[Cite as *Desir v. Mallett,* 2015-Ohio-2124.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jean Michel Desir et al.,	:	
Plaintiffs-Appellants,	:	
		No. 14AP-766
v.	:	(C.P.C. No. 13CV-1588)
John W. Mallett et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 2, 2015

Robert W. Kerpsack, Co., LPA, and *Robert W. Kerpsack,* for appellants.

Alan B. Glassman, for appellees The Miami-Jacobs Business College Company, Gerald Dowe, Jr., Donte Dunnagan and Aaron Watson.

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Plaintiffs-appellants, Jean Michel Desir and Marie L. Fleurime, appeal from a judgment of the Franklin County Court of Common Pleas, granting the Civ.R. 56 motion for summary judgment filed by defendants-appellees, The Miami-Jacobs Business College Company ("Miami-Jacobs"), Gerald Dowe, Jr., Donte Dunnagan, and Aaron Watson. Plaintiffs assign the following, sole assignment of error for our review:

> THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANTS JEAN MICHEL DESIR AND MARIE L. FLEURIME IN ORDERING SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY IN FAVOR OF APPELLEES THE MIAMI-JACOBS BUSINESS COLLEGE

COMPANY, GERALD DOWE, JR., DONTE DUNNAGAN, AND AARON WATSON.

{¶ 2} Because the trial court did not err in granting defendants' motion for summary judgment, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} On February 11, 2013, plaintiffs filed a complaint against the defendants, John Mallett, and other entities who were later dismissed from the suit. Plaintiffs alleged in the complaint that Desir was a student at Miami-Jacobs on March 14, 2012, when Mallett assaulted him. Plaintiffs alleged that Miami-Jacobs negligently failed to maintain the business premises in a reasonably safe condition, negligently failed to provide adequate and reasonable security at the business premises, and negligently failed to prevent, intervene, warn, protect, assist, and/or rescue Desir from the felonious assault perpetrated by Mallet. Plaintiffs asserted that as a result of defendants' negligence, Desir sustained permanent physical injuries. Fleurime, Desir's wife, asserted a claim for loss of consortium. On November 14, 2013, plaintiffs filed an amended complaint, additionally asserting that defendants negligently failed to control Mallett.

{¶ 4} The events giving rise to the complaint occurred on March 14, 2012, when Mallett walked into the Continental Centre, a 25-story office building located in Columbus, Ohio, and randomly stabbed four individuals. Desir, Dowe, and Dunnagan were among the individuals Mallett stabbed that day. Mallet was later found not guilty by reason of insanity in the criminal proceedings which resulted from these incidents.

{¶ 5} Continental Real Estate Companies, the entity which owns the Continental Centre, rented offices within the building to several organizations, including Miami-Jacobs. Ohio Support Services Corporation provided security services for the building pursuant to a contract with Continental. On the day of the incident, Mallett entered the Continental Centre and walked up to the security desk in the main lobby of the building. Mallett told the security guard at the front desk that he "would like to go to * * * Miami-Jacobs College." (Benson Depo., 143.) As a business college, Miami-Jacobs was always accepting new students, and interested individuals would walk in off the street to inquire about attending Miami-Jacobs. (Watson Depo., 11.) The security guard told Mallett to sign in and, at 12:39 p.m., Mallett signed in using a fictitious name. The security guard did not

ask Mallett for identification, and did not inspect the plastic bag Mallett was carrying with him. Mallett had three knives concealed in the plastic bag.

{¶ 6} Mallett walked down a hallway and entered the Miami-Jacobs offices through a side entrance door. At 12:41 p.m., a girl walked out of the Miami-Jacobs offices and "said something about somebody with a knife." (Benson Depo., 152-3.) The security guard at the front desk then called 9-1-1.

{¶ 7} Dowe and Watson were both admissions representatives for Miami-Jacobs, and Dunnagan was a work-study student at the college. Dowe explained that he was sitting at his desk "on a phone call" when the door "opened, [and] there was a man that walked through the door and he just asked, can I talk to you about something?" (Dowe Depo., 8.) Mallett sat down in Dowe's office, and took "out a butcher knife" from the bag he was carrying "and attack[ed] [Dowe]." (Dowe Depo., 8.) Mallett stabbed Dowe's hand and leg. Dowe tried to grab ahold of Mallett, "by his arms * * * to kind of stop him." (Dowe Depo., 26.) Mallett and Dowe "wrestled out of [Dowe's] office" and into the hallway. (Dowe Depo., 27.) Dowe wrestled Mallett to the ground and started punching him; Dowe was "fighting for [his] life." (Dowe Depo., 32.) Dowe felt a pull on his right shoulder from Aaron Watson, and he then stopped punching Mallett. Dowe walked down the hallway to the male bathroom, "[t]o check how bad [he] was." (Dowe Depo., 38.) Dowe was bleeding from his stab wounds and tried "to stop the blood" using some paper towels. (Dowe Depo., 40.)

{¶ 8} Watson explained that he was on his computer when he "heard this large rumble like something was falling," and walked out of his office area and saw Dowe and Mallett "wrestling and fighting, they were fighting. And Mr. Mallett had a knife in his hand." (Watson Depo., 26.) Watson noted that it was "a scary sight. There was blood on the knife. I could see that. And they were wrestling. If you could imagine someone just fighting and trying to -- trying to survive." (Watson Depo., 27.) Watson called out for someone to call the police or get security. As Dowe and Mallett wrestled, "they fell to the ground, [and] the knife fell. [Watson] picked the knife up. At the same time, [Dunnagan] was coming down the hallway. [Watson] handed the knife to [Dunnagan]" and said "get this knife out of here." (Watson Depo., 28.) Watson observed Dowe hit Mallett "20, 30 times in his head," Watson thought Dowe might "kill this guy." (Watson Depo., 28-29.)

{¶ 9} When Dowe got up off Mallett, Mallett was "lying there, wasn't moving," so Watson told Dowe to "get out of here, get cleaned up." (Watson Depo., 29.) Watson then "put [his] knee on [Mallett's] chest close to his neck." (Watson Depo., 29.) Watson noted that Mallett's "eyes were just like glassy and he was not moving, he was not combative," Watson said there "wasn't even a twitch. So best [he could] estimate [Mallett] was out." (Watson Depo., 29-30.) As Watson had his knee on Mallett's chest he thought to himself, "what the hell are you doing. You know, you're not a policeman, you're not a security guard, you're not a bouncer. Get your butt out of here." (Watson Depo., 30.) Watson noted that he was 50-years-old and, at that time, had recently undergone shoulder surgery. As Mallett appeared "unconscious," Watson decided to get up off Mallett. (Watson Depo., 79-80.) As Watson walked down the hallway he "looked back the first time, [and Mallett] was out, still lying on the floor." (Watson Depo., 30.) When Watson got to the entrance where the hallway meets the front admissions office, he saw Desir standing there and said to him, "you don't want to go back there." (Watson Depo., 30.) Desir, however, "just kind of like ignored [Watson], he continued to walk by." (Watson Depo., 31.) When Watson later looked back, he saw that Desir had "fallen to the floor" and that Mallett was stabbing him. (Watson Depo., 31.) At that point, the security guard came in and told everyone to get out, "at which time [Watson] walked on out." (Watson Depo., 32.)

{¶ 10} When Dunnagan walked out of his office he saw Dowe "fighting with Mallett," and observed Watson standing there "trying to, you know, just verbally stop the situation." (Dunnagan Depo., 7.) Dunnagan saw the "knife there on the ground," so he "picked [the knife] up to get it away from the guy. And [he] walked back down to [his] area where [he] was at and placed it on the desk in front of" his desk. (Dunnagan Depo., 7.) Dunnagan then returned to the altercation, saw Dowe "hitting" Mallett, and noted that Mallett "just look[ed] like he's done." (Dunnagan Depo., 8.) Dunnagan then "made [his] way back out from the area to the front of our office to try to get security." (Dunnagan Depo., 8.) Dunnagan told the security guard "we've got this guy down who caused the problem," and the security guard simply said, "we've got to evacuate the building" and "walked on." (Dunnagan Depo., 8-9.) Dunnagan returned to the scene and saw Mallett "coming out of the last cubicle" with "two knives." (Dunnagan Depo., 9.) Mallett came

toward Dunnagan, "stabbing and swinging," Dunnagan "knocked him down once" but Mallett got back up and stabbed Dunnagan "a couple of times." (Dunnagan Depo., 9-10.) Dunnagan went into the library and locked the door.

{¶ 11} Desir stated in his affidavit that he was attending a meeting with a financial aid advisor when he heard a loud commotion out in the hallway. Desir averred that "[w]hen the commotion stopped, [he] believed it to be safe to leave Ms. Roberts' office." (Desir Affidavit, ¶ 3.)[1] Desir averred that he did not "recall Watson or anyone else ever advising [him] that it was unsafe to leave the office of Lindsey Roberts," and also averred that he relied on the "silence resulting from the control of Mallett by Dowe, Watson, and Dunnagan, * * * to [his] detriment as being an indication that it was safe to move about the school administration area." (Desir Affidavit, ¶ 6.)

{¶ 12} In his deposition, Desir explained that when he stepped out into the hallway he saw "two guys * * * over someone down * * *. And those two guys walk[ed] up and [went] in the -- in the corridor." (Desir Depo., 16.) Desir saw Mallett lying on the floor and noted that Mallett "was not struggling." (Desir Depo., 62.) Desir explained that he did not "understand what happened. [He] was thinking someone is sick," so he walked up to Mallett and said "[w]hat are you doing there, guy?" (Desir Depo., 16, 25.) Mallett did not answer, but he then "woke up. * * * He [went] inside this cubicle there." (Desir Depo., 22.) When Mallett came "back, he got two knives," and he then attacked Desir. (Desir Depo., 16.)

{¶ 13} On March 17, 2014, the defendants filed a Civ.R. 56 motion for summary judgment. Defendants noted that there was "no evidence that any prior violent crimes had occurred at Miami-Jacobs * * * that would establish a duty to the Plaintiff to protect him from the criminal acts of a third party." (Motion for Summary Judgment, 9.) Indeed, the evidence demonstrated that no crime had ever occurred at Miami-Jacobs. (Miami-Jacobs Response to Interrogatories, Interrogatory 12.) Defendants also noted that, as there was

[1] In his affidavit, Desir makes several conclusory statements regarding the incident. Desir explains that he arrived at these conclusions because he "conducted additional investigation relating to how the incident * * * occurred" by reviewing the depositions of the other witnesses. (Desir Affidavit, ¶ 4.) These conclusory statements violate Civ.R. 56(E), which requires that affidavits be made on personal knowledge. *See State ex rel. O'Brien v. Messina*, 10th Dist. No. 10AP-37, 2010-Ohio-4741, ¶ 21 (noting that personal knowledge means knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else said).

no special relationship between Mallett and the defendants, the defendants had no duty to control Mallett. As Dunnagan had removed the only knife the defendants knew Mallett to possess, and Mallett appeared unconscious on the floor when Dowe and Watson left him, defendants asserted that the subsequent attack on Desir was unforeseeable.

{¶ 14} Plaintiffs filed a memorandum contra the motion for summary judgment on April 17, 2014. Plaintiffs asserted that, "[b]y voluntarily intervening to stop John Mallett's aggression toward Gerald Dowe and taking physical control of Mr. Mallett, the Miami-Jacobs defendants assumed a duty of care to protect the general public, including Plaintiff * * * from further violence by Mr. Mallett." (Memo Contra, 4-5.) Plaintiffs further asserted that a special relationship existed between Mallett and the defendants because the defendants "undertook control of John Mallett." (Memo Contra, 6.) Plaintiffs submitted that a "question of fact exist[ed] as to whether the Miami-Jacobs defendants acted reasonably under the circumstances when they abandoned their control of Mallett." (Memo Contra, 9.)

{¶ 15} On September 25, 2014, the trial court filed a decision and entry granting the defendants' motion for summary judgment. The court found "beyond a genuine issue of material fact that it was not foreseeable to Dowe, Dunnagan, or Watson that, after being repeatedly punched in the head and by all accounts immobilized and apparently unconscious, Mallett would get up and have the wherewithal to cause injury before law enforcement arrived." (Decision, 8.) The court noted that Desir was a business invitee of Miami-Jacobs, and that accordingly Miami-Jacobs had a duty to protect Desir from the criminal acts of third-parties if those criminal acts were foreseeable. The court observed that, under the totality of the circumstances, Mallett "was completely still, unmoving, and by all accounts unconscious when the Defendants left to go get help. There [was] no evidence that he was a threat or dangerous in that condition and the subsequent attacks were neither likely nor foreseeable." (Decision, 20.) Additionally, the court determined that Desir "did not rely on Dowe and/or Watson for protection," as Desir approached Mallett out of curiosity and a desire to help him. (Decision, 22.) Because the attack was not foreseeable, the court concluded that defendants did not owe Desir a duty to protect him from the attack by Mallett.

II. SUMMARY JUDGMENT PROPERLY GRANTED

{¶ 16} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 17} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 18} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶ 19} Plaintiffs contend that the trial court erred by failing to recognize that the defendants had a duty to control Mallett until law enforcement arrived. Under the law of

negligence, a defendant's duty to a plaintiff depends on the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 645 (1992). "[T]o recover on a negligence claim, a plaintiff must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, and (3) that the breach of the duty proximately caused the plaintiff's injury." *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998), citing *Wellman v. E. Ohio Gas Co.*, 160 Ohio St. 103, 108–09 (1953).

{¶ 20} " 'Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.' " *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 23, quoting *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 98 (1989). The existence of a duty depends on the foreseeability of the injury. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Id.* Foreseeability of harm usually depends on a defendant's knowledge. *Id.* The determination of whether a duty exists in a negligence action is a question of law for a court to determine. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989).

{¶ 21} Initially, we briefly address plaintiffs' contention that, because the defendants acted "in concert while disarming and undertaking physical control of Mallett," it is "appropriate to discuss the liability of the Miami-Jacobs defendant's 'as a unit/whole.' " (Appellant's brief, 20.) Plaintiffs rely on 4 Restatement of the Law 2d, Torts, Section 876 (1979) to support their contention, which provides that "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him." Ohio, however, does not recognize a claim for tortious acts in concert under Restatement Section 876. *See DeVries Dairy, L.L.C. v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 2012-Ohio-3828, ¶ 2 (holding that Ohio has "never recognized a claim under 4 Restatement 2d of Torts, Section 876 (1979)" for tortious acts in concert).

{¶ 22} The issue in the instant case is whether the defendants owed Desir a duty to warn or protect him from the physical attack by Mallett. Generally, "there is no duty to prevent a third person from causing harm to another absent a special relation between the parties." *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 133 (1995). In *Gelbman v. Second Natl. Bank of Warren*, 9 Ohio St.3d 77, 79 (1984), the Supreme Court of Ohio adopted Sections 314 and 315 of the 2 Restatement of the Law 2d, Torts, at 122 (1965). Restatement Section 314 states the general rule that there is no duty to act affirmatively for another's aid or protection. Restatement Section 315 "is a special application of the general rule stated in § 314." 2 Restatement of the Law 2d, Torts, Section 315, Comment a (1965). Restatement Section 315 provides that there "is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct," or "(b) a special relation exists between the actor and the other which gives to the other a right to protection." *See also Fed. Steel & Wire Corp. v. Ruhlin Const. Co.*, 45 Ohio St.3d 171, 174 (1989)

{¶ 23} Here, a special relationship existed between Desir and Miami-Jacobs, because Desir was a student at Miami-Jacobs and thus a business invitee of the college. *See Wheeler v. Ohio State Univ.*, 10th Dist. No. 11AP-289, 2011-Ohio-6295, ¶ 17 (noting that, "[a]s a student at OSU, appellant's legal status was a business invitee"); *Hall v. Watson*, 7th Dist. No. 01 CA 55, 2002-Ohio-3176, ¶ 16 (noting that a possessor of land and an invitee are among the relationships that result in a duty to protect the other). Generally, a premises owner owes a business invitee a duty to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition. *Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68 (1986); *Presley v. Norwood*, 36 Ohio St.2d 29, 31 (1973).

{¶ 24} A business, however, is not an insurer of the safety of its patrons while they are on its premises. *Reitz v. May Co. Dept. Stores*, 66 Ohio App.3d 188, 192 (8th Dist.1990); *Shivers v. Univ. of Cincinnati*, 10th Dist. No. 06AP-209, 2006-Ohio-5518, ¶ 6. "[T]he duty to protect invitees from the criminal acts of third parties does not arise if the business 'does not, and could not in the exercise of ordinary care, know of a danger which causes injury to [its] business invitees.' " *Reitz* at 192, quoting *Howard v. Rogers*, 19 Ohio St.2d 42 (1969), paragraph three of the syllabus. Accordingly, a business owner

"has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner." *Simpson* at syllabus. "If a third party's criminal act is not foreseeable, then a university cannot be held liable in negligence." *Shivers* at ¶ 6.

{¶ 25} Furthermore, "[b]ecause criminal acts are largely unpredictable, the totality of the circumstances must be 'somewhat overwhelming' in order to create a duty." *Shivers* at ¶ 7, citing *Reitz* at 194. Accordingly, we review the "totality of the circumstances, including the occurrence of previous similar crimes and the specifics of the incident itself, to determine whether the criminal act was foreseeable." *Sullivan* at ¶ 25. *See also Shivers* at ¶ 7 (noting that under the totality of the circumstances courts consider "prior similar incidents, the propensity for criminal activity to occur on or near the location of the business, and the character of the business"). Thus, "[t]he foreseeability of criminal acts depends upon the knowledge of the business owner." *Id.* at ¶ 24.

{¶ 26} Reviewing the totality of the circumstances of the instant case, we find that the attack on Desir was not foreseeable to any of the defendants. No prior similar acts of violence had ever occurred on the Miami-Jacobs premises. (*See* Miami-Jacobs response to Interrogatory, # 12.) Accordingly, Miami-Jacobs could not reasonably foresee that a mentally ill individual would walk onto its premises and begin stabbing its employees and students. Moreover, the attack on Dowe, which preceded the attack on Desir by minutes, did not make the attack on Desir foreseeable. After being stabbed himself, Dowe rendered Mallett unconscious by punching him numerous times. Although Watson briefly placed his knee on Mallett, Mallett was still lying on the floor unconscious and motionless when Watson left him. Dunnagan never had any arguable control over Mallett; Dunnagan merely removed the knife away from the scene of the initial attack on Dowe, and then returned only to be attacked by Mallett himself. Desir testified that Mallett was lying still on the floor when he approached him, and that Mallett only woke up after Desir asked him what he was doing. Accordingly, when Dowe and Watson ended their arguable control of Mallett and left him lying unconscious on the floor, deprived of the only knife the defendants knew Mallett to have, a reasonably

prudent person could not have anticipated that Mallett would rise from his unconscious state, acquire additional knives, and continue on his stabbing spree.

{¶ 27} Plaintiffs contend that Watson's comment to Desir stating "you don't want to go back there," was "evidence that Mallett continued to be a threat and was fully-capable of committing additional violence after the Miami-Jacobs defendants abandoned their control over Mallett." (Appellant's brief, 10-11.) We disagree. Watson testified that Mallett was lying on the ground unconscious when he walked away from him. Desir testified that Mallett was lying on the ground "not struggling," until Desir "woke [him] up" by saying "what happened to you, man." (Desir Depo., 16, 62, 22.) Accordingly, as Mallett was unconscious when Watson left him, and remained unconscious until Desir woke him up, reasonable minds could only conclude that it was not foreseeable to Watson that Mallett would harm Desir. Watson's warning to Desir was simply that, a warning not to go down the hallway. We cannot infer from that warning that Watson knew that Mallett would wake up from his unconscious state and cause harm to Desir.

{¶ 28} Accordingly, we conclude that a reasonable fact-finder could only find that the attack on Desir was not foreseeable. *Compare Wheeler v. Ohio State Univ.*, 10th Dist. No. 11AP-289, 2011-Ohio-6295, ¶ 19 (where a university student was assaulted by fellow students, and there was no indication that the university was aware of prior assaults or threats from the fellow students towards any other student, we found the incident to be unforeseeable and concluded that "[b]ecause no reasonably prudent person could have foreseen the incident, given no warning, there [was] no evidence that OSU breached any duty to exercise ordinary care"); *King v. Lindsay*, 87 Ohio App.3d 383, 387 (10th Dist.1993) (finding the attack on the plaintiff was foreseeable, as the attack occurred on the dance floor at a busy campus bar on an evening following an Ohio State University football game, and "there was testimony that prior to the night in question, the disc jokey had to turn the lights on and call the bouncers to the floor when violence erupted," such that the bar's failure to place additional security guards near the dance floor increased the risk of harm to the bar patrons on the dance floor). Because the attack on Desir was not foreseeable under the totality of the circumstances, defendants did not owe Desir a duty to warn or protect him from the attack.

{¶ 29} Plaintiffs further assert that a special relationship existed between the defendants and Mallett, which created a duty on the part of defendants to control Mallett. Relationships that may give rise to a duty to control a third person's conduct include the following: (1) parent and child; (2) master and servant; and (3) custodian and person with dangerous propensities. *See Hall* at ¶ 16; Restatement of the Law 2d, Torts, Sections 316-319. *See also* 2 Restatement of the Law 2d, Torts, Section 319, Illustration 2 (1965) (giving the following example of a custodian who would be liable to control a person with dangerous propensities: "A operates a private sanitarium for the insane. Through the negligence of guards employed by A, B, a homicidal maniac is permitted to escape. B attacks and causes harm to C. A is subject to liability to C."). In *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284 (1997), the Supreme Court of Ohio concluded that the "relationship between the psychotherapist and the patient in the outpatient setting constitutes a special relation justifying the imposition of a duty upon the psychotherapist to protect against and/or control the patient's violent propensities." *Id*. at paragraph three of the syllabus. The court therein noted that "there is no more magic inherent in the conclusory term 'special relation' than there is in the term 'duty,' " as both terms are "part and parcel of the same inquiry into whether and how the law should regulate the activities and dealings that people have with each other." *Id*. at 298.

{¶ 30} Plaintiffs correctly note that the relationships listed in Restatement Section 315 are not exhaustive. *See Estates of Morgan* at 294, quoting *Tarasoff v. Regents of Univ. of California*, 17 Cal.3d 425, 435, fn.5 (1976) (noting that courts may " 'expand[] the list of special relationships which will justify departure from' " the general rule of no liability, where "affirmative duties to control should be imposed whenever the nature of the relationship warrants social recognition as a special relation"). Plaintiffs assert that "reasonable minds can conclude that a special relationship existed between the Miami-Jacobs defendants and Mallett," because the defendants each observed Mallett to exhibit violent behavior, and the defendants then disarmed him and took physical control of him. (Appellant's brief, 13.)

{¶ 31} Plaintiffs fail to explain how the relationship between a random, unknown attacker and their attack victim is remotely akin to the relationship between a parent

and their child, a master and their servant, a custodian and person with dangerous propensities, or a psychotherapist and their patient. These relationships all concern a personal, intimate relationship between two individuals, where the individuals have spent considerable time together, and where one individual in the relationship has some level of control over the other. The defendants herein had never met Mallett before the day of the attack. He was an unknown individual who came into the defendants' workplace and began randomly stabbing people. This brief terrifying encounter did not give rise to the intimate type of relationship which is necessary to impose a duty to control another's conduct under Restatement Section 315(a). The defendants had no relationship with Mallett, let alone a special relationship, which would justify imposing upon them a duty to control Mallett's conduct.

{¶ 32} Plaintiffs assert that in *M.S. v. Harvey*, 5th Dist. No. 13CA105, 2014-Ohio-4236, the court found that "the issue of whether past assault victims owe a duty of care to their criminal perpetrator's subsequent victims is a jury question." (Appellant's brief, 14.) In *M.S.*, the defendants' father sexually abused a young family relative. The father had sexually abused the defendants when they were children, and had abused the defendants' children, his grandchildren, as well. The defendants knew their father was providing day care services to the young family relative, and urged him not to do so. Although the defendants argued that "they had no legal obligation to report Harvey's past abuse to M.S. and her parents," the court disagreed, concluding that "a special relationship existed between [the adult children], and their father, which gave rise to such a duty. [The defendant's were] Harvey's adult children and they acted as his power of attorney," and thus "exercised some control over Harvey's affairs." *Id*. at ¶ 28. The court also noted that the defendants "had specialized knowledge of the potential risk of harm to M.S., a child of tender years, who they knew was being placed in Harvey's care," as the adult children "knew of Harvey's prior sexual abuse of minors." *Id*. at ¶ 30. As such, the court concluded that whether the defendants breached a duty to warn M.S.'s parents about their father was a jury issue.

{¶ 33} In contrast, the defendants herein did not have a special relationship with Mallett similar to that of adult children with a power of attorney over their father. Additionally, the defendants herein did not have specialized knowledge of Mallett's

dangerous propensities similar to the adult children in *M.S.*, who had years of prior knowledge regarding their father's propensity to sexually abuse children.

{¶ 34} Plaintiffs lastly assert that, "by voluntarily disarming and undertaking physical control of Mallett, the Miami-Jacobs defendants assumed a duty to protect the general public, including Desir, from further violence by Mallett." (Appellant's brief, 17.) "[A] voluntary act gratuitously undertaken must be completely performed with the exercise of due care under the circumstances." *Briere v. Lathrop Co.*, 22 Ohio St.2d 166, 172 (1970). In *Briere*, one of the defendant's employees voluntarily assisted the plaintiff by moving some scaffolding that the plaintiff was on top of. When the defendant's employee walked away without warning the plaintiff, the plaintiff fell from the scaffolding and suffered injuries. The court cited 2 Restatement of the Law 2d, Torts, Section 323, with approval, and held that the "question of whether Smith's leaving the scene without warning Lilly was negligence for which Lathrop must respond, or whether Lilly's allegedly negligent act proximately caused the accident thus * * * were questions of fact to be determined by the jury." *Id.* at 172.

{¶ 35} Restatement Section 323 provides that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking" if "(a) his failure to exercise such care increases the risk of such harm," or if "(b) the harm is suffered because of the other's reliance upon the undertaking." 2 Restatement of the Law 2d, Torts, Section 323 (1965). Negligence under Restatement Section 323 "follows the general rule for finding negligence, with the addition of one extra element of proof, that of reasonable reliance by the plaintiff on the actions of the defendant." *Douglass v. Salem Community Hosp.*, 153 Ohio App.3d 350, 2003-Ohio-4006, ¶ 74. *See also Wissel v. Ohio High School Athletic Assn.*, 78 Ohio App.3d 529, 540-41 (1st Dist.1992) (noting that under 323(a), the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun the performance, and that under 323(b) the plaintiff must show actual or affirmative reliance, i.e., reliance based on specific actions or representations which

cause the persons to forego other alternatives of protecting themselves); *Pierce v. Bishop*, 4th Dist. No. 10CA6, 2011-Ohio-371, ¶ 23.

{¶ 36} Defendants did not assume a duty to protect Desir from Mallett under Restatement Section 323. Defendants never rendered any services to Desir. Dowe rendered Mallett unconscious after Mallett attacked him, Dunnagan removed the knife from the scene of the initial fracas, and Watson briefly put his knee on Mallett's chest while Mallett was unconscious and left while Mallett remained unconscious. None of these actions can be construed as rendering services to Desir. Indeed, Desir was not present during this initial confrontation. At most, potentially, Watson rendered a service to Desir when he warned Desir not to go down the hallway. To the extent Watson made that warning, he exercised due care in attempting to warn Desir.

{¶ 37} Furthermore, the defendants' actions did not increase the risk of harm to Desir, as the defendants at least temporarily halted Mallett's stabbing spree. Desir also did not rely on defendants' actions to his determent. Desir testified that when he saw that the defendants had left Mallett lying on the ground, "in [his] mind" he thought "something happened to [Mallett] and they – they check him and try to go for help," because he believed Mallett was "sick." (Desir Depo., 62, 52.) Thus, Desir did not forgo other available opportunities in reliance upon the actions of the defendants, rather he walked up to Mallett because he believed Mallett was sick. Desir did not indicate that he believed it was safe to approach Mallett because the defendants had rendered him unconscious. Desir did not even know that the defendants had rendered Mallett unconscious. Desir averred that he relied on the "silence resulting from the control of Mallett" by the defendants "as being an indication that it was safe to move about the school administration area." (Desir Affidavit, ¶ 6.) However, under Restatement Section 323, a plaintiff must rely on specific actions or representations of the defendant. *See Wissel, supra*. Relying on silence, in this situation, was insufficient to show that Desir actually relied on some action or representation by the defendants to his detriment. *Compare Freiburger v. Four Seasons Golf Ctr., L.L.C.*, 10th Dist. No. 06AP-765, 2007-Ohio-2871, ¶ 16-17 (where the defendant golf facility had installed a safety net for its customers, this court noted that "[a]lthough Four Seasons did not verbally assure plaintiff the safety net would catch him in the event that he fell, the net's purpose was

readily apparent" and the plaintiff "testified that he saw the safety net and realized it was there to protect people").

{¶ 38} Because defendants did not owe Desir a duty to warn or protect him from the unforeseeable attack by Mallett, the trial court did not err in granting defendants' Civ.R. 56 motion for summary judgment. Accordingly, plaintiffs' sole assignment of error is overruled. Having overruled plaintiffs' sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and LUPER SCHUSTER, JJ., concur.
