

Herring v Wariner

2007 NY Slip Op 33980(U)

December 4, 2007

Supreme Court, Suffolk County

Docket Number: 0028885/2003

Judge: Peter Fox Cohalan

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INDEX #: 28885/03
 RETURN DATE: 3/14/07
 MOT. SEQ.: 002 & 003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

ISHELLA HERRING, an infant under the age of
 eighteen years, by her parents and natural
 guardians JAMES HERRING and MATTIE
 HERRING and JAMES HERRING and MATTIE
 HERRING, individually,

Plaintiffs,

-against-

DANIEL JAMES WARINER, NY SOUTH
 MISSIONARY and THE FULL GOSPEL
 ASSEMBLY OF GOD IN EAST NORTHPORT,

Defendants.

CALENDAR DATE: August 22, 2007
 MNEMONIC: 002 - MD
 003 - XMG

PLTF'S/PET'S ATTORNEY:

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Upon the following papers numbered 1 to 39 read on this motion and cross motions for summary judgment
1-10; Notice of Motion/ Order to Show Cause and supporting papers 11-20; Answering Affidavits and
 supporting papers 21-28; Replying Affidavits and supporting papers 29-30; 31-37; Other 38-39; and
 after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion (002), by the defendants Daniel James Wariner and NY
 South Missionary pursuant to CPLR 3212 for summary judgment dismissing the complaint and all
 cross-claims against them, is denied; and it is further

ORDERED that this cross-motion (003) by the defendant The Full Gospel Assembly
 of God in East Northport (hereinafter FGA), pursuant to CPLR 3211 and 3212 for summary
 judgment is granted and the complaint of this action and all cross-claims are dismissed against it.

This is an action to recover damages for personal injuries allegedly sustained within
 the meaning of Insurance Law §5102 by the infant plaintiff, Ishella Herring, on July 3, 2002, while
 she was crossing the street in front of her home located at 123 West 10th Street, Huntington
 Station, County of Suffolk, State of New York (hereinafter 10th St.). It is alleged that the vehicle
 which struck the infant child was owned by defendant NY South Missionary (hereinafter NYSM)

and operated by Daniel James Wariner (hereinafter Wariner). It is further alleged that the infant plaintiff was lured to the bus by various employees and agents of the FGA who had come to her house to check on her. The complaint asserts a cause of action sounding in negligence as against the defendants and a derivative claim by the child's mother and father.

The defendants Wariner and NYSM seek summary judgment dismissing the complaint and all cross-claims on the basis they have no liability for the happening of the accident in that they claim the child darted out from the front of a church bus into the roadway and pathway of the NYSM vehicle. They further assert that Wariner was driving his vehicle past the bus when the infant plaintiff made contact with the passenger side of the vehicle. Thus, they argue, this accident occurred solely because the pedestrian-plaintiff ran into the side of the defendant's vehicle, not in front of it.

The defendant FGA seeks an order dismissing the complaint pursuant to CPLR 3211, but has failed to set forth the applicable section of the statute upon which it seeks relief. Therefore, this motion will be considered for summary judgment pursuant to CPLR 3212. The defendant FGA argues it bears no liability for the happening of the accident and that it was not the responsibility of FGA, or anyone affiliated with it, to escort the infant plaintiff across the street or to warn her of the dangers in crossing the street. FGA further argues that even if such a duty was found by this Court, it was not a substantial factor or proximate cause of the accident. FGA further asserts that the proximate cause of this accident was the action of the infant plaintiff and the co-defendant operator of the vehicle which struck her.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center**, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (**Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (002), the defendants NYSM and Wariner have submitted, *inter alia*, a copy of the summons and complaint and the verified answer of the co-defendant FGA; an uncertified copy of the MV 104 Police Accident Report; copies of the transcripts of the

examinations before trial (hereinafter EBT) of Mattie Herring, mother of the infant plaintiff, Wariner, and non-party witness David Ostrander; and several photographs.

In support of motion (003) the defendant FGA has submitted, *inter alia*, a copy of the amended summons and amended complaint and its verified answer; a copy of the plaintiffs' verified bill of particulars; and copies of the EBTs of non-party Henry A. Washington, Diddi Washington, and the infant plaintiff Ishella Herring.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (see, **Lacagnino v Gonzalez**, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; **Hegy v Coller**, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

It is noted that no party has submitted a copy of the answer of the defendants NYSM and Wariner. Therefore, it cannot be determined if a cross-claim has been asserted by NYSM and the defendant Wariner against the co-defendants. East Northport Gospel Church, shown as the Full Gospel Assembly of God in East Northport, has asserted a cross-claim against NYSM and the defendant Wariner.

The plaintiffs oppose both motions, submitting, *inter alia*, a copy of the witness statement of David A. Ostrander; a statement given by David A. Ostrander; a statement given by Wariner; and several photographs.

Mattie Herring, mother of Ishella Herring, testified at her EBT that she was inside her house when the accident occurred and did not see the accident happen. She described 10th Street, where the accident occurred, as a two way street with two travel lanes and parking on both sides of the street. There were street lights. She learned of the accident when the bus driver, Pastor Henry A. Washington, knocked on her door and told her her daughter, Ishella Herring, had an accident. Ishella Herring was thirteen years old at the time. Mattie Herring testified she had not spoken to the bus driver or anyone else prior to his visit. She had previously met him when he picked up her children to take them to church in East Northport. She did not belong to this church. She testified he came by to let her know he would pick up the children Friday or Saturday. When she went to her daughter after learning of the accident, she stated she found her on the ground being assisted by Diddi Washington. Her daughter was on the left side of the roadway about two to three feet from the bus which was parked on the side of the roadway, with no lights on. She saw the vehicle which struck her daughter parked across the street in front of her house on the side of the street.

Wariner testified he was a missionary for the Church of the Latter-Day Saints and provided phone contact or videos or pamphlets from the church by dropping them off and also went door to door to share the message. He was at this particular mission about a week, and was provided with a vehicle by the church the week of the accident. He was the operator of that vehicle on July 3, 2003 when he was involved in the accident with the infant plaintiff. Jameson Jewkes was a passenger in the vehicle at the time. The accident, Wariner stated, occurred around 9 p.m. It was dark out. His vehicle was heading west on 10th Street, and he made a U-turn of his vehicle behind the bus and was then heading east, intending to go home after dropping off videos to people who were interested in learning about the church. The bus, which he

described as a full-size yellow school bus with flashing yellow lights, was then to his vehicle's right parked on the side of the road as his vehicle was traveling in the eastbound lane. He stated his vehicle had enough room to get by on the road in its lane of travel. His vehicle traveled about a house length when the accident occurred in front of a commercial building. He stated he saw the plaintiff Ishella Herring before the accident, about two or three to five feet from where the accident occurred. She was running across the street from in front of the bus and was to the front and the right of his vehicle, running to the left into the roadway. The closest portion of his vehicle to her was the front right corner bumper. He stated his vehicle was two to three feet to the left of the bus in the eastbound lane of the road. He was approaching very close by, about three to five feet from the front of the bus, when he saw the plaintiff. The vehicle's headlights were on and it was traveling approximately fifteen to twenty miles an hour. He saw the plaintiff running. She was facing north. He testified she did not look toward him prior to the actual impact. He testified he swerved his vehicle to its left and hit its brakes hard. Half of his vehicle then crossed over into the other lane. He stated about a half second to a second passed from the time he first observed Ishella Herring until the impact occurred. He stated the passenger side of his vehicle side view mirror where the windshield meets the hood and the plaintiff's left side came into contact. He then lost sight of her and did not see her until he was getting out of his vehicle. After the impact, his stated his vehicle moved about eight to ten feet still facing east, at kind of a diagonal. He brought his vehicle to a stop on the north shoulder on the west side of the road. When he saw the plaintiff, she was on the ground sitting up by the side of the bus. Wariner also testified he had given a statement after the accident, and the only inaccuracy was that his vehicle hit her. He testified she ran into the side of his vehicle which was still moving because she did not have time to stop running

David Ostrander (hereinafter Ostrander), a non-party witness, testified he was a member of the FGA church and helped with the children's ministry by picking children up to take them to the program. He did not remember meeting the plaintiff prior to July 3, 2003. Pastor Henry A. Washington was driving the bus that evening. He stated they had driven to the infant plaintiff's house to check on her as they were not sure if they had dropped her off or where she was. He stated they learned she never went on the trip. It was dark out and he remembered the lights flashing on the bus. There was no stop or yield sign that came out from the side of the bus. They had pulled over to the side of the road facing in an easterly direction across the street from Ishella Herring's house. He described the roadway as running in an east/west direction. He did not think there was a full shoulder for the bus to park and thought the bus might have been slightly protruding into the street. He did not recall if Diddi Washington, the Pastor's wife, was on the bus, but he did later recall her getting off the bus. Ostrander stated he was sitting in the front seat behind the driver's seat of the church bus, a converted school bus, when the accident happened. Pastor Henry A. Washington had gotten off the bus to go to Ishella Herring's house. Ostrander testified he saw the children run out of the house towards the bus, and were in the road for a period of time, a few minutes. None of the children got on the bus. He thought they were saying hello to Diddi Washington. Ishella Herring was at one time behind the bus, in front of the bus, and then might have been out in the road. He also thought she was in front of the bus talking to Diddi Washington. Ostrander testified he was looking out into the street, with his body angled toward the street, when he saw the Wariner vehicle pull alongside the bus traveling in an easterly direction. He stated it happened so quickly. He thought the other vehicle was going a little too fast. He approximated the vehicle to be traveling at approximately twenty miles per hour just

seconds before the accident. He testified he only saw the other vehicle a split second when all of a sudden he saw Ishella Herring run out, sprint, and collide with the right corner panel, the right front passenger side of the vehicle. He testified that the other vehicle did not hit her head on and she never ran into the front of the vehicle. He thought she hit her hip on the vehicle; then he saw her flying through the air sort of gyrating and landing on the ground. He stated he heard the screeching of tires or brakes as soon as the other vehicle hit her, because the driver couldn't see her as she ran. Then he stated he didn't think the other vehicle skidded, but it slowed down very quickly and pulled over to the side of the road. He then stated that he was not exactly sure if he heard any screeching of tires or brakes. He did not know if the other vehicle slowed before the impact because he only saw it a brief second before. He thought the other vehicle traveled about ten feet from when he first saw it until the impact. He saw the infant plaintiff running out. He was not looking when she first started running so he did not know if she looked both ways prior to crossing the street. She had gone about two or three steps and moved a distance of about five feet before the impact. The right side of the vehicle and the left side of the bus were about four feet apart when the impact occurred. The front of the vehicle had slightly passed the front of the bus at the time of impact. He testified that just before the incident, he saw Diddi Washington sort of squatting in the front of the bus to talk to the infant plaintiff. He described Diddi Washington as tall, so she was kneeling to talk to the girl on her level. He also testified there may have been a brief moment between seeing that until he was looking at the accident. He stated the infant plaintiff just ran into the street.

Pastor Henry A. Washington testified he was the Pastor and only employee of the East Northport Gospel Church on July 3, 2003. Diddi Washington was his wife. He was running a weekly bus ministry on Sunday afternoon for about a year and a half before the incident. Ishella Herring was not a regular participant at his church, but she had come to vacation Bible school there. Because Ishella Herring did not attend the program the day of the accident, he stopped by to check with her mother and let her mother know about the rest of the week's events. On five or fewer prior occasions he would park on the same side of the street as the infant plaintiff's house to pick up or drop off the children. When he returned that evening, it was after he finished the bus route and they were done for the day. He had driven the bus down 11th street, turned right and parked in front of Ishella Herring's house on the opposite side of the street. He stated it was dusk, more light than dark. He also stated that at that time it was becoming dark within fifteen minutes. He described the bus as a yellow school bus with a big green stripe with the name of the church and its phone number written on it in black lettering on both sides of the main stripe at eye level on the side of the bus. He described the bus as being about forty feet long. He stated it had the standard reflectors and red, flashing offset lights. There was no stop sign that flips out as there is on a school bus, because, he stated, the law does not permit it. The flashing red lights were located on the upper back and upper front at the top of the vehicle. He testified he stopped the bus facing in an easterly direction. He pulled over as far out of the way as he possibly could off the road, left the headlights on and turned on the red four-way flashers. The bus engine was turned off. He testified that about two or three feet of the bus was blocking the travel lane. He described the street as having two travel lanes, one in each direction, with no line dividing the travel lanes. He described 10th street as partly residential and partly industrial, near the railroad tracks at the end of the street. He stated the road straightens out from a gradual curve just near Ishella Herring's house which is near the end of the street. He testified there is room for vehicles to park on either side of the road, but it is dirt, and there are no marked parking areas. When he

got off the bus, he left Ostrander and his wife Diddi Washington on it. He went to the Herring house and spoke for a couple of minutes. He testified that his wife was somewhere in the vicinity of the bus at the time of the accident, but he did not know if she was on the bus or just outside the bus. She or Ostrander came to him and told him to phone for an ambulance. He said his wife told him she saw the accident. He did not witness the accident, he stated, as he was at the house outside the door. He did witness one or two other children whom he believed were Ishella Herrings's sisters playing, but did not know if they were in the driveway or the street prior to the accident. They were not near the bus when he parked. The accident happened while he was talking to Ishella Herrings's mother about two to four minutes after he parked. Ishella Herring was initially there while he was talking to her mother, but then she left. He estimated the accident occurred about fifty feet from the front door of her house. When he first saw her after the accident, she was to the far side of the street, more to the southern side of the street, halfway between the center line and the far side of the street, about fifteen feet in front of the bus. He had no specific recollection of instructing or seeing anyone escorting a child to or from the bus at any time before the accident. He did not recollect telling Ishella Herring not to go to the bus, but if he thought any of the children were going to the bus, he would have discouraged it.

Diddi Washington testified that she thought the accident occurred in the daylight, but was told it was evening or twilight. She said her husband was driving the bus and went to check on the children at Ishella Herring's residence because the children didn't come to the program that day. She stated her husband pulled over to the side of the road and the flashers were on when he got off the bus. She did not know if he turned off the engine. She did not know if the headlights were on. She stated the bus was parked on the side of the road, but thought maybe part of it was protruding into the eastbound lane, but she was not sure. She said there were a couple of children from that family outside. She thought that she might have gone out of the bus to them, given them a hug and returned to the bus. Ishella Herring came over to the door of the bus. Diddi Washington thought she got off the bus and gave her a hug and talked to her. She stated Ishella Herring was not there long and then left. Diddi Washington was not sure if she heard a screech or heard something, and ran out of the bus. She testified she did not remember exactly how it all went. She stated she did not see the contact between Ishella Herring and the Wariner vehicle, and did not see the vehicle before it struck the infant plaintiff. When she first saw the vehicle, it was across the street and up the road a little, but she was unsure how far ahead. She thought it was maybe a few vehicle lengths away. She testified that they had specific people on the bus crew who escorted children on and off the bus, and she was not one of them. She did not know the policy for escorting children.

Ishella Herring testified her date of birth was August 9, 1990 and that she lives with her mother and father, and has an older brother and three younger siblings. She remembered the accident happening close to night. She had been inside her house playing, watching TV, when some people came knocking on her door. She said it was Diddi Washington from the church, her husband and two other men. She stated she knew Diddi Washington and her husband from the church. She talked to them and they went out to the bus, except for one man who stayed and was speaking with her brother and sister. Her mother was in the house when she went out to the bus which was parked across the street from her house. She described the bus as a yellow school bus but did not remember anything about it. She stated she crossed the street by herself when she went to the bus and was talking with Diddi Washington. The other two men had already gone

to the bus. She said Diddi Washington was telling her about a party, a picnic, they were going to have at the church or park. She stated she was standing on the first step of the bus and Diddi Washington was on the bus sitting down in the first seat on the right while they were talking. She said Diddi Washington's husband was in the driver's seat, just sitting there. There were no kids on the bus and no one was outside the bus. She got off the bus to go home. She stated she walked by the front of the bus, stopped and looked both ways, then ran out and a vehicle hit her. She said she saw nothing when she looked to her left and to her right. When asked why she ran across the street, she said she didn't know, she wasn't thinking. She stated she saw the vehicle that hit her going down the street before on another day, but not right before the accident happened. She testified she was running when she was hit by the middle of the front of the vehicle where the wheel was.

"N.Y. Veh. & Traf. Law §1146 requires every driver to exercise due care to avoid colliding with any pedestrian upon any roadway. While the term "due care" is not defined in the statute, the cases connote a standard of reasonableness under the circumstances. Due care is that care which is exercised by reasonably prudent drivers. It is not that degree of care which guarantees that a driver will avoid any accident no matter what the circumstances might be." (*In the Matter of Edward M. Russell v. Patrician B. Adduci, as Commissioner of the Department of Motor Vehicles of the State of New York*, 140 AD2d 844, 528 NYS2d 232 [3rd Dept 1988]). N.Y. Veh. & Traf. Law §1180(a) provides in pertinent part that "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." Drivers are under duty to maintain a reasonable safe rate of speed, have the automobile under reasonable control, and to use reasonable care under the circumstances to avoid an accident (*Oberman v Alexander's Rent a Car*, 56 AD2d 814, 392 NYS2d 662 [1st Dept 1977]). Whether the speed of a driver on a favored street was reasonable under the existing conditions is a question of fact for the jury (*Smart v Woznaik*, 58 AD2d 993, 397 NYS2d 489 [4th Dept 1977]). In the instant action, there are material factual issues which preclude summary judgment being granted to defendants Wariner and NYSM. The adduced, unrebutted testimony of defendant Wariner and non-party witness Ostrander establishes Wariner, in a residential area, was operating his vehicle at approximately twenty miles per hour within seconds before the accident. Wariner testified he had traveled past the stopped school bus, made a U-turn and traveled east, again almost passing the bus with the front end of his vehicle when the plaintiff child ran out from in front of the bus, impacting his vehicle. Wariner testified the flashing yellow lights were operating when his vehicle passed the bus in either direction. There are factual issues concerning whether Wariner exercised due care under the circumstances when passing the parked bus which had on its flashing lights, and whether he was driving too fast for the conditions. There are also factual issues concerning whether the child exercised reasonable care to protect herself from danger when she ran into the street, not seeing defendants' vehicle coming, hitting the side of defendants' vehicle (*Thorna v Ronai*, 189 AD2d 635, 592 NYS2d 333 [1st Dept 1993]).

Accordingly, motion (002) by the defendants Wariner and NYSM for summary judgment dismissing the complaint is denied.

“Proximate cause and foreseeability are relative terms, nothing more than a convenient formula for disposing of the case. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. So it is with proximate cause and foreseeability. The word ‘proximate’ means that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point” (**Ventricelli v Kinney System Rent A Car, Inc.**, 45 NY2d 950, 411 NYS2d 555 [1978]). In **Ventricelli**, the lessee was injured when she was struck by the automobile owner’s vehicle while trying to close the trunk lid of her leased vehicle while parked along side a curb. There was evidence that the trunk lid repeatedly flew open and that several attempts to repair the lid failed. The Court affirmed the judgment of the Appellate Court and held that the negligence of the lessor was not the proximate cause of the lessee’s injuries because it was not reasonably foreseeable that the lessee, while in a safe area attempting to close the defective trunk lid, would be struck by another automobile. The Court concluded that effective cause of the lessee’s injuries was solely the negligence of the automobile owner. Although proximate cause is generally a jury issue, liability cannot be imposed upon a party who merely furnished the condition or occasion for the occurrence of the event but was not one of its causes (**Wechter v Kelner**, 40 AD3d 747, 835 NYS2d 653 [2nd Dept 2007]). Here, the FGA has demonstrated prima facie entitlement to summary judgment on the issue of liability as it has presented testimony supporting the position that stopping and parking the bus on the side of the road merely furnished the condition or occasion for the accident, and was not the proximate cause of pedestrian plaintiff’s injuries. Plaintiffs have failed to raise a triable issue of fact and have failed to demonstrate that any conduct on the part of defendant FGA was one of the causes of the infant plaintiff being struck by the vehicle (**Shatz v Kutshers Country Club**, 247 AD2d 375, 668 NYS2d 643 [2nd Dept 1998]). Although the amended complaint sets forth that defendant FGA lured the plaintiff child to the bus, testimony does not demonstrate that the defendant FGA invited or encouraged the infant plaintiff to leave her home and go out to the church bus. In fact, Pastor Henry A. Washington said he would have discouraged the child from going out to the bus if he knew she was going. It is undisputed by all the testimony submitted that Ishella Herring left her home on her own, went outside and crossed the street to go to the bus. After a brief conversation with Diddi Washington, the infant plaintiff ran into the roadway from in front of the bus into the side of the defendant NYSM’s vehicle, operated by defendant Wariner. The plaintiffs have not demonstrated that any action by the defendant FGA was the proximate cause of the accident. Accordingly, this Court finds, as a matter of law, that the plaintiffs have demonstrated that the defendant FGA merely furnished the condition or occasion for the accident, but did not proximately cause the accident.

Accordingly, the motion (seq. 003) by the defendant Full Assembly of God Church in East Northport is granted and the complaint and cross-claims as against it are dismissed.

Dated: DEC 04 2007



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION