2012 IL App (2d) 111168-U
No. 2-11-1168
Order filed March 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MONICA FUSTON, as Parent and next Friend of JACOB FUSTON, a Minor, Plaintiff-Appellant, v. FIRST STUDENT INC. and KATHY ROHDE, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 10-L-479 Honorable Raymond J. McKoski, David M. Hall, Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

Held: (1) Section 2-619 motion to dismiss did not require supporting affidavit where affirmative matter was apparent on the face of the pleading attacked; (2) injury to student who was hit by car as he walked to school instead of riding school bus because of alleged prior bullying that occurred on bus was not foreseeable; injuries were caused by subsequent, independent acts; thus, trial court did not err in dismissing negligence claims against bus company and bus driver.

¶ 1 Plaintiff, Monica Fuston, appeals from the trial court's order granting the motion to dismiss of defendants, First Student Inc. and Kathy Rohde. We affirm.

¶ 2 On September 17, 2009, Jacob Fuston, Monica's son, was struck by a car and severely injured as he walked to school. Monica filed a series of complaints in the trial court against various defendants that culminated in her fourth amended complaint, which alleged two counts of negligence against First Student, the school bus company that provided student transport for students in the Diamond Lake School District 76 (District) (count I) and Rohde, a bus driver employed by First Student (count II). Monica alleged that, pursuant to the contract between First Student and the District, First Student was required to: (1) follow the District's instructions regarding the behavior of students; (2) establish procedures to maintain school bus safety; (3) discipline student riders of the bus as necessary to operate the bus and protect the safety of the students; and (4) immediately report in writing to the school principal each incident of student misconduct occurring on the busses, including bullying. Prior to September 17, 2009, Jacob had been a victim of repeated bullying by other students as he rode the First Student school bus, driven by Rohde, to West Oak Middle School. As a result of the bullying, Jacob stopped riding the bus and began walking to and from school each day. At about 6:50 a.m on September 17, he was struck by a vehicle and injured while walking to school on the north shoulder of Route 60/83.[1] Monica alleged that defendants failed to enforce bus safety procedures; failed to prevent the hazing, bullying, harassment, and intimidation of Jacob; and failed to notify school administrators and Jacob's parents of the bullying.

¶ 3 Defendants filed a motion to dismiss the fourth-amended complaint pursuant to section 2-619 (a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619 (a)(9) (West 2010)), arguing that Monica

[1]The driver of that vehicle, Samuel Perez, was dismissed from the case with prejudice pursuant to a settlement.

failed to allege a duty of care owed by defendants and proximate cause. After a hearing, the trial court dismissed the fourth-amended complaint with prejudice, and this appeal followed.

¶ 4 Monica first contends that the trial court erred in granting the defendants' section 2-619 motion to dismiss because the motion was not supported by affidavits. A section 2-619 motion allows for the disposition of questions of law and easily proved issues of fact at the outset of the case. *Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289, 296 (1997). Such a motion admits the legal sufficiency of the complaint along with all well-pleaded facts and reasonable inferences drawn from those facts; it assumes that a cause of action has been pleaded but asserts that the claim is defeated by some other affirmative matter. *Johannesen v. Eddins*, 2011 IL App (2d) 110108, ¶ 28. Where the claimed grounds for dismissal do not appear on the face of the pleadings, section 2-619(a) requires that the motion be supported by affidavit. 735 ILCS 5/2-619(a) (West 2010); *Doe*, 287 Ill. App. 3d at 1088. A section 2-619 motion to dismiss should be granted if, after construing the motion in the light most favorable to the nonmovant, the court finds that no set of facts can be proved that would entitle the plaintiff to recover. *Doe*, 287 Ill. App. 3d at 297. On review, this court conducts an independent review of the propriety of dismissing the complaint. *Id*.

¶ 5 Monica argues that defendants did not argue below that the grounds for dismissal appeared on the face of the fourth-amended complaint. Thus, according to Monica, defendants were then required to support their motion to dismiss with an affidavit, which they failed to do, and their motion to dismiss should have been denied for that failure. We disagree. Monica fails to cite any statutory or case law for such a requirement. Our supreme court has acknowledged that some affirmative matter "has been considered to be apparent on the face of the pleading." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). Affirmative matter that defeats a claim must

be supported by affidavit *unless* it is apparent on the face of the pleading attacked. *Chandler v. Illinois Central Railroad Co.*, 207 Ill. 2d 331, 340 (2003). We can find no error in the mere absence of an affidavit here.

¶ 6 We now turn to the merits of the appeal. Monica's fourth amended complaint raised two claims of negligence. To prevail on a negligence claim, a plaintiff must set out sufficient facts to establish that: (1) the defendants owed him a duty; (2) they breached that duty; and (3) the breach proximately caused the plaintiff's injuries. *Kohn v. Laidlaw Transit, Inc.*, 347 Ill. App. 3d 746, 754 (2004). A plaintiff may not merely allege a duty; she must also allege facts from which the law will raise a duty and specific facts showing an omission of that duty and resulting injury. *Id.*

¶ 7 Further, if the negligence charged does nothing more than furnish a condition by which the injury was made possible, and the condition causes an injury by the subsequent, independent act of a third party, the creation of the condition is not the proximate cause of the injury. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257 (1999). The test in such a situation is whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party's own negligence. *Id.* at 257. While proximate cause is ordinarily a question of fact for the jury, it becomes a question of law where there can be no difference in the judgment of reasonable men on the inferences to be drawn. *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶ 25.

¶ 8 Assuming, *arguendo*, that Monica has alleged that defendants owed a duty to Jacob[2],we conclude that the conduct of neither First Student nor Rohde was the proximate cause of Jacob's, and, thus, her, injuries; therefore, the trial court did not err in granting dismissal. We find instructive our supreme court's decision in *First Springfield Bank & Trust*. In that case, a driver illegally parked his truck on a street (Lawrence Avenue) on which parking was prohibited at that time, 41 feet from a marked crosswalk. The decedent, May Phillippart, was a pedestrian attempting to cross Lawrence Avenue. However, Phillippart did not cross at the crosswalk; instead, she walked the length of the illegally parked truck and attempted to cross at mid-block from in front of the truck. She was struck by a car as she crossed the street and eventually died of her injuries. *First Springfield Bank & Trust*, 188 Ill. 2d at 254-55. A jury returned a general verdict against, among others, the owner (ADM) and the driver (Dobson) of the illegally parked truck. The trial court subsequently denied the motion of ADM and Dobson for judgment notwithstanding the verdict.

¶ 9 On appeal, our supreme court agreed with ADM and Dobson that the trial court erred in denying their motion. According to the court, the relevant question was:

> "whether it was reasonably foreseeable that violating a 'no parking' sign at mid-block would likely result in a pedestrian's ignoring a marked crosswalk at the corner, walking to mid-block, and attempting to cross a designated truck route blindly and in clear violation of the law. Clearly, it would not. May Phillippart's decision to jaywalk, while undeniably tragic and regrettable, was entirely of her own making. Dobson and ADM neither caused

[2]Monica argues that defendants owed a duty to Jacob on three bases: (1) under the contract between First Student and Diamond Lake School District 76; (2) pursuant to statute; and (3) under the common law.

Phillippart to make that decision, nor reasonably could have anticipated that decision as a likely consequence of their conduct. One simply does not follow the other." *Id.* at 261.

Thus, the court found that the illegally parked truck was not a proximate cause of Phillippart's injuries and that the motion for judgment notwithstanding the verdict should have been granted. *Id.* at 262.

¶ 10 Here, the alleged failures to provide a safe environment on the bus and to report incidents of bullying created a condition by which Jacob's injury was made possible; however, Jacob's injuries were caused by the subsequent, independent acts of Jacob walking to school on the shoulder of Route 60/83 and of Samuel Perez, who struck Jacob with his vehicle. The relevant question is: was it reasonably foreseeable that failing to address alleged bullying on the school bus would likely result in Jacob being struck by a vehicle while he walked to school unattended? We conclude that neither First Student nor Rohde could reasonably have anticipated this outcome as a natural and probable result of the failure to prevent or report the bullying of Jacob on the bus.

¶ 11 Citing to section 29-3 of the School Code (105 ILCS 5/29-3 (West 2008)), Monica argues that defendants could reasonably foresee that Jacob "would be struck by a car as he walked to school." According to Monica, Illinois "recognizes that a student walking to school * * * encounters a 'serious safety hazard due to vehicular traffic or rail crossings.' 105 ILCS 5/29-3 (West 2008)." However, while we are sensitive to the serious injuries encountered here, this quotation is taken out of context, and it tests our credulity to argue recovery based upon a reasonable foreseeability established by the quotation. Section 29-3 makes no such generalized finding or recognition regarding serious safety hazards of walking to school. On the contrary, "adequate transportation for the public" is "assumed to exist for such pupils as can reach school *by walking*, one way, *along*

normally traveled roads or streets less than 1½ miles irrespective of the distance the pupil is transported by public transportation." (Emphasis added.) 105 ILCS 5/29-3 (West 2008). If "walking * * * along normally traveled roads or streets" is part of the definition of "adequate transportation for the public," it cannot simultaneously be inherently a "serious safety hazard due to vehicular traffic or rail crossings." We also cannot conclude that the legislature would require students pursuing their educations to traverse a "serious safety hazard each day merely because they live less than 1½ miles from school. Monica quotes language used in discussing specific exceptions to the general statutory provisions regarding school transportation. Specific procedures for a determination that a "serious safety hazard" exists involve the school board, the Illinois Department of Transportation, and the State Superintendent of Education. See 105 ILCS 5/29-3 (West 2008). There is no general recognition that walking to school involves serious safety hazards, and Monica's argument to the contrary is not well-taken.

¶ 12 In addition to the reasonable foreseeability of an injury, this court must also consider the magnitude of the burden of guarding against an injury and the consequences of placing that burden on the defendant. See *O'Hara v. Holy Cross Hospital*, 137 Ill. 2d 332, 339-40 (1990). Here, the injury sought to be prevented is a student getting hit by a car while walking to school. Monica seeks to impose the burden of preventing this injury onto the bus company and driver who allegedly failed to prevent the student from being bullied while on the bus and, consequently, leading the student to forsake bus transportation in favor of walking. However, such a burden cannot be logically placed on these defendants. While a school bus driver is responsible for the safety of the bus riders while the riders are on the bus, the driver cannot be held responsible for the actions and the safety of students that, for whatever reason, choose not to ride the bus at any given time. If a driver is to carry

such a burden, the driver must know exactly which of the potential student riders is present on the bus each trip and, for those not present, the reason for their absences. How else could a driver be held responsible for injuries suffered by students who are potentially, but not actually, present on the bus? We will not impose an attendance policy, complete with parental notification of excused absences, on school transportation.

¶ 13 For these reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 14 Affirmed.