

[Cite as *Shivers v. Univ. of Cincinnati*, 2005-Ohio-949.]

IN THE COURT OF CLAIMS OF OHIO

JAMILA SHIVERS :
Plaintiff : CASE NO. 2000-02461
v. : Judge J. Warren Bettis
DECISION
UNIVERSITY OF CINCINNATI :
Defendant :
: : : : : : : : : : : : : : : :

{¶1} On September 12, 2003, following remand from the Tenth District Court of Appeals in *Shivers v. University of Cincinnati*, Franklin App. No. 02AP-395, 2002-Ohio-6633, the court issued an entry wherein it stated that the parties had agreed to submit this case for a determination of liability based upon written briefs and the record from the previous trial, excluding any testimony of defendant's expert witness, John Carpenter. On October 9, 2003, the court determined that live witness testimony was necessary for the trier of facts to evaluate the credibility of witnesses. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Plaintiff testified that in February 1998, she was a student at the University of Cincinnati (UC), residing in Daniels Hall dormitory, which houses both male and female students. Each floor of the dormitory has two communal bathrooms, one for men and one for women. Plaintiff stated that in the evening on February 26, 1998, she was preparing to take a shower in the women's bathroom on the twelfth floor of Daniels Hall when an unknown male entered the shower area and raped her.

{¶ 3} Ralph L. Trost, defendant's investigator, testified that he interviewed plaintiff and collected what he described as a "limited amount" of physical evidence from the crime scene. Plaintiff's description of the assailant was used to make a composite drawing that was posted around campus, in the community, and featured on local television reports. Despite police efforts, the assailant was never apprehended.

{¶ 4} Plaintiff alleges that defendant was negligent in failing to provide adequate security for Daniels Hall. Specifically, plaintiff asserts that defendant failed to exercise reasonable care because neither locks nor latches were provided on shower doors and because defendant was aware that in the past unauthorized persons had gained access to Daniels Hall.

{¶ 5} Defendant argues, conversely, that plaintiff failed to prove that defendant could have reasonably foreseen that plaintiff would be raped in the dormitory shower. Defendant insists that because plaintiff's attacker was never identified, she cannot prove that the offender obtained access to the dormitory via lax security as opposed to being someone's invited guest on the premises who nevertheless perpetrated this heinous, criminal act.

{¶ 6} 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, the duty owed to invitees is as follows:

{¶ 7} "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, ***." (Citations omitted.) 76 Ohio Jur.3d (1987) 18-20, Premises Liability, Section 7. See, also, *Presley v. Norwood* (1973), 36 Ohio St.2d 29; *Light v. Ohio University* (1986), 28 Ohio St.3d 66. Therefore, defendant owed plaintiff a duty to exercise ordinary and reasonable care to protect her from unreasonable risks of physical harm of which the university knew or had reason to know. *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51.

{¶ 8} 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. The duty on the landlord is to take some reasonable precautions to provide reasonable security. *Carmichael v. Colonial Square Apartments* (1987), 38 Ohio App.3d 131, 132.

{¶ 9} Defendant's director of resident education and development, Dawn Wilson, testified that the first floor doors on the west side of the building were the primary doors to enter and exit Daniels Hall. The residents and their visitors were instructed to stop at the front desk and present identification to student-employees for authorization to proceed into the dormitory. All other exterior doors were locked to access from the outside but could be opened from the inside in the event of a fire or other emergency. According to Wilson, students and others were able to thwart safety procedures and to gain access to the dormitory stairwells by propping open exterior doors.

{¶ 10} Defendant's director of public safety, Eugene Ferrara, testified that students received printed materials during orientation to familiarize themselves with public safety measures. He stated that students were advised to walk in pairs, to be aware of their surroundings, and to lock the doors to their dormitory rooms. He admitted that various property crimes and assaults had occurred at Daniels Hall in the three years prior to plaintiff's incident. He acknowledged that there were no locks or latches on the shower doors in Daniels Hall and that latches do provide some measure of privacy by preventing someone from inadvertently opening the door. However, Mr. Ferrara also maintained that while a latch would have hindered the offender, it would not have prevented the rape.

{¶ 11} Both parties presented expert testimony regarding the adequacy of UC's security measures. Defendant's expert, John Kleberg, testified that in his opinion, defendant had a duty to provide reasonable security to students in the dormitory setting and that defendant met the standard of care owed by universities. In addition, Kleberg stated that security can be reasonable even if unauthorized persons gain access to the residence hall. Kleberg noted that students were able to prop open locked doors or to thwart security measures and that the university could not always prevent these breaches in security. Kleberg did concede that the presence of a privacy latch on the shower stall door would alert the occupant to the presence of another person attempting to gain access. He further acknowledged that having the privacy latch would interfere with unauthorized entrance at least initially but that force would soon overcome it.

{¶ 12} Plaintiff's security expert, James Clark, testified that he had visited Daniels Hall. He described the twelfth floor women's shower area as being located inside the bathroom, at the

end of a row of toilet stalls, across from the sinks and mirrors. Clark noted that there was framing in place around the entrance to the shower areas but that there were no doors in place; he surmised that doors had not been put in place or that doors which had once been in place had subsequently been removed. He further testified that the showers consisted of individual stalls equipped with plexiglass doors that did not have any latch or locking device available to the user, and that there was also an open changing area adjacent to each stall, which consisted of a small bench and some metal hooks affixed to the wall.

{¶ 13} According to Clark, defendant's security was inadequate. Specifically, Clark opined that students should have been provided the ability to lock themselves in the shower. Clark advised that the presence of a lock or even a simple latch on the door of the shower stall could have prevented the attack on plaintiff. In essence, Clark opined that even minimal resistance encountered by the rapist may have served to thwart his course in that he would have lost the element of surprise. Clark maintained that plaintiff was most vulnerable to attack in the shower and that without the presence of a latch, she lost the opportunity, albeit even if only momentary, to realize that she was in imminent danger to which she could respond.

{¶ 14} Upon review of the evidence and testimony presented at trial, the court makes the following determination. The court finds that plaintiff failed to prove that the offender gained access to the twelfth floor as a result of lax security measures at the entrance level of Daniels Hall. Indeed, plaintiff was unable to prove by a preponderance of the evidence that the assailant was not authorized to be on the twelfth floor of Daniels Hall either as a resident or as some resident's visitor.

{¶ 15} However, the court finds that defendant acted unreasonably by failing to install locks or latches on the shower doors. 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; *Fed. 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. In the instant case, the experts themselves confirmed that UC recognized the need to protect resident students from criminal acts of third parties. There was ample evidence that the university readily assumed this duty inasmuch as access to the dormitory was monitored by student-employees and the university had installed locked exterior doors that were alarmed. Further, students were warned during orientation about the known crimes occurring in and around the campus and they received printed materials about safety measures. Indeed, the court finds that students reasonably relied on the university to keep them apprised of crime statistics and safety measures.

{¶ 16} In addition, the court recognizes that students are not in a position to alter the premises such that individual locks might be utilized. Testimony and evidence at trial established that the dormitory rooms were equipped with locks and that locks or latches were present on the doors of other campus bathrooms and showers. Without the means to secure the shower door, plaintiff was vulnerable and unprotected from not only inadvertent interruption, but in this instance, violent attack. Had the rapist's progress been frustrated by a lock or latch, the court

finds that the assailant may have abandoned his plan; certainly, he would have faced an increased risk of discovery. The installation of such lock or latch would have been a simple, inexpensive task and the court finds that defendant's failure to provide such a device was unreasonable.

{¶ 17} 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.

{¶ 18} In the instant case, the court finds that the evidence adduced at trial was sufficient for plaintiff to show the attack was foreseeable. Defendant acknowledged that it warned students during orientation of the risks associated with living on an open, urban campus and of the steps they should take to increase their safety. Both Ferrara and Wilson testified that the university had knowledge of numerous criminal acts occurring on campus, in classrooms, and in the dormitories themselves. In addition, the court finds that the university had notice that there was the risk of harm to its student population and particularly to female students in the setting of a co-ed dormitory, inasmuch as it allowed male visitors access to all floors and the respective common areas of Daniels Hall; that there had been prior assaults and criminal activity; and that unauthorized persons had previously been observed on the premises. Accordingly, the court concludes that the attack on plaintiff was foreseeable.

{¶ 19} The court notes that defendant was in control of the residential facility and that as the landlord of Daniels Hall, it had an obligation to provide those protective devices which were known to exist, were reasonably available, and which could diminish the possibility of a foreseeable assault. The court finds that defendant's failure to install simple, inexpensive locks or latches on the shower doors constituted a breach of the duty of care and that the breach proximately caused plaintiff's injury.

{¶ 20} For the foregoing reasons, the court finds that defendant is liable to plaintiff for its negligence and accordingly, judgment shall be rendered in favor of plaintiff.

IN THE COURT OF CLAIMS OF OHIO

JAMILA SHIVERS	:	
Plaintiff	:	CASE NO. 2000-02461
v.	:	Judge J. Warren Bettis
	:	<u>JUDGMENT ENTRY</u>
UNIVERSITY OF CINCINNATI	:	
Defendant	:	
: : : : : : : : : : : : : : : :		

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 plaintiff in an amount to be determined after the damages phase of the trial. The court shall issue an entry in the near future scheduling a date for the trial on the issue of damages.

J. WARREN BETTIS
Judge

Entry cc:

Barry D. Levy
Michael D. Weisensel
2200 Kroger Building
1014 Vine Street
Cincinnati, Ohio 45202-1141

Attorneys for Plaintiff

Randall W. Knutti
Lisa M. Eschbacher
Assistant Attorneys General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Attorneys for Defendant

SJM/cmd/Filed January 6, 2005
To S.C. reporter March 7, 2005