 at 16:33:33; Pa222-235, 281-319.[5] Prior to entering the crossing, Ms. Flood never looked to see if a train was coming on Track 1. Compare Pa162, ¶67 with Pa764, ¶67; Pa257-299 (stills from the head end camera); Pa582:14-19; Pa1152 at 16:33:28 to 16:33:35.

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[4] Plaintiff disputed this fact (Pa764, ¶57) in her opposition papers without providing any basis for the dispute, and her expert agrees with the fact.
[5] Plaintiff disputed this fact (Pa764, ¶58) in her opposition papers without providing any basis for the dispute, and the video and stills clearly show the moment Ms. Flood stepped onto the crossing.

At the time Ms. Flood stepped onto the crossing:

- Train 81 had the proceed signal and the right of way to enter and pass through the crossing; T8:4-9:1;
- the pedestrian signal was indicating that she was not permitted to enter the crossing, and she did not have the right of way; Ibid.;
- the traffic light for vehicles on York Street was red, indicating that they could not enter the crossing, and a car was stopped at the traffic light on the same side of the crossing as her; Compare Pa162, ¶¶69 and 70 with Pa764, ¶¶69 and 70; Pa257-299; Pa344, 349, 354, 361 at ¶9, and 362 at ¶13; Pa679:16-683:5; and Pa1152 at 16:33:28 to 16:33:35; and
- another HBLR train travelling in the opposite direction on Track 2 had just left the Exchange Place station and was blocking her path across the crossing; Compare Pa163, ¶71 with Pa764, ¶71; Pa214-256; Pa257-299; Pa342-343; Pa1152 at 16:33:28 to 16:33:35; Da51 at 4:33:10 to 4:33:14 (video from security camera).

Plaintiff does not dispute that Mr. Bishop sounded the horn and bell and applied the train's full-service brake and track brake less than 1 second after Ms. Flood stepped from the sidewalk onto the crossing. Compare Pa165, ¶79 with Pa765, ¶79; Pa327 at Table 1, Pa351 at Table 2; Pa579:1-12; Pa1152 at 16:33:30 to 16:33:35. Ms. Flood did not attempt to move out of the path of the

train prior to the impact, despite the horn, bells, and presence of the train. Pa222-235, 281-319; PaPa1152 at 16:33:30 to 16:33:35.[6] The collision then occurred at 16:33:35 as Ms. Flood was present in the middle of the gauge of Track 1 on the right of way. Compare Pa154, ¶17 with Pa762, ¶17; Pa222-235, 281-319; Pa1152 at 16:33:30 to 16:33:35.

The train was travelling approximately 11 to 12 mph at the moment of impact with Ms. Flood. Pa351 (Defendants' expert concluded, "[t]he speed at the point of impact was calculated to be approximately 12.1 mph."); Pa585:9-14 (Plaintiff's expert concluded the speed of the light rail train at the time of impact was "11 miles an hour, 11.1 miles per hour").[7] It took approximately 5 to 6 seconds for the train to stop after Mr. Bishop applied the brakes. Compare Pa162, ¶64 with Pa 764, ¶64. The train stopped approximately 4 seconds after the impact with the head end just before the entrance to the Exchange Place station. Compare Pa162, ¶63 with Pa 764, ¶63. Mr. Bishop did not exceed 25 mph as Train 81 travelled down the last block from Grand Street to the point of

[6] Plaintiff disputed this fact (Pa764, ¶61) in her opposition papers without providing any basis for the dispute, and the video indisputably shows that Ms. Flood never attempted to move from the path of the oncoming train prior to the impact.

[7] Plaintiff disputed this fact in her opposition papers (Pa764, ¶62) without providing any basis for the dispute, and her expert agrees with the fact.

impact at the York Street Crossing. Pa346 at Figure 28; Pa585:11-19.[8]

Plaintiff does not dispute that Ms. Flood was not permitted to enter the crossing when she did under the circumstances present. T8:4-9:1; Compare Pa163, ¶73 with Pa765, ¶73; Pa361 at ¶9; Pa582:20-23.

[8] Plaintiff disputed this fact in her opposition papers (Pa764, ¶55) without providing any basis for the dispute, and her expert agrees with the fact.

LEGAL ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DECISION BELOW BECAUSE IT IS UNDENIABLE THAT PLAINTIFF'S DECEDENT VIOLATED N.J.S.A. 48:12-152 AND PLAINTIFF'S CLAIMS ARE THEREFORE BARRED AS A MATTER OF LAW.

The trial court was correct when it determined that Plaintiff's claims are barred as a matter of law by N.J.S.A. 48:12-152, the railroad immunity statute, because it is undeniable that Plaintiff's decedent, Shannon Flood, lost her life due to contact with HBLR Train 81 that occurred because she impermissibly entered onto NJT's railroad crossing and right of way and used the crossing in a manner in which it was not intended to be used, which is conduct prohibited by the statute. The statute acts as a complete bar to all claims for injuries or death caused by contact with a train while the person was wrongfully present on "the right of way of any railroad" or "using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations", regardless of whether the railroad may also have been negligent.[9] N.J.S.A. 48:12-152(b)(4) and (5). Id.

The record below establishes that a rational jury could only conclude that Shannon Flood was wrongfully present on NJT's right of way and using

[9] The only exception to the statute is that it does not apply to bar claims arising out of injury or death to a minor. N.J.S.A. 48:12-152(c).

its railroad crossing in a manner in which it was not intended to be used when she contacted Train 81 because at the time she stepped onto the crossing:

- Train 81 had the proceed signal and the right of way to enter and pass through the crossing; T8:4-9:1;
- the pedestrian signal was indicating that she was not permitted to enter the crossing, and she did not have the right of way; Ibid.;
- another HBLR train travelling in the opposite direction on Track 2 had just left the Exchange Place station and was blocking her path across the crossing; Compare Pa163, ¶71 with Pa764, ¶71; Pa214-256; Pa257-299; Pa342-343; Pa1152 at 16:33:28 to 16:33:35; Da51 at 4:33:10 to 4:33:14 (video from security camera).

Likewise, there is no dispute that the collision occurred on NJT's right of way and on the crossing, which are owned by NJT. Pa178 at ¶¶1-2; Pa189 at ¶¶1-2; Pa500; Pa674:7-23; Da33-34, ¶¶1-5, Da39-40, ¶¶6-9. Therefore, the Court was correct when it determined that Plaintiff is barred from recovering under N.J.S.A. 48:12-152 because her injuries were caused by her misuse of NJT's "railroad property", and summary judgment was properly granted dismissing all of plaintiff's claims with prejudice as a matter of law.

Plaintiff argues in her appeal that the immunity statute cannot bar her claims because she was not using "the property of any railroad" at the time of

the collision as that phrase is meant in subsection (b)(5) of the statute. Plaintiff argues that the meaning of "railroad property" cannot include NJT's "railroad right of way" or a railroad crossing. Instead, Plaintiff argues that the "railroad property" referred to in subsection (b)(5) can only include "railroad real estate or real property." Pb22. Therefore, Plaintiff argues the trial court was incorrect when it determined that Plaintiff's claims are barred by the statute because Ms. Flood cannot be said to have used "railroad property" in a manner in which it was not intended to be used at the time of the collision.

Plaintiff also argues that the statute was not intended to apply at railroad crossings, relying on ancient caselaw and the prior version of the statute before it was amended by the Legislature in 1998. Therefore, she argues that this Court should find that the statute cannot apply to the case at bar. Pb at Point IV.

Last, Plaintiff argues that even if she is incorrect and she was using "railroad property" for the purposes of subsection (b)(5), then there is a genuine dispute of material fact as to whether Ms. Flood was using the property "in a manner in which it was not intended to be used or in violation of posted regulations." Pb33-34. Therefore, she argues that the trial court improperly granted summary judgment.

As will be shown below, Plaintiff is incorrect. The trial court properly interpreted the statute, granted summary judgment, and dismissed Plaintiff's claims with prejudice because it is clear that a rational jury could only conclude that Shannon Flood collided with HBLR Train 81 due to her misuse of NJT's crossing and right of way, which were "railroad property" for the purposes of N.J.S.A. 48:12-152(b)(5). Therefore, Respondents respectfully submit that this Court should affirm the decision below.

A. THE PLAIN LANGUAGE OF N.J.S.A. 48:12-152 AND ITS LEGISLATIVE HISTORY SHOWS THAT IT BARS RECOVERY OF DAMAGES CAUSED BY CONTACT WITH A TRAIN WHILE THE PERSON WAS WRONGFULLY PRESENT ON A RAILROAD RIGHT OF WAY, INCLUDING AT A CROSSING ESTABLISED BY A RAILROAD.

N.J.S.A. 48:12-152 was adopted in 1869 and has been amended by the Legislature several times since its enactment. Id.; Da46 (Funes ex rel. Estate of Martinez v. Norfolk S. Corp., No. A-5348-10T1, 2012 WL 4069543, at *3 (App. Div. 2012)). The statute applies to all railroad companies operating in New Jersey. Id. The statute was last amended by the Legislature in 1998. Ibid.

The current version of the statute that was in effect at the time of the accident provides as follows:

> a. **No person other than those connected with or employed upon the railroad who are acting within the scope of their employment shall enter upon the right of way of any railroad or come into contact with any equipment, machinery, wires or rolling stock of any railroad**. This section shall not prohibit a passenger for hire from utilizing those parts of

a railroad particularly intended for passenger use nor shall it prohibit a person from using a crossing established by the railroad.

b. **No person shall recover from the company owning or operating the railroad** or from any officer or employee of the railroad, **any damages for death or injury to person** or property as a result of contact with any equipment, machinery, wires or rolling stock of any railroad, **if death or injury occurred while that person was**:

(1) under the influence of alcohol as evidenced by a blood alcohol concentration of 0.10% or higher by weight of alcohol in the person's blood; or

(2) under the influence of drugs, other than drugs medically prescribed for use by that person and used in the manner prescribed; or

(3) engaging in conduct intended to result in personal bodily injury or death; or

(4) engaging in conduct proscribed by subsection a. of this section; or

(5) **using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations**.

In the absence of proof to the contrary, any person injured while attempting to board or disembark from a moving train shall be presumed to have used the property in a manner in which it was not intended to be used.

This subsection shall apply notwithstanding the provisions of P.L.1973, c. 146 (C.2A:15-5.1 et seq.).

c. This section shall not preclude recovery for injury or death of a person who was, at the time of the injury, less than 18 years of age.

N.J.S.A. 48:12-152 (emphasis added).

The plain language of the statute in its current version, shows that it bars recovery for damages when a person is injured or killed due to contact with a train that occurred while that person was engaged in prohibited conduct that is

defined by the statute. The statute does not use a "status" approach that bars claims only if the injured person at the time of the accident held the status of a "trespasser" in the traditional common law sense of the word. This conclusion is supported by a plain reading of words of the statute as well as the Appellate Division's thoughtful analysis in Funes ex rel. Estate of Martinez v. Norfolk S. Corp., No. A-5348-10T1, 2012 WL 4069543, at *3 (App. Div. 2012), an unpublished opinion interpreting the statute.

In Funes, the Appellate Division analyzed the history of the statute, including the significant changes to the statute that were made when it was amended in 1998, in order to determine whether it applied to foreign railroads operating in New Jersey. The Court explained as follows:

> **N.J.S.A. 48:12–152 was significantly amended in 1998 in response to a series of cases beginning with Renz v. Penn Cent. Corp., 87 N.J. 437 (1981), and culminating in Ocasio v. Amtrak, 299 N.J.Super. 139 (App.Div.1997)**. When the first railroad immunity statute became law in 1869, it merely codified the common law of New Jersey that a landowner owed no duty to a trespasser other than to refrain from willful and wanton conduct. *Egan, supra,* 29 *N.J.* at 250. One hundred years later in *Egan,* the plaintiffs contended that the statute had become an anachronism as courts had by then restricted the prior common law policy of a landowner's duty to trespassers in a variety of ways, leaving the statute "isolated" within our premises liability law. *Id.* at 251–52. The Supreme Court rejected the argument, holding that the Legislature had "solidified" the common law in effect at the time of the statute's enactment as it related to trespassers on the rights of way of railroads, and the evolution of the common law in the area provided no basis "to encroach upon a field where the Legislature has spoken." *Id.* at 252.

More than twenty years later in *Renz,* the Supreme Court read the statutory history differently. **The Renz Court concluded that the Legislature had intended to predicate the railroads' statutory immunity on the common law doctrine of contributory negligence and not trespass**. 87 *N.J.* at 448. Contributory negligence, however, had been abrogated in New Jersey by the Legislature in 1972 when it adopted the Comparative Negligence Act. *N.J.S.A.* 2A:15–5.1 to –5.17. In order to resolve the apparent conflict between the railroad immunity statute and the Comparative Negligence Act, the Court infused the doctrine of comparative negligence into the railroad immunity statute. *Renz, supra,* 87 *N.J.* at 459–60. Accordingly, after *Renz,* the railroads no longer enjoyed complete immunity from the claims of injured trespassers. Instead, they would be absolved of liability only if they could prove to a jury that the plaintiff's negligent contribution to his own injuries exceeded that of the railroad. *Id.* at 460–61.

We subsequently applied *Renz* in two cases against Conrail and Amtrak, holding in both that the railroads owed trespassers a duty of reasonable care under all surrounding circumstances. *Boyd v. Conrail,* 291 *N.J.Super.* 608, 618–19 (App.Div.1996); *Ocasio, supra,* 299 *N.J.Super.* at 150–51. **Following our opinion in *Ocasio*, the Legislature in 1998 comprehensively amended the railroad immunity statute, restoring to railroads the absolute immunity from the claims of trespassers they had enjoyed before *Renz*, except as to minors, including railroad officers and employees within the protections of the statute, extending the statute's definition of trespass, and expressly repudiating application of the Comparative Negligence Act to railroad trespassers.**

The point of this brief history is to illustrate the care that the Legislature took in crafting the statute in its current form. **Obviously aware of the extended discussion in *Renz* regarding the disparate opinions over many decades engendered by the Legislature's choice to include both "status" and "conduct" concepts in the 1869 and 1903 renditions of the statute, the Legislature in 1998 did as the *Renz* Court suggested it could and adopted an approach focusing solely on whether the plaintiff was unlawfully within the right of way.** 87 *N.J.* at 445 ("If the Legislature, in enacting the railroad immunity statute, had wanted to adopt an approach focusing upon the presence or absence of landowner duty, and to codify a rule of no duty to trespassers, it could very well have done

> so simply by relating the statute to the status of the plaintiff vis-a-vis the property of the railroad.").

Da48 (Funes, 2012 WL 4069543 at *5-6 (footnotes omitted) (emphasis added)).

In considering the plain language, as well as the Appellate Division's interpretation in Funes, the statute works as follows. Subsection (a) prohibits non-railroad employees from entering "upon the right of way of any railroad or com[ing] into contact with any equipment, machinery, wires or rolling stock of any railroad." However, this section does not "prohibit a passenger for hire from utilizing those parts of a railroad particularly intended for passenger use nor shall it prohibit a person from using a crossing established by the railroad." Next, subsection (b) bars a plaintiff from recovering from a railroad or its employees "any damages for death or injury to person or property as a result of contact with any equipment, machinery, wires or rolling stock of any railroad, if death or injury occurred while that person was . . . (4) engaging in conduct proscribed by subsection a. of this section; or (5) using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations." Ibid.

Next, the phrase, "the property of a railroad" or "railroad property", which is how the parties have sometimes referred to it here and in the record below, is not defined by the statute. Plaintiff admits that NJT at least owns a right of way at the location where the incident occurred. However, Plaintiff

argues that "railroad property" under (b)(5) "[r]efers to railroad real estate or real property" and that it does not include NJT's "railroad right of way". Pb3, 22.

Plaintiff does not provide any authority for this conclusion as to how railroad property must be defined. Instead, Plaintiff cites to ancient case law interpreting the statute long before it was substantially amended by the Legislature in 1998 as proof that the phrase "the property of a railroad" cannot include a "railroad right of way". Plaintiff's argument is that the phrase "railroad right of way" cannot be included in the meaning of "the property of any railroad", because prior to the 1998 amendments, the immunity statute was never interpreted to apply to claims involving collisions that occurred at railroad crossings. Pb18-19. However, Plaintiff ignores the Legislative history as well the specific language that was changed by the 1998 amendments, which nullify this argument.

Before it was amended in 1998, *N.J.S.A.* 48:12-152 read as follows:

> It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway.
>
> Any person injured by an engine or car while walking, standing or playing on a railroad or by jumping on or off a car while in motion shall be deemed to have contributed to the injury sustained and shall not recover therefor any damages from the company owning or operating the railroad. **This section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing**.

Potter v. Charles V. Finch & Sons, 76 N.J. 499, 502 (1978) (quoting N.J.S.A. 48:12-152) (emphasis added).

As noted above, the statute was amended in 1998 by the Legislature. The June 3, 1996, Assembly Committee Statement explains that "New Jersey Transit estimates that since 1981 over 300 trespasser cases have resulted in approximately $24 million in actual and projected claim payouts by the corporation." Pa1024. The December 1, 1997, Senate Transportation Committee Statement further explains, that the purpose for the amendment was to bar recovery based on prohibited behavior:

> This bill would amend R.S.48:12-152 **to clarify the law concerning prohibited behavior with regard to railroad property and the ability to recover for injuries sustained as a result of that behavior**. **It is the sponsor's intent that the provisions of this bill affect recovery when a person engages in prohibited behavior** and not when a person is injured only because of a railroad's negligent or reckless action.
>
> The bill provides that no person other than one connected with or employed upon the railroad acting within the scope of their employment may enter upon the right of way of any railroad or to come in contact with any equipment, machinery, wires or rolling stock of any railroad. However, these provisions would not prohibit a passenger for hire from utilizing those parts of the railroad particularly intended for passenger use nor shall it prohibit a person from using a crossing established by the railroad.
>
> **The bill also provides that a person shall not recover for injuries sustained while coming into contact with any equipment, machinery, wires or rolling stock of any railroad while that person was**:
>
> . . .

> (4) engaging in conduct proscribed by subsection a. of section 1of this bill; or
>
> **(5) using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations**.

Pa1027 (emphasis added).

In sum, the Legislature created the 1998 amendments to reverse the continuing judicial abrogation of the immunity statute, with the intent of specifically including NJT in its protections as well as all other railroads operating in New Jersey. In doing so, it specifically modified the statute so that it bars recovery when a person engaged in prohibited conduct, regardless of where the conduct occurs. Moreover, the legislature removed the sentence stating, "[t]his section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing", replaced it with, "[t]his section shall not . . . prohibit a person from using a crossing established by the railroad" and added a new subsection (b), which bars recovery of any damages caused by contact with a train while the person was "(5) **using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations**." Pa1024-1029; Potter, 76 N.J. at 502; N.J.S.A. 48:12-152 (current version).

Although N.J.S.A. 48:12-152 does not define the phrase "the property of any railroad" contained in section (b)(5), N.J.S.A. 48:13-17.2 defines "right of way" and "easement" as follows:

> (b) "right of way" means the area devoted to passing over, on, through or under lands with utility plant facilities as part of a way for such purpose;
>
> (c) "easement" or "easement rights" means privileges essential or appurtenant to the enjoyment of a right of way.

Ibid. Next, unless "otherwise expressly provided or there is something in the subject or context repugnant to such construction" N.J.S.A. 1:1-2 defines "personal property", "property", "other property", "real estate", and "real property", when used in any statute and in the Revised Statutes, as follows:

> Other property. See "Property; other property," infra, this section.
>
> Personal property. "Personal property" includes goods and chattels, rights and credits, moneys and effects, evidences of debt, choses in action and all written instruments by which any right to, interest in, or lien or encumbrance upon, property or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, in whole or in part, and everything except real property as herein defined which may be the subject of ownership.
>
> Property; other property. The words "property" and "other property," unless restricted or limited by the context to either real or personal property, includes both real and personal property.
>
> Real estate; real property. The words "real estate" and "real property," include lands, tenements and hereditaments and all rights thereto and interests therein.

Ibid.

In Tewksbury Twp. v. Jersey Cent. Power & Light Co., 159 N.J. Super. 44, 47 (App. Div. 1978), aff'd sub nom. Twp. of Tewksbury v. Jersey Cent. Power & Light Co., 79 N.J. 398, 400 A.2d 60 (1979), the Appellate Division reviewed whether easements for the purpose of constructing and maintaining overhead power lines held by Jersey Central Power & Light Company, a public electrical utility, were taxable as real property under N.J.S.A. 54:30A-50 by the municipality where the easements were located. A majority of the panel in the Appellate Division found that the easements were easements "in gross", which the Court concluded meant they were "nonpossessory and personal to respondents who do not own lands appurtenant to them." In turn, the majority found that while such easements are considered real property as defined by N.J.S.A. 1:1-2, they are not considered real property under N.J.S.A. 54:30A-50 and therefore not taxable by the local municipality under the tax statute.

Judge Larner dissented, and the matter was appealed to our Supreme Court. Our Supreme Court reversed the Appellate Division's judgment "substantially for the reasons expressed in the dissenting opinion of Judge Larner. . . ." Twp. of Tewksbury v. Jersey Cent. Power & Light Co., 79 N.J. 398, 399 (1979)

Judge Larner began his analysis with an explanation of proper statutory interpretation:

> It is elementary that in the area of construction of statutes, particularly those having to do with taxation or exemption therefrom, our sole guidepost is the legislative intent. We can have no concern, short of constitutional considerations, with the wisdom or policy of a taxing statute. We agree with the view expressed in the N.J. Power & Light Co. case, supra, that the best approach to the meaning of a tax statute is to give to the words used by the Legislature "their generally accepted meaning, unless another or different meaning is expressly indicated."

Id. at 55.

After determining that the statute in question "places utilities in the same position as private owners of interests in land, "he proceeded to consider the question whether easements of the type held by the utilities herein would normally be assessable and taxable to an individual or private corporation, an issue not reached by the majority." Id. Ultimately, Judge Larner concluded that the easement in question was taxable by the local municipality because it was taxable as "real property" because it was "a substantial interest in land". Id. at 60.

Importantly, in reaching his decision, Judge Larner explained the following:

> I recognize that the easements herein are not appurtenant to other lands owned by the grantees and that they are therefore within the common law category of easements in gross. **Nevertheless, the absence of a dominant tenement to which the easement may be appurtenant does not detract from its character as a substantial interest in land, so as to come within the compass of "lands" under the applicable statute**. As a comment to the Restatement of Property s 454 (1944) points out:

> b. Easement in gross as real or personal property. Depending on its period of duration, an easement in gross may be, as an interest in land, either real property or a chattel real. Thus, if it is to endure indefinitely or for a period measured by the life of a human being, it is real property. If its duration is measured by a definite period or periods of time, it is a chattel real.

Id. at 57-58 (emphasis added).

Judge Larner's reasoning and holding, which was adopted by our Supreme Court, ultimately shows that NJT's "right of way" is both "property" and "real property" for the purposes of N.J.S.A. 48:12-152. Therefore, NJT's right of way must be considered "the property of any railroad" as the phrase is meant by N.J.S.A. 48:12-152(b)(5). In turn, because it is undeniable that Ms. Flood collided with Train 81 while she was misusing NJT's right of way, Judge D'Elia was correct in concluding that Plaintiff's claims are barred by N.J.S.A. 48:12-152 as a matter of law.

B. IT IS UNDISPUTED THAT NJT OWNS THE CROSSING IN QUESTION.

Although Judge D'Elia did not base his decision on a finding of fact that NJT actually owns the railroad crossing in question in addition to owning the right of way, it is undisputed that NJT owns the physical crossing that Shannon Flood was attempting to use at the time of the collision. NJT owns and controls the entire HBLR system, including the stations, signals, right of way, the train tracks, track bed, and the pedestrian crossing where the collision occurred as

well as the train involved in the collision. Pa178 at ¶¶1-2; Pa189 at ¶¶1-2; Pa500; Pa674:7-23; Da33-34, ¶¶1-5, Da39-40, ¶¶6-9. The entire system -- including the tracks, track bed, signals, warnings, protections, stations, crossings, and traffic control devices where the collision occurred -- was designed and constructed by NJT's contractors, with NJT's approval. Pa479-480; Pa579:20-580:11; Pa626:24-268:11. Plaintiff did not dispute any of these facts in the record below. Ibid.

Likewise, in its cross motion for summary judgment Defendant Jersey City confirmed that NJT owns and controls the crossing where the incident occurred, and that Jersey City does not. Da33-34, ¶¶1-5. Jersey City's Director of Traffic Engineering, Division of Traffic Engineering, Department of Infrastructure for the City of Jersey City certified that, "[t]he crossing, the tracks, and track beds, within the NJT Light Rail System in the City of Jersey City are owned maintained and controlled by NJT, including the crossing, tracks at the crossing of York Street and Hudson Street as well as the track bed on Hudson Street." Da39-40, ¶¶1 and 9. Plaintiff did not dispute these facts or oppose Jersey City's cross motion, and the court adopted the unopposed factual and legal arguments made by Jersey City in granting the motion. T5:9-6:10.

Therefore, even if NJT's right of way is not considered "property" or "real property" such that it is included in the meaning of "the property of any railroad" under N.J.S.A. 48:12-152(b)(5), the physical crossing itself, and all of the components that make up the crossing, must be included in that meaning and there is no dispute that NJT owns all of this property. In turn, because it is undisputed that Ms. Flood was not permitted to enter the crossing when she did and she then collided with Train 81 while wrongfully present on the crossing, Plaintiff's claims must be barred by N.J.S.A. 48:12-152.

C. IT IS UNDENIABLE THAT PLAINTIFF'S DECEDENT MISUSED THE RIGHT OF WAY AND RAILROAD CROSSING AS A MATTER OF LAW.

It is axiomatic that the railroad right of way and crossing in question was not intended to be used by pedestrians when a train is either imminently approaching or already present on it. Compare Pa155, ¶24 with Pa762, ¶24. Likewise, there is no dispute that pedestrians are not permitted to enter the crossing against the pedestrian signal. Compare Pa155, ¶23 with Pa762, ¶23. Additionally, there is no genuine dispute as to what occurred in the moments prior to the collision, as the accident was recorded on multiple cameras present on the head end of the train and at the station located just north of the crossing. Pa1152, Da51. All of the evidence establishes that it is an inescapable conclusion

that Ms. Flood used the right of way and crossing in a manner in which it was not intended to be used.

The undisputed facts material to this issue establish the following. About 7 seconds before the collision, Mr. Bishop sounded the horn as the front of the train was just finishing crossing over Grand Street, which is one block prior to the crossing. Pb7; Pa1152 at 16:35:28/29 on the head end video. When Mr. Bishop sounded the horn at this time, Ms. Flood was walking forward (north) on the sidewalk adjacent to the right of way where Track 1 is located.

Approximately 5 seconds before the collision (16:33:30 on the head end video), the train was travelling approximately 24.5 mph and Ms. Flood was still walking forward (north) on the sidewalk adjacent to the right of way where Track 1 is located. Compare Pa160, ¶56 with Pa764, ¶56. About 2 to 2.5 seconds before the collision, Ms. Flood changed directions and began to walk towards the pedestrian railroad crossing that was to her left. Pa1152 at 16:35:28/29 on the head end video; Pa521 (Plaintiffs' expert's analysis of the video evidence: "16:33:33 – Ms. Flood turns toward the crossing to cross over the tracks . . . 16:33:35 – LRV strikes Ms. Flood."[10]

Approximately 2 seconds before the collision, Ms. Flood stepped onto

[10] Plaintiff disputed this fact (Pa764, ¶57) in her opposition papers without providing any basis for the dispute, and her expert agrees with the fact.

the railroad crossing in front of the oncoming train, which was imminently about to enter the crossing. Pa1152 at 16:33:33; Pa222-235, 281-319.[11]

Prior to entering the crossing, Ms. Flood never looked to see if a train was coming on Track 1. Compare Pa162, ¶67 with Pa764, ¶67; Pa257-299 (stills from the head end camera); Pa582:14-19; Pa1152 at 16:33:28 to 16:33:35. Moreover, At the time Ms. Flood stepped onto the crossing:

- Train 81 had the proceed signal and the right of way to enter and pass through the crossing; T8:4-9:1;
- the pedestrian signal was indicating that she was not permitted to enter the crossing, and she did not have the right of way; Ibid.;
- the traffic light for vehicles on York Street was red, indicating that they could not enter the crossing, and a car was stopped at the traffic light on the same side of the crossing as her; Compare Pa162, ¶¶69 and 70 with Pa764, ¶¶69 and 70; Pa257-299; Pa344, 349, 354, 361 at ¶9, and 362 at ¶13; Pa679:16-683:5; and Pa1152 at 16:33:28 to 16:33:35; and
- another HBLR train travelling in the opposite direction on Track 2 had just left the Exchange Place station and was blocking her path across the crossing; Compare Pa163, ¶71 with Pa764, ¶71; Pa214-256; Pa257-299;

[11] Plaintiff disputed this fact (Pa764, ¶58) in her opposition papers without providing any basis for the dispute, and the video and stills clearly show the moment Ms. Flood stepped onto the crossing.

Pa342-343; Pa1152 at 16:33:28 to 16:33:35; Da51 at 4:33:10 to 4:33:14 (video from security camera).

Mr. Bishop sounded the horn and bell and applied the train's full-service brake and track brake less than 1 second after Ms. Flood stepped from the sidewalk onto the crossing. Compare Pa165, ¶79 with Pa765, ¶79; Pa327 at Table 1, Pa351 at Table 2; Pa579:1-12; Pa1152 at 16:33:30 to 16:33:35. Ms. Flood did not attempt to move out of the path of the train prior to the impact, despite the horn, bells, and presence of the train. Pa222-235, 281-319; PaPa1152 at 16:33:30 to 16:33:35.[12] The collision then occurred at 16:33:35 as Ms. Flood was present in the middle of the gauge of Track 1 on the right of way. Compare Pa154, ¶17 with Pa762, ¶17; Pa222-235, 281-319; Pa1152 at 16:33:30 to 16:33:35.

Ultimately, Plaintiff does not dispute that Ms. Flood was not permitted to enter the crossing when she did under the circumstances present. T8:4-9:1; Compare Pa163, ¶73 with Pa765, ¶73; Pa361 at ¶9; Pa582:20-23. No rational jury could disagree. Likewise, a rational jury could only find that Ms. Flood used the crossing and right of way in a manner in which it was not intended to

[12] Plaintiff disputed this fact (Pa764, ¶61) in her opposition papers without providing any basis for the dispute, and the video indisputably shows that Ms. Flood never attempted to move from the path of the oncoming train prior to the impact.

be used in violation of N.J.S.A. 48:12-152 based on the undisputed facts. Therefore, the trial court was correct when it granted summary judgment and dismissed Plaintiff's claims with prejudice because N.J.S.A. 48:12-152 bars the claims as a matter of law. As such, Respondents respectfully submit that this Court should affirm the judgment below.

CONCLUSION

For all the reasons stated above, Respondents respectfully submit that this Court should affirm the judgment of the trial court because there are no genuine issues of the material facts and N.J.S.A. 48:12-152 bars Plaintiff's claims as a matter of law.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Docket No.: A-001882-23T4

Devon Collins, Administratrix of the Estate of Shannon Flood; Devon Collins, Guardian Ad Litem for Shea Lulla, an infant, Plaintiff, v. New Jersey Transit; New Jersey Transit Rail Operations, Inc.; The Hudson-Bergen Light Rail; The State of New Jersey; The City of Jersey City; 21st Century Rail Corporation; AECOM Technology Corporation; Washington Group International; URS Corporation; URS Corporation Washington Division; Itochu Corporation; Kinkisharyo International LLC, Alexander Bishop, Defendants.	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY OF NEW JERSEY, LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L-134-21 Sat Below: HONORABLE ANTHONY V. D'ELIA, J.S.C.

DEFENDANTS-RESPONDENTS BRIEF IN RESPONSE TO BRIEF OF AMICUS CURIAE, NEW JERSEY ASSOCIATION FOR JUSTICE

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Date Submitted: October 3, 2024

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LEGAL ARGUMENT

I. THE PLAIN LANGUAGE OF N.J.S.A. 48:12-152 AND ITS LEGISLATIVE HISTORY SHOWS THAT IT CAN APPLY AT RAILROAD CROSSINGS.

The Railroad defendants incorporate and rely on their arguments submitted in their Brief filed July 28, 2024, to respond to the arguments made by Amicus Curiae, New Jersey Association for Justice ("NJAJ"), related to the applicability of N.J.S.A. 48:12-152 at railroad crossings.

In summary, and as set forth fully in Respondent's Brief at Point I.A., a plain reading of the text of the statute as it currently stands shows that it applies at railroad crossings. Specifically, the language of subsection (b)(5), expressly requires that a plaintiff shall not recover damages due to injury or death caused by contact with a train if the death occurred while the person was "using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations." N.J.S.A. 48:12-152(b)(5).

Moreover, the legislative history for the 1998 amendments, the substance of the changes made by the 1998 amendments, and the Appellate Division's interpretation of the statute in the unpublished decision in Funes ex rel. Estate of Martinez v. Norfolk S. Corp., No. A-5348-10T1, 2012 WL 4069543, at *3 (App. Div. 2012), all show that the legislature intended the statute to apply at crossings following the 1998 amendments. Rb24-31. The 1998 amendments were created to

reverse the continuing judicial abrogation of the immunity statute, with the intent of specifically including NJT in its protections as well as all other railroads operating in New Jersey. Pa1027. In doing so, the Legislature specifically modified the statute so that it bars recovery when a person engaged in prohibited conduct, regardless of where the conduct occurs.

Moreover, the legislature removed the sentence present in the prior version that stated, "[t]his section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing", replaced it with, "[t]his section shall not . . . prohibit a person from using a crossing established by the railroad" and then added a new subsection (b), which bars recovery of any damages caused by contact with a train while the person was "(5) using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations." Pa1024-1029; Potter v. Charles V. Finch & Sons, 76 N.J. 499, 502 (1978) (quoting N.J.S.A. 48:12-152); N.J.S.A. 48:12-152 (current version). This shows that the legislative intent for the statute, in addition to its plain language, is that it will bar claims for damages arising out of the blatant misuse of a crossing, such as walking onto it without first looking, while the pedestrian signals prohibit entry onto it, and while an oncoming train, is openly, obviously, and imminently about to enter it.

It should also be noted that if NJAJ's position is accepted, this would led to absurd results. For example, if NJAJ is correct, then the statute would not apply to

bar recovery of damages when a person is injured or killed because they collided with a train after driving around a lowered railroad gate and entering a crossing in disregard of flashing red lights and an obviously approaching train. Notably, the conduct in this example would constitute a violation of N.J.S.A. 39:4-127.1 and would mean the person was unlawfully present on the crossing at the time of the collision. The legislature could not have intended damages to be recovered given this type of conduct, yet if NJAJ's position is correct, then this would be the result.

Moreover, if NJAJ's position is correct, then Plaintiff can recover in this matter because Ms. Flood walked from the sidewalk onto the edge of the crossing, but Plaintiff could not recover if Ms. Flood instead walked from the sidewalk and onto the pavement just outside the limits of the crossing, which was just two to three feet further north and adjacent to the crossing. See Pa257-299 and 543-550 for context. This begs the question of why the Legislature would permit recovery under the one example, but not the other, when there is no meaningful distinction, and that fact is that Ms. Flood should not have walked onto either area at the time because a train was coming and had the right of way. In short, NJAJ's interpretation of the statute would lead to absurd results and it should therefore be rejected.

II. NJAJ MISTATES THE DUTY OF A TRAIN OPERATOR.

In further support of its argument on the appropriate statutory interpretation for the immunity statute, NJAJ argues that contributory negligence should not apply because the duty of a train operator is " 'to use reasonable care to so operate the train as it approaches a grade crossing with due regard to its right of way, as to protect travelers' extended '[e]ven as to those who in disregard of due care may attempt to cross the tracks in the face of an oncoming train or to one whose vehicle may be stalled or stopped on the tracks[.]' " NJb8. This is not a correct statement of the law. Therefore, the argument should be disregarded.

The operator of a train does not owe a duty to stop a train at a crossing merely because of the "possible danger of a collision." Jelinek v. Sotak, 9 N.J. 19 (1952). Instead, the duty to attempt to stop a train prior to a crossing does not arise until after it "should become apparent that the traveler in disregard of due care or the railroad's right of way ***will or is attempting to cross the crossing before the train so that a collision will probably result***." Id. at 22-23 (emphasis added).

In Jelinek, a delivery truck drove onto a railroad crossing without yielding to an oncoming train and was struck. Id. at 22. At the trial, the court gave a jury instruction that was taken from the language of the opinion in Taylor v. Lehigh Valley R.R. Co., 87 N.J.L. 673, 675 (E. & A. 1915) stating:

> Well, it was the duty of the engineer to make reasonable and proper efforts, in view of the circumstances, to foresee and avoid collision, including the

> duty, if he saw that there was *possible* danger of collision, to exercise reasonable care and diligence to avoid it, by stopping his engine.

Jelenik, 9 N.J. at 22. (quoting *Taylor*, 87 N.J.L. at 675 (emphasis in the original).

On appeal, our Supreme Court "deem[ed] such a charge clear and prejudicial error" because "[a]s phrased, it places an undue burden on a railroad company, one it is not required to bear, to stop its engine if there is a *possible* danger of collision." Id. (emphasis added). The Supreme Court explained that the source of the error was the trial court's failure to appreciate that the facts of Taylor involved allegations that "the engineer in the exercise of diligence and reasonable care could have seen that the plaintiff's automobile was stalled on the crossing, in time and at such a distance so as to have stopped the train before colliding with it" while the facts of Jelenik involved a truck that simply failed to yield to an approaching train. Id.

Our Supreme Court then explained the general duty of an engineer approaching a crossing as follows:

> The engineer can rightfully assume that travelers in the exercise of due care with due regard to the railroad's right of way, will not attempt to cross the tracks. But if in the exercise of reasonable diligence it should become apparent that the traveler in disregard of due care or the railroad's right of way ***will or is attempting to cross the crossing before the train so that a collision will probably result***, ***then from that point on the engineer must with all reasonable care and diligence attempt to stop the train***. If he does so then there is no negligence.
>
> Id. (citation omitted) (emphasis added).

Going further, our Supreme Court explained:

> We do not subscribe to the view that the use of the words '***possible danger of collision***' in the Taylor opinion when read in proper context gives rise to the imputation that the railroad must with reasonable care and diligence attempt to stop its train ***merely because there is a bare possibility of collision*** because such a view disregards the reciprocal rights and duties of the railroad and the traveler at the crossing. The duty of reasonable care and diligence is founded on the probabilities of a given situation, not on mere possibilities.

Id. (quoting *Taylor*, 87 N.J.L. at 675) (emphasis added).

The rule explained in Jelenik -- that an engineer does not owe a duty to slow or stop a train until after it is apparent that a person, in disregard of the train's right of way, is present on, or will enter onto, the railroad tracks -- was most recently cited with approval by our Appellate Division in Lopez v. New Jersey Transit, 295 N.J. Super. 196 (App. Div. 1996). In Lopez, a 14-year-old boy was struck by a train after he went onto the right of way. *Id.* at 199-200. The engineer of the train was aware that trespassers could sometimes be present on the tracks in the area where the collision ultimately occurred. Id. However, he was not aware that anyone was actually present on the tracks as he approached the location of the collision because he could not see that area until after the train completed the curve just before it. Id. After coming out of the curve, the engineer saw the boy on the tracks and then immediately tried to stop the train. Unfortunately, the train could not stop in time to avoid the collision. Id.

After determining that the train tracks in question could not constitute a

dangerous condition under N.J.S.A. 59:4-2, the Appellate Division also considered whether summary judgment was properly granted in favor of the NJT's engineer because he was not under a duty to slow the train or attempt to stop it prior to the time that he did. Id. at 204-205. The plaintiff argued that the engineer's knowledge that trespassers could have been on the tracks in the area of the collision obligated him to slow the train so it could stop prior to the area in cases a person was actually present. Id. The Appellate Division rejected this conclusion and affirmed the trial court's entry of summary judgment in favor of the engineer, explaining that the rule from Jelinek applied:

> As Jelinek, supra, noted, "[t]he duty of reasonable care and diligence is founded on the probabilities of a given situation, not on mere possibilities." *Jelinek*, *supra*, 9 N.J. at 24, 86 A.2d 684. The Schreiber /Pashman concurrence in Eden requires, like Jelinek, that there be at least some activity which an alert engineer could observe which would have given "reason to be aware of a trespasser's presence...." 87 N.J. at 479, 435 A.2d 556. That kind of activity was not present here. *At most, the engineer knew that trespassing occurred occasionally in the area and that there was a slight possibility that on rounding the curve he might see a trespasser in peril*. ***We have discovered no case which would require in such circumstances either a reduction of speed or the sounding of a warning whistle simply because someone might be on the tracks***.
>
> Lopez, 295 N.J.Super. at 205.

Ultimately, as set forth in the Railroad defendants statement of facts, it is undisputed that Mr. Bishop sounded the horn and bell and applied the train's full - service brake and track brake less than 1 second after Ms. Flood stepped from the sidewalk onto the crossing. Compare Pa165, ¶79 with Pa765, ¶79; Pa327 at Table

1, Pa351 at Table 2; Pa579:1-12; Pa1152 at 16:33:30 to 16:33:35. There was no indication that she was going to walk onto the tracks in disregard of the signal and the oncoming train prior to 2.5 seconds before the collision and Mr. Bishop reacted immediately to stop the train just 1 second later. Pa1152 at 16:33:33; Pa222 -235, 281-319. Therefore, NJAJ's argument that the immunity act should not apply because Mr. Bishop had a duty to attempt stop his train sooner than he did because he should have anticipated that Ms. Flood might go onto the crossing should be disregarded.

CONCLUSION

For all the reasons stated above, Respondents respectfully submit that this Court should affirm the judgment of the trial court because there are no genuine issues of the material facts and N.J.S.A. 48:12-152 bars Plaintiff's claims as a matter of law.

Respectfully submitted,

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DEVON COLLINS, ADMINISTRATRIX OF THE ESTATE OF SHANNON FLOOD; DEVON COLLINS, GUARDIAN AD LITEM FOR SHEA LULLA, AN INFANT, Plaintiff, v. NEW JERSEY TRANSIT; NEW JERSEY TRANSIT RAIL OPERATIONS, INC.; THE HUDSON-BERGEN LIGHT RAIL; THE STATE OF NEW JERSEY; THE CITY OF JERSEY CITY; 21ST CENTURY RAIL CORPORATION; AECOM TECHNOLOGY CORPORATION; WASHINGTON GROUP INTERNATIONAL; URS CORPORATION; URS CORPORATION WASHINGTON DIVISION; ITOCHU CORPORATION; KINKISHARYO INTERNATIONAL LLC; AND ALEXANDER BISHOP, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-1882-23T4 **CIVIL ACTION** On Appeal from the Final Order of the Superior Court of New Jersey, Hudson County, Law Division, Docket No. HUD-L-134-21 Sat Below: Hon. Anthony V. D'Elia, J.S.C. **Stark & Stark,** **A Professional Corporation** Mailing Address: P.O. Box 5315, Princeton, NJ 08543 Office Location: 100 American Metro Blvd., Hamilton, NJ 08619 Telephone: (609) 896-9060 **Attorneys for Amicus Curiae,** **New Jersey Association for Justice**

BRIEF OF AMICUS CURIAE, NEW JERSEY ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF'S APPEAL

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PRELIMINARY STATEMENT

New Jersey's Railroad Immunity Act, N.J.S.A. 48:12-152, was never intended to immunize a railroad for a pedestrian fatality at a crossing its operator likely could have avoided, merely because the Do Not Cross signal might have been active. The text and purpose of the Act, as first enacted in 1869 and as amended in 1998, has always been to immunize railroads from the claims of trespassers. The trial court's interpretation, where in a lit sign's flicker commuters are somehow morphed into trespassers or suicidal-persons unlawfully-within-the-crosswalk barred from recovery, represents a harsh expansion of the immunities afforded by the Act. The subsection at issue, N.J.S.A. 48:12-152(b)(5) (hereafter, (b)(5)), bars recovery for "using the property of any railroad in a manner in which it was not intended to be used or in violation of posted regulations[,]" providing the specific example of "attempting to board or disembark from a moving train[.]" As will be explained, the text, history, and purpose of the Act reflect that its conception of "property" never included the nebulous idea of the crossing itself (where in actuality the Act's prohibitions do not attach) or this type of conduct.

Historically, contributory negligence has not attached to unindicated crossings where a jury could draw the legitimate inference a railroad operator breached their duty to avoid a collision. Here, with sufficient time and distance to brake to avoid the ultimate collision, the operator blew his horn. This is an act reserved for

emergency or to prevent an accident. Yet, he did not apply the brake for an additional six or seven seconds. In fact, he accelerated. Defendants and the trial court have fixated on a red herring – it is not a matter of his reaction time to Ms. Flood actually stepping into the crossing, a jury could conclude it was unreasonable to have let the tragedy even unfold to that point.

The New Jersey Association for Justice (NJAJ) is a voluntary bar association dedicated to the pursuit of equal justice for all. NJAJ seeks to intervene here as amicus curiae out of concern for the safety of the people of the State of New Jersey and their ability to seek redress for civil wrongs. This tragedy is never one the Legislature intended to be cruelly governed by the contributory negligence standard. Crossing when not indicated, something thousands of New Jersey commuters must absentmindedly or foolishly do each day, is not the sort of culpable conduct like being suicidal, trespassing, or disembarking from a moving train that would warrant an absolute bar to recovery. As the trial court's interpretation of the Railroad Immunity Act conflicts with its the text, history, and purpose, this Court should reverse the Order of February 14, 2024 and remand the matter for trial. A jury, not judge, must determine if Ms. Flood's stepping back into the crossing is more negligent than the operator accelerating toward the point of impact rather than braking.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The New Jersey Association for Justice does not dispute plaintiff's recitation of the procedural history and factual background of this matter and incorporates same here by reference.

LEGAL ARGUMENT

The trial court's application of the Railroad Immunity Act to bar plaintiff's claims is flawed on multiple levels. First, a review of the text of the Act demonstrates that (b)(5) is a reconstruction of language from the original statute clearly concerning tangible railroad property. Second, looking historically, contributory negligence has not attached in credible "failure to avoid" cases. Third, looking at the intent and purpose of the Act's 1998 amendment, it was never intended to expand the immunities afforded to railroads in this broad fashion. The Legislature (and reviewing courts) acknowledge the Act is concerned with immunity against the claims of trespassers. There is simply no basis, in the text or outside it, justifying the trial court's expansive reading of (b)(5).

POINT I : SUBSECTION (b)(5) IS CONCERNED WITH AFFIRMATIVE MISUSE OF TANGIBLE RAILROAD PROPERTY

The trial court presumed without analysis that "property" as used in in N.J.S.A. 48:12-152(b)(5) applied to the railroad's crossing. It does not. While the term "property" can refer to both personal and real property, the term must be "restricted or limited by the context" in which it is found. See Db32 (quoting N.J.S.A. 1:1-2). Here, a comparison of the current and former text of the Act demonstrates that "property" was not intended to include the railroad crossing itself.[1]

[1] The crossing is also not New Jersey Transit Corporation's (NJT) property. NJT publishes an active list of the real property it owns on its webpage. See https://www.njtransit.com/real-property-owned-nj-transit. It does not purport to own the subject location.

Prior to the Act's 1998 amendment, the Act provided that:

> It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway. Any person injured by an engine or car while walking, standing or playing on a railroad or by jumping on or off a car while in motion shall be deemed to have contributed to the injury sustained and shall not recover therefor any damages from the company owning or operating the railroad. This section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing.
>
> [See Renz v. Penn Cent. Corp., 87 N.J. 437, 440 (1981) (quoting 1903, L. 1903, c. 257, § 55).]

The 1998 amendment to the Act split this single paragraph into two parts, Subsections (a) and (b), and added a third subsection, (c), excluding minors from its reach. A review of the adopted Substitute Assembly Bill No. 1788, which contains essentially a "redline" of the edited Act, reveals that the first and third sentence of the original became Subsection (a).

Subsection (b), which we will focus on, was partly formed out of the original's second sentence. Like the original, N.J.S.A. 48:12-152(b)(5) (hereafter, (b)(4)), bars recovery for trespass, phrased as "the conduct prohibited by Subsection (a), i.e., coming into the railroad's right of way or into contact with the railroad's "equipment, machinery, wires or rolling stock" not at a crossing or not intended for passenger use.

For Subsection (b)(5), the obvious intent was to maintain the immunity against the claims of "[a]ny person injured by an engine or car while walking,

standing or playing on a railroad or by jumping on or off a car while in motion" from the prior version of the Act. Without Subsection (b)(5), railroads may face liability for that always impermissible conduct because of the newly added language within Subsection (a) permitting a passenger for hire to utilize parts of the railroad intended for passenger use. Compare N.J.S.A. 48:12-152 (1937); with N.J.S.A. 48:12-152 (1998). "Property" within Subsection (b)(5) is intended to refer to the list contained in Subsection (a) and repeated in Subsection (b): "equipment, machinery, wires or rolling stock of any railroad." N.J.S.A. 48:12-152 (1998). This is the "property" that may be misused, for which the Legislature intended to immunize the railroads even if that property were intended for passenger use. The statute's language supports this more limited interpretation, where the Legislature has even copied over one of the original examples of misuse: "jumping on or off a car while in motion[,]" now "attempting to board or disembark from a moving train[.]" N.J.S.A. 48:12-152 (1937); and (b)(5) (1998).

If property included the crossing itself, there would be no actual need for Subsection (b)(5) at all. Subsection (a) provides only one exception to its prohibition on entering a railroad's right of way or making contact with enumerated railroad property – "using a crossing established by the railroad[.]" N.J.S.A. 48:12-152(a). A claimant misusing the crosswalk area at the time they were struck, by doing a gymnastics routine for example, would not be "using a crossing" in any meaningful

sense. Ibid. Thus, the claimant would have engaged in conduct prohibited by Subsection (a) and therefore barred from recovery by Subsection (b)(4). Interpretation of Subsection (b) that limits Subsection (b)(5) to misuse of tangible railroad property gives the provision purpose, comporting with the axiom "that courts 'must avoid an interpretation that renders words in a statute surplusage.'" Johnson & Johnson v. Director, Div. of Taxation, 244 N.J. 413, 422 (2020) (quoting Shelton v. Restaurant.com, Inc., 214 N.J. 419, 440 (2013)).

Last, interpreting (b)(5) to expand the immunities of the Act in this vague manner contradicts the manner in the Legislature's other 1998 amendments to the Act. It included three new immunities, barring recovery for injury resulting from (b)(1) (alcohol intoxication); (b)(2) (drug intoxication); and (b)(3) (intended self-harm). Clearly where the Legislature intended to expand the Act, it did so by express enumeration. If the Legislature wanted to limit the crossing exception or expand the concept of misuse, it could and would have done so expressly. As our Supreme Court has noted in this very context, we should not "encroach upon a field where the Legislature has spoken." Egan v. Erie R.R. Co., 29 N.J. 243, 247-48 (1959). This is particularly true when since the Act's inception, contributory negligence has not attached where a railroad operator failed to avoid a collision.

POINT II : CONTRIBUTORY NEGLIGENCE HAS NEVER BEEN A BAR WHERE IT IS CREDIBLY ALLEGED THE RAILROAD OPERATOR COULD HAVE AVOIDED THE COLLISION

Interpretation of (b)(5) to bar recovery here is not only at odds with the Act's language, but also decades of railroad case law. Neither the Act's immunities nor contributory negligence generally have attached in circumstances where it is credibly alleged an operator is liable for their failure to avoid the imminent collision.

Our Supreme Court extensively outlined the confine of an operator's duty in Jelinek v. Sotak, 9 N.J. 19, 22-24 (1952), boundaries the instant circumstances fall well-within. In Jelinek, the Court recognized a railroad's duty "to use reasonable care to so operate the train as it approaches a grade crossing with due regard to its right of way, as to protect travelers" extended "[e]ven as to those who in disregard of due care may attempt to cross the tracks in the face of an oncoming train or to one whose vehicle may be stalled or stopped on the tracks[.]" Id. at 23.

In support of this position, the Court cited to Webb v. W. Jersey and Seashore R.R. Co., 100 N.J.L. 204 (1924), an earlier decision evidencing the traditional leeway shown toward a pedestrian at a crossing. There, the plaintiff was struck when she drove her car onto a railroad crossing out of the belief the train she saw nearby was stationary rather than, as it was, continually in motion toward her, bells ringing, with two brakemen hollering at her to stop. Id. at 205. As opposed to the draconian bar applied by the trial court to Ms. Flood's crossing, our Court was willing to

indulge all manner of factual questions to avoid outright barring the plaintiff's recovery. Id. at 207. For example, the Court held it was for a jury to determine, among other questions,

> whether [the plaintiff] was careless in not appreciating that the ringing of the bell was an indication that the train was backing down towards the crossing, or in failing to understand that the brakeman in hollowing while standing on the rear of the train were attempting to warn her of approaching danger.
>
> [Ibid.]

Historically, these indulgences were not just applied to those using the crossing perfectly as intended, but to others as well. For example, in Hendrickson v. W. Jersey and Seashore R.R. Co., 102 N.J.L. 310, 312 (1926), the plaintiff's claims were not barred despite the fact he was using the railroad crossing to perform a U-Turn in his vehicle rather than to make his way across the tracks. The Court rejected the railroad's argument the plaintiff was not entitled to protections on this basis, holding the railroad owed him the same duty it owed to any other highway traveler at the crossing. Id. at 312-13.

Looking beyond the Act's text to its historical context, there is simply no basis to expansively read (b)(5) to provide an immunity never before conferred upon railroads. As NJAJ will conclude in Point III, neither the Legislature's own words or judicial interpretation of the Act's 1998 amendment reflect any intention to expand the Act's immunities.

POINT III : THE LEGISLATURE DID NOT INTEND FOR THE 1998 AMENDMENTS TO EXPAND THE ACT'S IMMUNITY AGAINST CROSSING FATALITIES

The legislative history of the 1998 amendments to the Railroad Immunity Act does not evidence any intent to expand the Act's immunity against crossing fatalities. Briefly, as there is no need to even reach this stage of statutory interpretation given the clear textual language and historical context, the New Jersey Assembly Transportation and Communications Committee's June 3, 1996 Statement in support of then-pending Assembly Bill No. 1788 clearly states the Legislature's intent: "This amended bill would clarify the Legislature's intent that the provisions of [N.J.S.A.] 48:12-152 would control in railroad-related injuries sustained by a trespasser; that is, there remains an absolute bar to recovery for these injuries despite the adoption of the comparative negligence doctrine in New Jersey." (Pa1024).

None of the Assembly Committee or Senate Committee statements contains any sort of indication the Legislature intended to water down the Act's crossing exception, or expand the concept of property, or misuse of property. This Court certainly identified nothing of the sort in Funes v. Norfolk S. Corp, A-5348-10, 2012 N.J. Super. Unpub. LEXIS 2134 (App. Div. Sept. 18, 2012) (Da59), where it conducted an exhaustive review of the 1998 amendments. Rather, as summarized by this Court, the amendments simply "restor[ed] to railroads the absolute immunity from the claims of trespassers they had enjoyed before Renz, except as to minors,

including railroad officers and employees within the protections of the statute, extending the statute's definition of trespass, and expressly repudiating application of the Comparative Negligence Act to railroad trespassers." Id. at *19; (Da63).

To be clear, that "expanded definition of trespass" does not in any way sweep in Ms. Flood's conduct. Where, [t]he statute previously applied only to those persons injured by 'an engine or car' while walking, standing or playing on a railroad[, t]he amended statute applies to anyone 'com[ing] into contact with any equipment, machinery, wires or rolling stock of any railroad.'" Id. at *19, n.6. As case in point that the Legislature's amendments were carefully crafted, and their boundaries respected, its inclusion of "wires" in its list of railroad property is an abrogation of the 1960's holding in Jasiczek v. Pa. R.R., 90 N.J. Super. 380, 383-84 (App. Div. 1967), where a plaintiff escaped the immunities because his injury was caused by contact with overhead power lines rather than an "engine or car," the limited language of the earlier Act.

In amending the Act in this fashion, the Legislature demonstrated jurisprudential awareness sufficient to act when Renz and subsequent decisions over-encroached. Further, the amendments evince legislative knowhow sufficient to craft amendments that targeted decades-old decisions (while promoting modern sensibilities, such as adding Subsection (c), excluding minors, to limit its abrogation of Jasiczek). Against this backdrop, our courts should respect that if our Legislature

wished to strike a new balance for circumstances like in Webb or Hendrickson by way of amendment to the Act, it was more than capable. It simply did not.

Neither the text, nor historical context, nor legislative purpose of the Railroad Immunity Act warrants an interpretation of (b)(5) that bars recovery for a crossing fatality the operator could likely have avoided entirely. That it not how the Act, nor contributory negligence, have been applied in the past. This Court should ensure that is not how they are applied moving forward, for the safety and security of the New Jersey public.

CONCLUSION

For the foregoing reasons, the New Jersey Association for Justice respectfully requests the Court reverse summary judgment and remand the matter for trial.

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