[Cite as *Korellas v. Ohio State Univ.*, 2004-Ohio-3817.]

IN THE COURT OF CLAIMS OF OHIO

PETROS KORELLAS	:	
Plaintiff	:	CASE NO. 2001-09206 Judge J. Warren Bettis
v.	:	DECISION
OHIO STATE UNIVERSITY	:	
Defendant	:	

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{¶1} Plaintiff brought this action against defendant alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Testimony presented at trial disclosed that on September 16, 2000, plaintiff was employed as a driver for a restaurant that delivered food to students who lived on defendant's campus. At approximately 3:30 that morning, plaintiff arrived at defendant's Morrill Tower dormitory with a delivery for Andrew Lee, a student-athlete who resided at the dormitory. Plaintiff had called approximately five minutes before his arrival to ask Lee to meet him in the dormitory lobby because Lee had been late to pick up two other orders that plaintiff had delivered earlier in the evening. Defendant's policy required all deliveries to be made to the lobby. Plaintiff testified that he telephoned Lee three times from the dormitory lobby, but Lee did not come to the lobby to pick up his food. Plaintiff offered to sell the food to the lobby attendants and when they declined plaintiff left the dormitory. As he walked down the dormitory ramp, plaintiff heard the lobby door slam and he turned to see Lee running toward him.

{¶3} According to statements made by dormitory staff members to police, Lee was angry and made threatening comments about plaintiff as he exited the dormitory. From

inside the entrance to the lobby, staff members observed plaintiff and Lee engage in a verbal altercation; however, the staff members returned to the lobby desk before the altercation became physical. Plaintiff testified that Lee pushed him and grabbed his clothes as he tried to back up.[1] Plaintiff further testified that he told Lee that he did not want to fight, but Lee persisted and punched his nose. According to plaintiff, Lee tried twice to throw him over the dormitory ramp railing. Plaintiff stated that Lee threatened to kill him when plaintiff walked to the lobby to get help. At plaintiff's request, the dormitory staff called defendant's police department. Defendant's officers responded to the incident and interviewed witnesses. Lee was subsequently arrested for an outstanding warrant for failing to pay a fine for disorderly conduct. Plaintiff was transported to defendant's hospital where he was treated for a broken nose.

{¶4} On November 19, 2002, the court issued a decision wherein it found that Andrew Lee was not an employee of defendant and, consequently, that he was not entitled to personal immunity pursuant to R.C. 9.86. Nevertheless, plaintiff has continued to assert claims that are predicated upon plaintiff's theory that Lee was defendant's employee. Specifically, plaintiff alleges that defendant was negligent in "hiring" and "recruiting" Lee.

{¶5} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶6} To successfully prove his claim that defendant was negligent in "hiring" Lee, plaintiff must show: 1) the existence of an employment relationship; 2) the employee's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employee's act or omission causing the plaintiff's injuries; and 5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Evans v. Ohio State Univ*. (1996), 112 Ohio App.3d 724, 739. As stated above, this court

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[1] Although Lee testified at trial, he refused to answer any questions concerning his conduct that night.

previously determined that an employment relationship did not exist between Lee and defendant. Therefore, plaintiff has failed to establish a claim of negligent hiring.

{¶7} With regard to recruiting, plaintiff has not cited any authority adopting a cause of action in tort for "negligent recruitment." Bill Conley, defendant's head recruiting coordinator, testified that all of the information he received during the recruiting process suggested that Lee would be a good candidate for defendant's football program. According to Conley, at the time of Lee's admission, defendant was not aware that any criminal charges had been filed against Lee. Plaintiff failed to present any evidence to support his claim that defendant was negligent in recruiting Lee. The court concludes that plaintiff's "negligent recruitment" claim is without merit.

{¶8} Plaintiff's remaining claim is that defendant negligently failed to provide adequate security for him when he visited the Morrill Tower dormitory. As the landlord of its dormitory, defendant has "a duty to take those steps which are within [its] power to minimize the predictable risk to [its] tenants." *Doe v. Flair Corp*. (1998), 129 Ohio App.3d 739, 751, quoting, *Kline v. 1500 Massachusetts Avenue Apartment Corp*. (C.A., D.C. 1970), 439 F.2d 477. Ordinarily there is no duty to prevent a third person from harming another unless a "special relationship" exists between the parties. *Estates of Morgan v. Fairfield Family Counseling Ctr.* (1997), 77 Ohio St.3d 284, at 293, citing 2 Restatement of the Law 2d, Torts (1965), 116-130, Sections 314-319; *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210 at ¶38. Where a special relationship does exist, the duty to protect against injury caused by third parties is an exception to the general rule of no liability. *Fed. Steel & Wire Corp. v. Ruhlin Constr*. (1989), 45 Ohio St.3d 171, 174. A "special relationship" exists when a duty is imposed upon one to act for the protection of others. *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St.3d 77, 79. Such a "special relationship" exists between a business and its invitees. *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188. It is undisputed that plaintiff was an invitee at defendant's dormitory.

{¶9} Although plaintiff contends that Lee assaulted him without provocation, defendant maintains that the investigation by its law enforcement officers revealed that plaintiff's injuries were the result of mutual combat.

{¶10} Renee Kopczewski, an officer at defendant's police department, testified that she and Lieutenant David Rose were among the first officers to respond to a dispatch regarding a fight at Morrill Tower. Kopczewski and Lieutenant Rose questioned plaintiff, Lee and the building staff members in the dormitory lobby. The staff members informed the officers that they did not witness the physical altercation. According to Kopczewski, both plaintiff and Lee reported that they had argued before they pushed and hit each other. Kopczewski testified that plaintiff admitted that he had pushed Lee before Lee punched him. Based upon her investigation, Kopczewski characterized the incident as an altercation between two "mutual combatants" who became angry and chose to fight rather than walk away.

{¶11} Lieutenant Rose corroborated Kopczewski's testimony that plaintiff reported to the officers that he had participated in the altercation by pushing Lee. Lieutenant Rose testified that he decided not to charge Lee with a crime because the officers believed that plaintiff was a mutual combatant who had actively participated in the altercation. Lieutenant Rose further testified that he advised plaintiff to file a report at the prosecutor's office if he wished to pursue charges against Lee. Plaintiff testified that he did not pursue criminal charges against Lee because Lee had threatened him.

{¶12} Although plaintiff asserts that defendant was aware of Lee's "violent history," plaintiff failed to establish that defendant exposed him to an unnecessary or unreasonable danger. Indeed, in considering the conflicting testimony presented, the court finds the testimony of defendant's police officers to be more credible than plaintiff's testimony regarding his participation in the altercation. The court concludes that plaintiff's statement to defendant's police officers supports a finding that plaintiff was a voluntary participant in the altercation.

{¶13} Even if the court were to find that plaintiff was the victim of a criminal assault by Lee, he still could not prevail on his negligence claim. To find liability in

negligence against a defendant based upon the criminal act of a third-party, an invitee must demonstrate that the criminal act was foreseeable. *Reitz, supra,* at 191-192; *Howard v. Rogers* (1969), 19 Ohio St.2d 42, paragraphs one and two of the syllabus. The duty to warn or protect invitees from criminal acts of third persons arises when defendant knows or should know that there is a substantial risk of harm to its invitees on the premises in possession and control of the owner. *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, syllabus. Although a landlord has some duty to provide security in common areas, he is not an insurer of the premises against criminal activity. *Doe v. Beach House Dev. Co.* (2000), 136 Ohio App.3d 573, 580.

{¶14} Under certain circumstances, Ohio courts have found, as a matter of law, that criminal acts are not foreseeable. See *Flair Corp.*, supra (finding that a criminal assault is an unforeseeable act which supersedes alleged negligence for failing to provide adequate building security). A landlord will be liable for a criminal attack only when it should have been reasonably foreseen and there was a failure to take reasonable precautions to prevent it. Id. at 751. The foreseeability of criminal acts occurring on premises is determined by using a totality of the circumstances test. *Reitz*, *supra*. The totality of the circumstances must be "somewhat overwhelming" before a criminal act will be considered foreseeable. Id. at 194.

{¶15} Plaintiff failed to prove that Lee had a propensity for violence or that defendant had any notice that Lee had a criminal record. The only testimony concerning Lee's criminal record was Officer Kopczewski's testimony that Lee had an outstanding warrant. Even if defendant had notice of the warrant, the court finds that this was not the quality of notice required to establish foreseeability sufficient to hold defendant liable for the criminal act of a third-party. Based on the totality of the circumstances, defendant had no reason to expect that Lee would commit a violent assault. The court concludes that an assault by Lee on plaintiff was not foreseeable and that, accordingly, defendant had no duty to protect against what it could not reasonably foresee. For the foregoing reasons, the court finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence. Judgment shall be rendered in favor of defendant.

IN THE COURT OF CLAIMS OF OHIO

PETROS KORELLAS	:	
Plaintiff	:	CASE NO. 2001-09206 Judge J. Warren Bettis
v.	:	JUDGMENT ENTRY
OHIO STATE UNIVERSITY	:	
Defendant	:	

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This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
J. WARREN BETTIS
Judge

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AMR/cmd
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