[Cite as *Kleisch v. Cleveland State Univ.*, 2005-Ohio-1285.]

IN THE COURT OF CLAIMS OF OHIO

MARIE G. KLEISCH	:	
Plaintiff	:	CASE NO. 2003-08452 Judge Fred J. Shoemaker
v.	:	
		DECISION
CLEVELAND STATE UNIVERSITY	:	
Defendant	:	

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{¶ 1} Plaintiff brought this action against defendant, Cleveland State University (CSU), alleging a claim of negligence. Plaintiff further alleged that defendant's Chief of Police, Lester Mitchell, acted with malice, in bad faith, or in a wanton and reckless manner and, accordingly, had requested a determination from this court whether Chief Mitchell is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. The issues of liability and damages were bifurcated and the case proceeded to trial on the issues of liability and civil immunity.

{¶ 2} Plaintiff testified that on August 3, 2001, she was a commuter student at CSU and that she arrived at defendant's campus at approximately 8:00 a.m. to study for an exam scheduled to begin at 10:00. She stated that she entered the exam room, Room 151, in the Science and Research Building and began reviewing her notes. She recalled that the room was a large lecture hall with two tiers of multi-row seating. There were doors at both the upper and lower levels which were unlocked. Plaintiff stated that she was alone in the room but that she expected fellow students to arrive and join her. At approximately 8:55, someone entered the room, turned off the overhead lights and attacked plaintiff. She testified that she was brutally beaten and raped for several minutes. According to

plaintiff, no one responded to her screams or came to her assistance, and the offender was able to escape from the building without being apprehended. Plaintiff testified that through DNA evidence testing, the same offender has been linked to at least two other rapes but that he has not yet been arrested or convicted.

{¶ 3} Plaintiff alleges that defendant was negligent in failing to provide adequate security in its classrooms. Specifically, plaintiff asserts that defendant did not exercise reasonable care by failing to ensure that classroom doors were locked prior to the start of each classroom session. Further, plaintiff alleges that defendant's police force was not adequate enough to protect the students, staff and visitors from serious physical harm. Plaintiff maintains that Chief Mitchell acted recklessly and with heedless indifference to known dangers in that he failed to convey an accurate description of the true nature of criminal activity on or near campus and thus created a false sense of security among students who frequented the campus.

{¶ 4} Defendant argues, conversely, that plaintiff failed to prove that defendant had notice that an attack by a serial rapist was likely to occur or that defendant could have reasonably foreseen that plaintiff would be raped in a classroom during normal school hours. Defendant further asserts that its security force was adequate for a college campus and that Chief Mitchell was not reckless nor did he act with malice or heedless indifference toward plaintiff.

{¶ 5} In order for plaintiff to prevail upon her claim of negligence, she must prove, by a preponderance of the evidence, that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. The duty of care owed to plaintiff as a student of a state university is that of an

invitee. *Baldauf v. Kent State Univ.* (1988), 49 Ohio App.3d 46; *Shimer v. Bowling Green State Univ.* (1999), 96 Ohio Misc.2d 12, 16. In Ohio, it is the duty of the owner or occupier of premises to exercise ordinary or reasonable care for the safety of invitees, so that the premises are in a reasonably safe condition for use in a manner consistent with the purpose of the invitation. If he directly or by implication invites others to go on the premises, it is his duty to have them reasonably safe. See, generally, 76 Ohio Jur.3d (1987) 21-26, Premises Liability, Sections 10-12. See, also, *Presley v. Norwood* (1973), 36 Ohio St.2d 29; *Light v. Ohio University* (1986), 28 Ohio St.3d 66.

{¶ 6} Ordinarily, there is no duty to prevent a third person from harming another unless a "special relationship" exists between the parties. *Eagle v. Mathews-Click-Bauman, Inc.* (1995), 104 Ohio App.3d 792; *Federal Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 173. 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" may exist between a business and its invitees. *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188. 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 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 193-194.

{¶ 7} Defendant's Chief of Police, Lester Mitchell, testified that the CSU campus was spread over 85 acres and encompassed 38

buildings. He stated that, from approximately 7:00 a.m. to 11:00 p.m. each weekday, the public has open access to the buildings. According to Mitchell, there are usually three to five officers on duty during a shift who patrol the grounds on foot, via bicycle or in marked cars. He acknowledged that there is a high incidence of property-theft crimes on campus, most often involving books and computers. He admitted that there had been a rape in another building approximately 16 months prior to the attack on plaintiff. Mitchell testified in detail regarding how statistics related to campus crimes are compiled and reported, and that the campus security office provides notice of criminal acts which have occurred by posting information on flyers and on its website.

{¶ 8} Both parties presented expert testimony regarding the adequacy of CSU's security measures. Plaintiff's expert, Gregory Baeppler, testified that he had visited Room 151. He described the room as windowless and seemingly soundproof. He also noted that the doors were equipped with locking mechanisms that were in good working order. In his opinion, defendant did not use reasonable care by its failure to ensure that classroom doors were locked when class was not in session. It was undisputed that the classrooms could be unlocked immediately prior to each class by professors, staff or maintenance workers. Mr. Baeppler also faulted defendant's method for reporting crime statistics. Many of the crimes occurring in areas bordering campus buildings were reported to Cleveland city police and did not appear in the information distributed to students or on the CSU website. In essence, Mr. Baeppler found that there was no coordination between campus and local police officers in the reporting of crimes or in the gathering of crime statistics, despite having nearly overlapping jurisdictions. In Mr. Baeppler's opinion, since the campus buildings were interspersed among several city blocks that had a

high incidence of violent crime and weapons offenses, students did not receive an accurate assessment of the significant risk of harm which they faced.

{¶ 9} Defendant's expert, James Clark, testified that CSU security staffing levels were consistent with other urban campuses. Clark noted that a major hospital, a public housing project, and a juvenile detention center were situated within areas immediately adjacent to campus buildings and contributed to the high incidence of crime in the area. He opined that CSU took appropriate steps to patrol the grounds and to disseminate information concerning crime in and around campus. According to Clark, the overall security measures in place at CSU were in compliance with the standards for urban college campuses. He further opined that because of the open, sprawling nature of the campus, it was not reasonable or practical to require defendant to keep the classroom doors locked up to the moment that classes were scheduled to start.

{¶ 10} After careful consideration of all the testimony and other evidence presented, the court finds that it was not foreseeable that plaintiff would be raped in a classroom on a weekday morning when final examinations were going to be held. While it is often readily apparent after a tragedy has occurred to see how such an event could have been avoided, the Tenth District Court of Appeals has stated that foresight, not hindsight, is the standard of diligence. The court explained that "[i]t is nearly always easy, after an [incident] has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence." *Grabill v. Worthington Industries, Inc.* (1994), 98 Ohio App.3d 739, 744. In the instant case, the court notes that defendant was unaware of the rapist's presence or motives until after the attack had occurred and that defendant had no reason to anticipate such a violent and heinous crime would be

perpetrated. The court further finds that plaintiff failed to prove that defendant breached any duty owed to her that proximately caused her injury.

{¶ 11} At the conclusion of the proceedings, the court addressed the civil immunity of Chief Mitchell. The court noted that R.C. 2743.02(F) provides, in part:

{¶ 12} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶ 13} R.C. 9.86 provides, in part:

{¶ 14} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ***" (Emphasis added.)

{¶ 15} In order to find malicious purpose, bad faith, or wanton or reckless conduct there must be a showing that the employee harbored a willful or intentional design to do injury; acted upon self-interest or sinister motive; and/or perversely disregarded a known risk. See, e.g., *Jackson v. Butler County Bd. of County Commrs.* (1991), 76 Ohio App.3d 448, 453-454; *Lowry v.*

Ohio State Highway Patrol (Feb. 27, 1997), Franklin App. No. 96API07-835; *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 771; *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 105, quoting Restatement of the Law 2d, Torts (1965) 590, Section 500, Comment f. The court found that the testimony of Chief Mitchell was candid and credible and that there was nothing in his testimony or demeanor that compelled the court to believe that he harbored willful, intentional, sinister or perverse motives or dispositions toward plaintiff. The evidence was wholly insufficient to establish that the conduct of Chief Mitchell was manifestly outside the scope of his state employment, or that any of his actions were taken with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 16} Consequently, the court ruled from the bench on this issue and determined that Chief Mitchell is entitled to personal immunity pursuant to R.C. 2743.02(F) and 9.86 and the courts of common pleas do not have jurisdiction over civil actions against him based upon his alleged actions and inactions in this case.

{¶ 17} For the foregoing reasons, plaintiff cannot prevail on any of her claims, and judgment shall be rendered in favor of defendant.

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Defendant	:	

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This case was tried to the court on the issues of liability and civil immunity. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, the court finds that Lester Mitchell is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over this matter. 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.

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FRED J. SHOEMAKER
Judge

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