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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAUL HERZLICH, a MINOR, etc., Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITIAN TRANSPORTATION AUTHORITY, Defendant and Respondent.	**B184926** (Los Angeles County Super. Ct. No. LC069522)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard A. Adler, Judge. Affirmed.

Grassini & Wrinkle and Roland Wrinkle for Plaintiff and Appellant.

Ford, Walker, Haggerty & Behar, Joseph A. Heath; Greines, Martin, Stein & Richland, Martin Stein, Timothy Coates and Cynthia E. Tobisman for Defendant and Respondent.

Paul Herzlich was shot and seriously wounded as he waited for a bus near his high school. Prior to the shooting, as the crowd gathered at the bus stop became increasingly unruly, two buses passed without picking up passengers. Through his guardian ad litem, appellant sued the Los Angeles County Metropolitan Transportation Authority (respondent or MTA) for its alleged negligence in failing to board appellant. The appeal is from the judgment of dismissal following the sustaining without leave to amend of appellant's third amended complaint (TAC).

The question presented is whether the MTA can be liable if one of its bus drivers passes a bus stop with a growing crowd of students and a second bus driver passes the same stop at a time the crowd had become boisterous, leaving at the stop a student waiting to board the bus, and then that student is shot. We agree with the trial court that there is no legal duty to that passenger and for that and other reasons shall affirm the judgment (order of dismissal.)

PROCEDURAL HISTORY

The operative complaint

Following sustaining of the demurrer to the second amended complaint, appellant took the bus driver's deposition and added allegations resulting from that deposition. The relevant first cause of action in the TAC sets forth the following factual scenario:[1]

The MTA's buses and bus stop are used daily by students at the high school. On September 9, 2003, the MTA was notified that the students would be dismissed earlier than usual. Appellant went to the subject bus stop and waited for a bus to pick him up. At least one bus "negligently and carelessly refused to stop and pick up the waiting students . . . ."

With appellant stranded at the bus stop, a second bus pulled over and stopped in front of the bus stop with the intent to pick up the students waiting there, including appellant. With the first bus's failure to pick up any of the students, the crowd at the bus stop was then "over 50 and the crowd became frustrated and angry, its numbers swelling and its mood turning darker."

The second bus driver had "actual knowledge that the crowd, as the result of having been stranded by the first bus, had become boisterous, vituperative, rambunctious, loud, unruly, was shouting insults and was banging on the bus and had turned into a mob." The bus driver left them stranded notwithstanding his actual and constructive knowledge that if he left "without picking up any of

the stranded students, the mob would grow in number, would become more agitated, would yell more, would become more frustrated, would become physically combative, that the situation would thereby become dangerous and unsafe for the students in that such circumstances would likely cause, foster and promote assaults, violence and injuries to the students engendered by the escalating unruliness, vituperativeness, and provoking nature of the crowd . . . ." The second driver did not pick up any passengers, did nothing to prevent the further escalation of the "dangerous and provocative situation just described," and left "without contacting headquarters for instructions. He did not contact headquarters for instructions because defendant's communication equipment was dilapidated and non-functioning."

Soon after the second bus left, the "mob did in fact become more agitated, angry, frustrated, vituperative, loud, and boisterous and became combative, confrontational, violent, dangerous and prone to assaultive, outrageous, reckless and provoking behavior and . . . [appellant] and two others in the crowd were assaulted and shot as the direct, proximate and foreseeable result thereof." As the alleged result of respondent's acts and omissions, appellant suffered serious injuries.

The legal basis of the MTA's alleged liability is its status as a common carrier "owing to the general public a duty of utmost care and highest vigilance," which thus was "required to do all that human care, vigilance and foresight reasonably can do under the circumstances to avoid harm to the public they serve." The TAC relied on Civil Code section 2100 as the MTA's statutory liability: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."[2]

Demurrer to the TAC

The demurrer was made on the ground that the TAC "fails to state facts sufficient to constitute any cause of action" against respondent. The MTA argued that the allegations do not support a reasonable inference that the bus operator knew or should have known that an assault with a firearm was about to occur; that there was a "nexus between the alleged failure of the operator to pick up the waiting passengers and the resulting harm caused by the random acts of the third party drive by shooter," or that the random shooting was "anything more than an unforeseeable attack that occurred without warning." In addition, the shooting was not perpetrated by someone in the waiting crowd but by an individual driving by after the bus left the stop.[3] Moreover, the operator had no duty to such potential passengers and, if he did, his recognized

duty to known passengers on the bus should outweigh any duty to potential boarders in an unruly crowd. Furthermore, there is no duty to protect members of the general public, especially after they are no longer even potential passengers, so there was no duty to report the unruly crowd and his decision not to board the potential passengers does not give rise to liability.

Hearing and ruling

A hearing on the demurrer to the TAC was held May 27, 2005.[4] Appellant argued that the foreseeability of general harm to those waiting to board the bus was "clear" and that the failure to pick up the passengers "further escalated the nature of that crowd's behavior, and thus resulting in some sort of violent conduct." His counsel also stated there was no dispute that the shot "came from a vehicle" and not from the crowd, a fact he mistakenly thought was alleged in the TAC. Further, asked if counsel had any additional facts to add, counsel replied "Not at the present time."[5]

The court took the matter under submission. Four days later, the trial court issued a 23-page ruling sustaining the demurrer without leave to amend on the basis that the MTA did not "breach its duty to [appellant]." Acknowledging the high duty of a common carrier towards its passengers, the trial court nevertheless observed that "No California case has held a common carrier liable for a sudden assault which occurs with no warning. Such liablity would literally require an armed presence on every common carrier, which is precisely what *Lopez* [*v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780] decried." Analogizing to *Palsgraf v. Long Island R. Co.* (1928) 248 NY 339 [162 NE 99], regarding lack of foreseeability of the random shooting and California cases involving no liability for failure to provide adequate police protection or for police conduct allegedly inciting a mob by making an arrest, the court concluded "there is no logical reason why a public bus company should be held to a higher standard." In sum, the court found no duty to a person such as appellant, not yet a passenger.

Furthermore, the trial court found no duty supported by the balancing test set forth in *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676-679 (*Ann M.*), and *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1149-1150, for protecting appellant from criminal acts by a third party. The court observed "To require the bus driver to stop and pick up passengers under these conditions is to put the driver to a Hobson's choice of endangering the already boarded passengers by moving the angry mob inside

the bus or by leaving Plaintiff at the bus stop." The complaint was dismissed, and this appeal from the order and judgment follows.

CONTENTIONS ON APPEAL[6]

Appellant argues first that this case should not be decided on demurrer but should await a fleshing out of facts in a summary judgment motion. He also argues the MTA had a clear duty to appellant, who sufficiently pleaded causation and breach. If this court examines the issue of duty, appellant argues the TAC pleads sufficient facts to establish duty, foreseeability, and causation.

DISCUSSION

1. Standard of review.

The standard of review from orders of dismissal following the sustaining of demurrers is well established: "[A]n appellate court treats the demurrer as admitting all material facts properly pled and matters subject to judicial notice, but not deductions, contentions, or conclusions of law or fact. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal.Rptr.2d 709, 45 P.3d 1171].) We also read the complaint as a whole and its parts in context, giving it a reasonable interpretation. (*Ibid.*) When a demurrer is sustained, we determine if the complaint states facts sufficient to constitute a cause of action. When it is sustained without leave to amend, we decide if there is a reasonable possibility that the defect can be cured by amendment. If so, the trial court abused its discretion, and the judgment is reversed. The plaintiff bears the burden of proving the reasonable possibility of cure. (*Ibid.*)" (*Cadlo v. Owens-Illinois, Inc*. (2004) 125 Cal.App.4th 513, 519.) "An appellate court must affirm if the trial court's decision to sustain the demurrer was correct on any theory. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742 [].)" (*Kennedy v. Baxter Healthcare Corp*. (1996) 43 Cal.App.4th 799, 808; *accord Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1168.)

"On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.]" (*Montclair Parkowners Assn v. City of Montclair* (1999) 76 Cal.App.4th 784, 790; accord *McCall v. PacifiCare of Cal., Inc*. (2001) 25 Cal.4th 412, 415.)

2. *The MTA owed no duty to appellant.*

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M.*, *supra*, 6 Cal.4th 666, 673.)

A common carrier has a high duty of care towards its passengers. (Civ. Code,§ 2100.) This duty of utmost care "applies to the duty of a carrier to protect *a passenger* from assaults by fellow passengers." (Judicial Council Comments appended to California Civil Jury Instructions (Jan. 2006 ed.) 908, citing *Terrell v. Key System* (1945) 69 Cal.App.2d 682, 686 (*Terrell*), for the high duty of utmost care imposed on common carriers for the benefit of their passengers but only if "in the exercise of the required degree of care the carrier has or should have knowledge of conditions from which it may reasonably be apprehended that an assault on a passenger may occur [citations], and has the ability in the exercise of that degree of care to prevent the injury [citations]." (*Ibid.*; accord *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 791 (*Lopez*).))

There are numerous cases that impose that "utmost duty of care" as to passengers while in transit. (*Terrell, supra,* 69 Cal.App.2d 682, [judgment of nonsuit reversed where plaintiff was pushed by another passenger during a general melee and was knocked from the train];[7] *Lopez*, *supra*, 40 Cal.3d 780, 790 ["common carriers have a specific statutory duty to provide for the safe carriage of those specific individuals who have accepted the carrier's offer of transportation and have put their safety, and even their lives, in the carrier's hands"]; see also *id*. at p. 791, fn. 9, collecting similar cases from other jurisdictions; accord *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1504 [if a chair lift operator is a common carrier for tort liability, it is held to a standard of care higher than that of ordinary, reasonable care].)[8]

California courts also enforce a duty to deliver the passenger to a relatively safe space. (*Ingham v. Luxor Cab Company* (2001) 93 Cal.App.4th 1045, 1051 [cab ejected passenger at a place other than the designated destination and passenger sustained a reasonably foreseeable injury]; but see *McGettigan v. Bay Area Rapid Transit Dist*. (1997) 57 Cal.App.4th 1011, 1014-1015, [BART owed no duty to highly inebriated passenger injured after he was ordered off the train at the end of the line and left on the platform before intending to board another train; the relationship of carrier and passenger terminated once he had safely exited the train and was in a place of relative safety].)

There are limits to liability even when the passenger is in transit. For example, in *City and County of San Francisco v. Superior Court* (1994) 31 Cal.App.4th 45, 49 (*Colbert*), the First Appellate District recognized the high duty owed by common carriers to passengers but nevertheless reversed denial of a defense summary judgment. The court concluded "No California case has held a common carrier liable for a sudden assault which occurs with no warning. Such liability would literally require an armed presence on every common carrier . . . ." (*Ibid*.) Plaintiff in *Colbert* was stabbed without warning by another passenger on a City-operated bus.

In *Terrell*, *supra*, 69 Cal.App. 2d 682, 686, there had been previous occasions on which "tempers had flared and knives had been drawn" while craps games were being played. The court concluded those prior experiences along with the additional factor "that in this particular game some of the white men were drunk, boisterous, abusive and quarrelsome" was sufficient "notice or knowledge of the danger of assault upon one or more passengers" to present a question for the jury whether the carrier "should have foreseen the danger" and support reversal of the nonsuit. (*Ibid*.) The alleged presence of a conductor in the car provided the jury with a factual question of his ability to protect the plaintiff passenger from danger. (*Id*. at p. 687.) And, if a conductor was not present, the jury could decide if the carrier, knowing of the prior incidents, had a duty to provide a conductor. (*Id*. at p. 688.)

Terrell was cited with approval, and extended to *public* carriers, by our Supreme Court in *Lopez*, *supra*, 40 Cal.3d 780, 785-786, which reversed a judgment of dismissal following the sustaining without leave of the common carrier's demurrer. *Lopez*, like *Terrell*, involved a fight on a common carrier where passengers injured other passengers. The driver knew a group of juveniles had boarded the bus and were harassing other passengers and that a fight broke out among the passengers, but the driver took no action. Moreover, the common carrier knew there had been previous assaults on passengers and operators of buses "on this particular bus route." (*Id*. at pp. 784, 797.)

Even the *Lopez* court, *supra*, 40 Cal.3d 780, 791, and citing *Terrell*, *supra*, emphasized "that carriers are not insurers of their passenger's safety and will not automatically be liable, regardless of the circumstances, for any injury suffered by a passenger at the hands of a fellow passenger. Rather, a carrier is liable for injuries resulting from an assault by one passenger upon another only where, in the exercise of the required degree of care, the carrier has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury."

The question of when the passenger/carrier relationship begins that imposes the duty of utmost care pursuant to Civil Code section 2100 is at issue in the case at bench. (See, e.g., *Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1472-1473 [no duty of utmost care to airplane ticket holder going through security device and struck from behind by an unknown person who had passed through the metal detector apparatus; only a duty of ordinary care]; *Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [bus driver refused to allow plaintiff to board the bus, so plaintiff "never became a passenger" and the duty codified by section 2100 "never arose . . . ."])[9] Appellant in the case at bench was a potential passenger who stood at or near the bus stop and never had the opportunity to attempt to board the bus or buses that passed him by. This was not a case where appellant was attempting to board and acceptance of his boarding was manifested by the driver. (*McGettigan v. Bay Area Rapid Transit Dist.*, *supra*, 57 Cal.App.4th 1011, 1019; citing *Lagomarsino v. Market Street Ry. Co.* (1945) 69 Cal.App.2d 388, 395 ["The relationship of carrier and passenger is not sustained under circumstances of a prospective passenger standing in a station area prior to the immediate approach of a carrier vehicle, but if a person intends to board a vehicle as a passenger and so indicates by the act of standing alongside, *and the person in charge of the vehicle indicates an intention to receive the prospective passenger*, and, as in this case, stops the car and prepares to immediately receive the person, the relationship of passenger to the carrier is established."].) (Italics added.))

As tragic as all find a high school student's severe injuries suffered following a shooting in a mob at a bus stop near his school, the factors alleged in the TAC do not support the carrier's liability. Appellant was not yet a passenger entitled to the "utmost care." His theory of liability is based on the MTA's *not* welcoming him as a passenger. The shooting was not by a "passenger" or upon a "passenger." There is no allegation of previous mobs at the location or on the route. As the court stated in *Lagomarsino*, *supra*, 69 Cal.App.2d 388, 395, perhaps the most favorable for appellant in defining "passenger," "the carrier does not become the guardian or insurer of persons about to board streetcars in the sense that a station area is guaranteed as a place of safety *from the wrongs of third parties*." (Italics added.)[10]

Moreover, assuming arguendo the carrier owed a duty of *ordinary* care to appellant, a legal proposition on which the parties disagree, there can be no duty for the sudden and unanticipated shooting by a party not on the bus (and admitted by plaintiff's counsel not to be a member of the crowd.)[11] California authority on liability for third party criminal conduct does not support the MTA's liability in the case at bench. Even where there is a duty of "utmost

care," as explained above, there is no duty for a carrier to protect even its passengers from "a sudden assault which occurs with no warning." (*Colbert*, *supra*, 31 Cal.App.4th 45, 49.)

Liability based on negligence for the criminal conduct of third parties, when the victim and defendant do not have a special relationship – and often when they do -- is restricted in California and does not encompass the situation in the case at bench, whether seen through the prism of duty or scope of duty (*Ann M.*, *supra*, 6 Cal.4th 666, 673), foreseeability (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 123, and/or causation. (*Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 435 ["causation was not (and could not have been) proved in this case"], cited with approval in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 776; *Rinehart v. Boys & Girls Club of Chula Vista* (2005) 133 Cal.App.4th 419, 430, 435 [no foreseeability or causation where 10-year-old was hit in the head by rocks thrown by nonmembers of the afterschool club].)[12] The trial court properly sustained the demurrer.

3. *The trial did not err in denying leave to amend.*

"'While the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. [Citations.] When the trial court sustains a demurrer without leave to amend, we must also consider whether the complaint might state a cause of action if a defect could reasonably be cured by amendment. If the defect can be cured, then the judgment of dismissal must be reversed to allow the plaintiff an opportunity to do so. The plaintiff bears the burden of demonstrating a reasonable possibility to cure any defect by amendment. [Citations.] A trial court abuses its discretion if it sustains a demurrer without leave to amend when the plaintiff shows a reasonable possibility to cure any defect by amendment. [Citations.] If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed. [Citation.]' (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1500-1501 [82 Cal.Rptr.2d 368], fn. omitted.)" (*Balikov v. Southern California Gas Co.* (2001) 94 Cal.App.4th 816, 819-820; accord *Gutkin v. University of Southern California* (2002) 101 Cal.App.4th 967, 976; *First Aid Services of San Diego, Inc. v. California Employment Development Dept*. (2005) 133 Cal.App.4th 1470, 1477 [abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment].)

Appellant has had four opportunities at drafting his complaint. He has not demonstrated "a reasonable possibility" of amending the complaint so that it would state a cause of action against respondent. The trial court did not abuse its discretion in sustaining the demurrer without leave to amend.

DISPOSITION

The judgment (order of dismissal) is affirmed.

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COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.