[Cite as *Wheatley v. Marietta College*, 2016-Ohio-949.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

EMILY WHEATLEY,	:	
Plaintiff-Appellant,	:	Case No. 14CA18
vs.	:	
MARIETTA COLLEGE,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

Perry W. Oxley and David E. Rich, Anspach Meeks Ellenberger, LLP, Huntington, West Virginia, for appellant.

Christopher E. Hogan and Wanda L. Carter, Newhouse, Prophater, Kolman & Hogan, LLC, Columbus, Ohio, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 2-16-16
ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court summary judgment in favor of Marietta College, defendant below and appellee herein. Emily Wheatley, plaintiff below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY NOT IMPOSING SANCTIONS

ON APPELLEE AND REQUIRING APPELLEE TO PAY FOR A THIRD-PARTY VENDOR EMAIL SEARCH."

{¶ 2} During the late evening of February 27, 2009 and into the early morning hours of February 28, 2009, former Marietta College student Brandon Marino attended a party at a fraternity house on the Marietta College campus. After Marino consumed copious amounts of alcohol, he decided to prowl the campus to find a prospective sexual assault victim. He initially looked for a victim in Russell Hall, but was unsuccessful. Marino then went to Parsons Hall.

{¶ 3} Once at Parsons Hall, Marino climbed the first-floor exterior balcony railing and hoisted himself to the second level. Marino found appellant's suite room door and entered through the unlocked door. Marino then found and opened appellant's bedroom door.[1] Once inside appellant's bedroom, he noted that she appeared to be asleep. Marino rifled through her belongings before he decided that he needed a condom. He then left appellant's room, exited the front door of Parsons Hall after placing a pen in the door so that he could easily re-enter. Marino purchased condoms at a nearby convenience store, returned to appellant's room, placed a pillow over her face and raped her.

{¶ 4} On February 25, 2011, appellant filed a complaint and alleged that appellee was negligent by failing to protect her from Marino, by failing to have adequate security in place, and by maintaining Parsons Hall in an unsafe and dangerous manner. Appellant's complaint further alleged that appellee breached its contractual duty to provide her with a safe environment.

[1] Appellant asserts that whether appellant's bedroom door was locked or unlocked is a disputed fact. However, as we explain, infra, even if it is a disputed fact, it is not a material fact that precludes summary judgment.

Appellant also sought punitive damages.

{¶ 5} Appellant subsequently amended her complaint to include a claim for spoliation of evidence and an allegation that appellee was negligent per se under R.C. 2921.12 (tampering with evidence).

{¶ 6} On December 20, 2013, appellee requested summary judgment. In particular, appellee asserted that appellant could not establish that appellee possessed a duty to protect appellant from Marino's criminal conduct. Appellee admitted that it owed appellant, a business invitee, a duty to exercise ordinary care and to protect her by maintaining the premises in a safe condition, but argued that this duty did not include protecting appellant from Marino's unforeseeable criminal act. Appellee contended that it could not have foreseen Marino's criminal because (1) appellee lacked any prior notice that Marino posed a threat on campus, and (2) no prior similar criminal acts had occurred in appellee's residence halls. Appellee thus claimed that because Marino's criminal act was unforeseeable, it did not have a duty to protect appellant from Marino's actions and appellant's failure to establish that appellee had a duty to protect her from Marino entitled appellee to judgment as a matter of law regarding appellant's negligence claims. Appellee further claimed that no genuine issues of material fact remained regarding whether any alleged negligence appellee may have committed was the proximate cause of appellant's rape.

{¶ 7} Appellee additionally asserted that it was entitled to summary judgment concerning appellant's breach of contract claim. Appellee contended that it did not contractually agree to provide any specific security or safety measures, thus appellant's breach of contract claim based upon appellee's alleged failure to "maintain adequate security procedures, protocols and practices" and "to maintain a safe environment" must fail.

{¶ 8} Appellee also argued that no genuine issues of material fact remained regarding appellant's spoliation of evidence claim. Appellee asserted that appellant lacked any evidence to show that (1) appellee willfully destroyed evidence in a manner designed to disrupt appellant's case, (2) appellant's case was, in fact, disrupted, and (3) appellant suffered damages as a result of any alleged spoliation. Appellee admitted that some alterations were made to Parsons Hall after appellant's rape, but stated that the alterations occurred before it received appellant's evidence-preservation letter. Appellee further conceded that it demolished Parsons Hall, but stated that appellant had ample opportunity to inspect the premises before the demolition and eventually did so. Appellee asserted that in July 2011, it granted appellant's request to inspect Parsons Hall, but appellant did not contact appellee to arrange an inspection until June 2012, when appellant learned that appellee had scheduled the demolition. Appellee also asserted that demolishing Parsons Hall was not designed to disrupt appellant's case, but was part of appellee's long-term planning.

{¶ 9} To show the absence of any genuine issues of material fact, appellee presented affidavits from Marietta College Residence Life Director Bruce Peterson and Marietta College Police Department (MCPD) Chief James S. Weaver, III, and relied upon former MCPD Chief David Valkinburg's deposition. Peterson attested in his affidavit that he is "not aware of any incidents of rape or sexual assault that occurred in a residence hall prior to [appellant]'s sexual assault that involved a non-student, unknown trespasser where access to the residence hall was an issue." Valkinburg, who was the police chief from October 2008 through May 2010, stated that he is unaware of any sexual assaults that occurred in Parsons Hall before appellant's rape. Weaver, the current police chief who began working for MCPD in August 2008, stated that he is

not aware of any incidents of rape or sexual assault that occurred on campus before appellant's "which involved an unknown trespasser who had gained access to a residence hall." Weaver also averred that "[t]he campus crime statistics reflect only a minimal number of crimes committed against persons during the five year period immediately prior to the sexual assault of [appellant] on February 28, 2009."

{¶ 10} On January 3, 2014, appellant filed a response opposing appellee's summary judgment motion. Appellant asserted that Marino's criminal act was foreseeable and, thus, appellee had a duty to protect appellant from the rape. Appellant argued that the following circumstances showed the foreseeability of Marino's act: (1) in 1992, a female student was raped in Parsons Hall; (2) in 2008, three rapes occurred in on-campus housing, and at least one of those rapes occurred in Parsons Hall; (3) trespassers could easily access Parsons Hall's upper floors by scaling the exterior balcony; (4) Parsons Hall had inadequate security to prevent trespassers; (5) a Parsons Hall policy prevented students from locking their suite room doors; and (6) a substantial amount of prior criminal activity had occurred at Parsons Hall.

{¶ 11} With respect to the 2008 rapes that occurred in on-campus housing, appellant asserted that appellee "refused to disclose the location" of two of the rapes and that appellee either destroyed the documents or did not generate any documents regarding the two rapes. Appellant argued that appellee's failure to produce evidence regarding the rapes created a genuine issue of material fact as to whether those rapes occurred in Parsons Hall. Thus, appellant contended that the trial court could not grant appellee summary judgment due to a lack of evidence of prior similar rapes occurring in Parsons Hall when appellee failed to provide evidence regarding those rapes.

{¶ 12} Appellant further disputed appellee's argument that no genuine issues of material

fact remained regarding her breach of contract claim. Appellant asserted that the student housing contract incorporates various other documents which state that students have the "right to be treated thoughtfully, considerately, and respectfully," including "the right to sleep without being disturbed." Appellant contended that genuine issues of material fact remain concerning her "right to sleep without being disturbed."

{¶ 13} Appellant additionally argued that genuine issues of material fact remained regarding her spoliation claim. Appellant asserted that genuine issues of material fact remain as to whether appellee willfully destroyed not only Parsons Hall, but also documents that would have helped appellant establish the elements of her action. Appellant contended that appellee destroyed MCPD case files, arrest logs, College Creed Citations, an "open door log," and emails. Appellant asserted that the many instances of destroyed documents allows an inference that appellee acted willfully, and thus precludes summary judgment regarding her spoliation claim. Appellant further claimed that the destroyed documents would have supported her case.

{¶ 14} Appellant also contended that appellee altered Parsons Hall before it permitted appellant to inspect it. Appellant recognized that she eventually inspected Parsons Hall, but claimed that by that point, it was "nothing but a hollow shell of a building."

{¶ 15} To support her argument that Marino's conduct was foreseeable, appellant relied upon former Marietta College Police Department Sergeant and Interim Chief Benita Ruth's deposition, as well as multiple exhibits, including MCPD Uniform Incident Reports that documented some of the prior crimes that occurred in Parsons Hall.

{¶ 16} In her deposition, Ruth stated that she believed that Parsons Hall posed a security risk and that she frequently voiced her concerns to the college administration. Ruth explained that

the Parsons Hall balcony presented a security risk because "[a]nybody could be on the balcony. You didn't have to be a–a member of Marietta College or the building." Ruth testified that appellee was aware that anyone could enter Parsons Hall by climbing the exterior balcony railing, by entering through improperly secured doors, or by "jerking" open the doors. Ruth feared that a female student could be raped, and she advised the female students to keep their doors locked. Ruth also indicated that the students complained about the lack of safety and informed Ruth that the Resident Advisors instructed the students that they would be "written up" for consuming alcohol if they locked their suite room doors.

{¶ 17} She also stated that Parsons Hall had more criminal activity than any other dorm. Ruth was called to Parsons Hall "[m]aybe once or twice a week" for a "stranger," an "unwanted guest," or a "person roaming around the halls." She believed the "unwanted guests" posed a problem. Ruth testified that she also received calls about people walking on the balconies and knocking on doors trying to sell magazines. One time, Ruth responded to Parsons Hall in response to an individual who did not belong in Parsons Hall, and the person, who was not a student, became combative.

{¶ 18} Appellant's counsel asked Ruth whether she believed that there was "a likelihood that a student would be raped in the dorm because of a non-student gaining access to Parsons Hall." Ruth responded: "It's possible, anything's possible." Appellant's counsel then asked her: "Do you believe that it was reasonably foreseeable that a rape could occur in Parsons Hall by someone gaining unauthorized access to Parsons Hall?" Ruth answered, "Yes."

{¶ 19} Appellant also submitted numerous MCPD Uniform Incident Reports that contained the MCPD's records regarding various reports of criminal activity occurring in Parsons Hall

between 2003 and 2008, including criminal trespass, burglary, theft, resisting arrest, disorderly conduct, underage drinking, criminal damaging, assault, and sexual battery. The criminal trespass incidents involved some of the following circumstances: (1) a female student moving into a Parsons Hall dorm room before she was authorized to do so; (2) a person who was not permitted on campus visiting friends who lived at Parsons Hall; (3) a female Parsons Hall resident who kicked an intoxicated student out of her room; (4) an intoxicated parent of a potential student found roaming campus to check dorm security; (5) a quarrel between a female non-student and a male Parsons Hall resident who apparently fathered a child with the female; and (6) an individual who had been prohibited from being on campus was discovered on Parsons Hall's second-floor balcony. Nearly all of the burglary offenses occurred when students were absent from campus during holiday breaks. A theft was reported when a student alleged that her bicycle had been stolen from her Parsons Hall suite hallway, but it was later discovered that another student had "borrowed" the bicycle. A resisting arrest, criminal trespass, and disorderly conduct report indicated that an intoxicated, underage non-student was visiting the premises "to party." Another intoxicated, underage non-student was discovered sitting outside a friend's dorm room. An assault was reported when a non-student slapped a male Parsons Hall resident because she believed he had caused her to miscarry a baby. A November 23, 2008 sexual assault report indicates that a male Parsons Hall resident was present in his room with a female who later alleged that he raped her.

{¶ 20} Appellant also submitted a MCPD report regarding a 1992 rape that occurred in Parsons Hall. This report indicated that the victim believed that she had been raped by a friend. The victim explained that she had been on a date, and her date took her back to his Parsons Hall room. While her date was absent from the room, her friend apparently entered the dorm room by

climbing through a window and allegedly raped her.

{¶ 21} On January 14, 2014, appellee filed a reply memorandum. Appellee initially asserted that only three of the twenty-four exhibits appellant submitted in opposition to appellee's summary judgment motion constituted proper Civ.R. 56 evidence. Appellee argued that the two affidavits and the response to appellant's request for admissions constituted proper Civ.R. 56 evidence, but that appellant had not properly authenticated the remaining documents she submitted–an unsigned incident report, a copy of 20 U.S.C. Section 1092, photographs, artwork, studies, reports, police offense records, incident reports, dispatch logs, correspondence, and Student Senate Minutes. Appellee contended that the court should strike the improper exhibits and not consider them when ruling on appellee's summary judgment motion.

{¶ 22} Appellee additionally argued that none of the evidence appellant submitted shows that Marino's criminal act was foreseeable, thus imposing a duty upon appellee to protect appellant from Marino. Appellee asserted that evidence regarding the 1992 rape did not establish the foreseeability of Marino's act because (1) any foreseeability that may have existed after the 1992 rape most certainly evaporated during the subsequent seventeen years that elapsed until Marino committed his rape, and (2) the 1992 rape did not involve a similar set of circumstances as appellant's rape.

{¶ 23} Appellee further disputed appellant's insinuations that appellee intentionally withheld any documents that would have helped establish her case. Appellee claimed that it produced "all case files related to sexual assaults on campus during the period from 2006 through 2009." Appellee thus argued that appellant could not rely upon an absence of documentation regarding the 2008 rapes to establish that Marino's criminal act was foreseeable.

{¶ 24} Appellee also submitted an affidavit and additional documentation regarding a November 23, 2008 rape that occurred in Parsons Hall. Appellee conceded that this rape was close in time to appellant's rape, but argued that the 2008 rape did not involve a similar set of circumstances as appellant's rape. Appellee asserted that the 2008 rape occurred when the alleged victim returned to a friend's room located in Parsons Hall, not from a criminal trespasser.

{¶ 25} With respect to appellee's spoliation claim, appellee contended that it did not destroy any MCPD case files and that appellee provided appellant "with copies of all case files involving assaults occurring on the Marietta College campus during the period 2006 through 2009, as well as copies of all case files pertaining to burglaries or thefts occurring in Parsons Hall during this period." Appellee also asserted that it provided the arrest and citation log for the years 2008 through 2011 and that it did not fail to produce emails responsive to her discovery requests.

{¶ 26} To support its assertions, appellee submitted Barbara Letcher's affidavit. In it, she stated that on October 22, 2013 she learned that MCPD case files from the years 2006 through 2009 had been located. On October 31, 2013, appellee produced all relevant documents to appellant, including documents related to the November 2008 rape.

{¶ 27} On May 9, 2014, the trial court, after reviewing the parties' motion and response and the evidentiary materials, entered summary judgment in appellee's favor. The court determined that the evidence failed to show that Marino's criminal act was foreseeable and, thus, the appellee did not have a duty to protect appellant from Marino's criminal act. The court disagreed with appellant that the 1992 rape was relevant to establishing foreseeability. The court concluded that the 1992 rape (1) occurred too far in the past to constitute evidence of foreseeability in 2009, and (2) did not involve a similar set of circumstances as appellant's rape. The court found no evidence

to suggest that the 1992 rape involved an unknown trespasser who unlawfully gained access to the victim's room. Instead, the court found that the evidence showed that in 1992 the victim returned to her date's Parsons Hall room and was subsequently sexually assaulted by a fellow student whom the victim considered a friend.

{¶ 28} The court also disagreed with appellant that the 2008 rape that occurred in Parsons Hall established the foreseeability of Marino's criminal act. The court determined that the circumstances of the 2008 rape were dissimilar to the circumstances of appellant's rape and did not involve an unknown trespasser.

{¶ 29} The trial court considered the incident reports that appellant submitted in opposition to appellee's summary judgment motion, but found that they did not demonstrate the foreseeability of Marino's act. The court determined that all of the prior incidents were dissimilar to appellant's rape. The trial court also did not believe that appellee's alleged knowledge that students climbed Parsons Hall's exterior balcony demonstrated foreseeability. The court determined that appellant failed to produce evidence to show that any of the alleged trespassers who climbed the exterior balcony engaged in criminal conduct.

{¶ 30} The trial court considered appellant's spoliation claim as it related to appellant's complaint that appellee altered Parsons Hall before her inspection. The court determined that appellant could not establish that any willful destruction of Parsons Hall disrupted her case. The court did not consider appellant's spoliation claim in relation to allegedly destroyed, altered, or concealed documentary evidence.

{¶ 31} The court also determined that appellee was entitled to summary judgment

regarding appellant's breach of contract claim and her allegation of negligence per se.[2] This appeal followed.

I

{¶ 32} In her first assignment of error, appellant asserts that the trial court erroneously entered summary judgment in appellee's favor. Appellant contends that the trial court wrongly concluded that Marino's criminal act was unforeseeable, and that appellee did not possess a duty to protect her from the rape. Appellant contends that the following circumstances demonstrate that Marino's actions were foreseeable: (1) the security measures at Parsons Hall were inadequate and permitted unfettered access; (2) multiple criminal offenses previously occurred in Parsons Hall, including rape, sex offenses, burglaries, break-ins, and violent crimes; (3) during the year before appellant's rape, three other rapes occurred in on-campus housing; (4) trespassers accessed the second story of Parsons Hall by scaling the exterior balcony; (5) keycard exterior doors could be bypassed by jerking on the handles; (6) the interior dorm room doors were "defective;" (7) the college had a policy that prevented Parsons Hall students from locking their suite room doors; (8) Benita Ruth "warned the College administration" of the security issues at Parsons Hall and "warned the MCPD Chief of Police that Parsons was unsafe to house students;" (9) MCPD received "multiple complaints per week of trespassers on the upper floors of Parsons;" and (10) Ruth opined that "it was reasonably foreseeable that a rape could occur in Parsons due to a trespasser entering Parsons Hall by climbing up onto the first floor railing and hoisting oneself up onto the second floor, in precisely the same way Appellant's rapist entered."

[2] Appellant did not raise any argument on appeal regarding the trial court's decision to enter summary judgment concerning her breach of contract and negligence per se claims.

{¶ 33} Appellant additionally asserts that whether appellee knew that trespassers who had climbed the balcony railing previously committed crimes is a disputed fact. She contends that 1980s Marietta College student Paul Bertram's testimony shows that appellee knew that trespassers were burglarizing students' dorm rooms during holiday breaks by climbing the exterior balcony. Bertram explained that when he attended Marietta College during the 1980s, if Parsons Hall was closed during a break "and somebody broke in, the only way they could get in would be up the front of the building." Bertram suggests that appellee should have known that individuals were climbing the exterior balcony to burglarize students' dorm rooms.

{¶ 34} Appellant further argues that a genuine issue of material fact remains regarding whether appellant's dorm room door was locked the night that Marino entered. She claims that the evidence does not clearly indicate whether Marino opened the door in an unlocked state, or whether Marino had somehow bypassed the locked door.

{¶ 35} Appellant next asserts that the trial court erred by failing to consider whether appellee negligently performed its voluntarily assumed duties (1) to properly monitor and respond to security alerts, (2) to replace the door locks in Parsons Hall, (3) to provide an adequate police force, and (4) to provide properly trained Residence Life staff.

{¶ 36} Appellant also argues that genuine issues of material fact remain regarding her spoliation claim. Appellant argues that disputed factual issues remain concerning whether appellee willfully destroyed or concealed documents material to appellant's case and whether appellee willfully destroyed or altered Parsons Hall.

{¶ 37} Appellee argues that appellant failed to put forth evidence to show that appellee knew, or should have known, that a rape was substantially likely to occur in Parsons Hall and thus

failed to establish that appellee possessed a duty to protect appellant from Marino's act. Appellee contends that the evidence does not show that Parsons Hall was the site of prior violent criminal conduct resulting from trespassers breaking into student dorm rooms, or that any prior similar rapes occurred in Parsons Hall. Appellee additionally asserts that simply because trespassers could access Parsons Hall and burglarize dorm rooms does not mean that appellee should have known that one such individual would rape a student. Appellee claims that trespassers having access to Parsons Hall raised nothing more than a potential for rape and did not give rise to a substantial likelihood that a student would be raped so as to render a rape foreseeable. Appellee thus argues that even if it knew unauthorized persons climbed the exterior balcony of Parsons Hall to burglarize student dorm rooms, this knowledge does not lead to a finding that appellee should have recognized a risk that a trespasser would climb the balcony to rape a student.

{¶ 38} Appellee challenges appellant's assertion that Ruth's testimony that a rape was foreseeable demonstrates that appellee should have foreseen appellant's rape and, thus, owed a duty to protect her from Marino. Appellee asserts that the evidence does not support Ruth's belief. Appellee also argues that Ruth's testimony is a legal conclusion that cannot defeat a properly supported summary judgment motion.

{¶ 39} Appellee contends that appellant did not specifically raise her voluntary-assumption-of-duty argument during the trial court proceedings and cannot, therefore, raise it for the first time on appeal.

{¶ 40} Appellee next argues that the trial court properly determined that no genuine issues of material fact remained regarding appellant's spoliation of evidence claim. Appellee asserts that the evidence fails to show that any alleged willful destruction of evidence disrupted appellant's

case.

A

SUMMARY JUDGMENT STANDARD

{¶ 41} Appellate courts conduct a de novo review of trial court summary judgment decisions. E.g., Troyer v. Janis, 132 Ohio St.3d 229, 2012-Ohio-2406, 971 N.E.2d 862, ¶6; Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. E.g., Brown v. Scioto Bd. of Commrs., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (1993); Morehead v. Conley, 75 Ohio App.3d 409, 411–12, 599 N.E.2d 786 (1991). To determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law. Civ.R. 56(C) provides in relevant part:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can 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 or stipulation construed most strongly in the party's favor. * * * *

Thus, pursuant to Civ.R. 56, a trial court may not grant summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party,

that conclusion is adverse to the party against whom the motion for summary judgment is made. E.g., Smith v. McBride, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶12; New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶24; Vahila v. Hall, 77 Ohio St.3d 421, 429–30, 674 N.E.2d 1164 (1997).

{¶ 42} The purpose of Civ.R. 56 "is to enable movement beyond allegations in pleadings and to analyze the evidence so as to ascertain whether an actual need for a trial exists. Because it is a procedural device to terminate litigation, summary judgment must be awarded with caution." Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau, 88 Ohio St.3d 292, 300, 725 N.E.2d 646 (2000) (citations omitted).

{¶ 43} Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion and to identify those portions of the record that demonstrate the absence of a material fact. Vahila, supra; Dresher v. Burt, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The moving party cannot discharge its initial burden with a conclusory assertion that the nonmoving party has no evidence to prove its case. Kulch v. Structural Fibers, Inc., 78 Ohio St.3d 134, 147, 677 N.E.2d 308 (1997); Dresher, supra. Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nomoving party's claims. Civ.R. 56(C); Dresher, supra.

{¶ 44} "[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of

proof at trial, a trial court shall not grant a summary judgment." Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc., 110 Ohio App.3d 732, 742, 675 N.E.2d 65 (2nd Dist.1996). Once the moving party satisfies its burden, the nomoving party bears a corresponding duty to set forth specific facts to show that a genuine issue exists. Civ.R. 56(E); Dresher, supra. More specifically, Civ.R. 56(E) states:

> * * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶ 45} Consequently, "'[m]ere speculation and unsupported conclusory assertions are not sufficient'" to meet the nonmovant's reciprocal burden to set forth specific facts to show that a genuine issue exists. Bank of New York Mellon v. Bobo, 4th Dist. Athens No. 14CA22, 2015-Ohio-4601, ¶13, quoting Loveday v. Essential Heating Cooling & Refrig., Inc., 4th Dist. Gallia No. 08CA4, 2008–Ohio-4756, ¶9. Thus, "'resting on mere allegations against a motion for summary judgment * * * is insufficient'" to defeat a properly supported summary judgment motion. Jackson v. Alert Fire & Safety Equip., Inc., 58 Ohio St.3d 48, 52, 567 N.E.2d 1027, 1032 (1991), quoting King v. K.R. Wilson Co., 8 Ohio St.3d 9, 11, 8 OBR 79, 80, 455 N.E.2d 1282, 1283 (1983). Moreover, "conclusory affidavits that merely provide legal conclusions or unsupported factual assertions are not proper under Civ. R. 56(E)" and are insufficient to establish a genuine issue of material fact. Moore v. Smith, 4th Dist. Washington No. 07CA61, 2008-Ohio-7004, 2008 WL 5451340, ¶15 (citations omitted); Wertz v. Cooper, 4th Dist. Scioto No. 06CA3077, 2006-Ohio-6844, 2006 WL 3759831, ¶13, citing and quoting Evans v. Jay

Instrument & Specialty Co., 889 F.Supp. 302, 310 (S.D.Ohio 1995) ("'bald self-serving and conclusory allegations are insufficient to withstand a motion for summary judgment'"); accord Stetz v. Copley Fairlawn Sch. Dist., – N.E.3d —, 2015-Ohio-4358, ¶17 (9th Dist.), quoting Brannon v. Rinzler, 77 Ohio App.3d 749, 756, 603 N.E.2d 1049 (2d Dist.1991) ("'Statements contained in affidavits must be based on personal knowledge and cannot be legal conclusions.'"); McCartney v. Oblates of St. Francis deSales, 80 Ohio App.3d 345, 357–358, 609 N.E.2d 216 (6th Dist.1992) (stating that a trial court considering a summary judgment motion is not required to accept conclusory allegations that are devoid of any evidence to create an issue of material fact).

{¶ 46} Additionally, when trial courts consider summary judgment motions, Civ.R. 56(C) specifies that the court may examine only "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, [that are] timely filed in the action." Id.; Whitt v. Wolfinger, 2015-Ohio-2726, 39 N.E.3d 809, 813♥14, ¶12 (4th Dist.); Davis v. Eachus, 4th Dist. Pike No. 04CA725, 2004-Ohio-5720, 2004 WL 2406685, ¶36; Wall v. Firelands Radiology, Inc., 106 Ohio App.3d 313, 334, 666 N.E.2d 235 (6th Dist.1995). "'Documents which are not sworn, certified, or authenticated by way of affidavit have no evidentiary value and shall not be considered by the trial court.'" State ex rel. Shumway v. Ohio State Teachers Retirement Bd., 114 Ohio App.3d 280, 287, 683 N.E.2d 70 (1996), quoting Mitchell v. Ross, 14 Ohio App.3d 75, 470 N.E.2d 245 (8th Dist.1984). A party may, however, introduce evidentiary material that does not fall within one of the categories of evidence listed in Civ.R. 56(C) when that material is incorporated by reference in a properly framed affidavit. Thompson v. Hayes, 10th Dist. Franklin No. 05AP–476, 2006–Ohio–6000, ¶103.

{¶ 47} According to Civ.R. 56(E), a properly framed affidavit is one that is (1) "based on

personal knowledge," (2) "set[s] forth such facts as would be admissible in evidence," and (3) "show[s] affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Additionally, if the affiant refers to documentary evidence, "[s]worn or certified copies of all papers or parts of papers * * * shall be attached to or served with the affidavit." Civ.R. 56(E). "'The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions.'" Cincinnati Bar Assn. v. Newman, 124 Ohio St.3d 505, 507, 2010-Ohio-928, 924 N.E.2d 359, 361, ¶7, quoting State ex rel. Corrigan v. Seminatore, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981); see also Bobo at ¶28, citing Wesley v. Walraven, 4th Dist. Washington No. 12CA18, 2013-Ohio-473, ¶31 ("Civ.R. 56(E)'s requirement that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit with a statement contained in the affidavit that the copies are true and accurate reproductions.").

{¶ 48} Furthermore, affidavits submitted to support or oppose a summary judgment motion must be based on personal knowledge. Civ.R. 56(E); Bonacorsi v. Wheeling & Lake Erie Ry. Co., 95 Ohio St.3d 314, 320, 2002-Ohio-2220, 767 N.E.2d 707, ¶26, citing State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn., 69 Ohio St.3d 217, 223, 631 N.E.2d 150 (1994).

> "For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. Id.; Evid.R. 602. 'Personal knowledge' is '[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' Black's Law Dictionary (7th Ed.Rev.1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ("The subject of a witness's testimony must have been perceived through one or more of the senses of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.")."

Id.

{¶ 49} "If a party submits evidence that does not fall within Civ.R. 56(C)'s parameters, the opposing party may file a motion to strike the improperly-submitted evidence." Whitt at ¶13. The determination of a motion to strike is within a court's broad discretion. Id., citing State ex rel. Dawson v. Bloom–Carroll Local School Dist., 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶23. Consequently, appellate courts will not disturb trial court rulings regarding motions to strike unless the court abused its discretion. Id., citing State ex rel. Mora v. Wilkinson, 105 Ohio St.3d 272, 2005-Ohio-1509, 824 N.E.2d 1000, ¶10. A decision constitutes an abuse of discretion when it is unreasonable, arbitrary, or unconscionable. Id., citing State ex rel. Striker v. Cline, 130 Ohio St.3d 214, 2011-Ohio-5350, 957 N.E.2d 19, ¶11. Moreover, when applying the abuse-of-discretion standard, a reviewing court may not substitute its judgment for that of the trial court. Id., citing Berk v. Matthews, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶ 50} In the case at bar, appellee argued in its reply memorandum that the majority of the material appellant attached to her opposition memorandum is not proper Civ.R. 56 evidence. In response, appellant submitted an affidavit from her counsel in which counsel averred that the documents are true and accurate copies. The trial court did not specifically rule upon the propriety of the evidentiary material appellant included with her opposition memorandum. Nevertheless, when a trial court fails to rule upon a pretrial motion, it may be presumed that the court overruled it. State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn., 69 Ohio St.3d 217, 223, 1994♥Ohio♥92, 631 N.E.2d 150, 155 (1994), citing Newman v. Al Castrucci Ford Sales, Inc., 54 Ohio App.3d 166, 561 N.E.2d 1001 (1988). Moreover, appellee did not file a motion to strike. It further appears that the trial court considered much of the evidentiary material. Under these

circumstances, we presume that the trial court overruled appellee's objection to the evidentiary material. Appellee did not cross-appeal nor argue that the trial court abused its discretion by considering the material. Consequently, we believe that we may properly consider the evidence.[3]

B

NEGLIGENCE

{¶ 51} A negligence action requires a plaintiff to establish "(1) a duty requiring the defendant to conform to a certain standard of conduct, (2) breach of that duty, (3) a causal connection between the breach and injury, and (4) damages." Cromer v. Children's Hosp. Med. Ctr. of Akron, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶23; accord Texler v. D.O. Summers Cleaners, 81 Ohio St.3d 677, 680, 693 N.E.2d 217 (1998); Menifee v. Ohio Welding Products, Inc., 15 Ohio St.3d 75, 472 N.E.2d 707 (1984). If a defendant demonstrates that the plaintiff will be unable to prove any one of the foregoing elements, the defendant is entitled to judgment as a matter of law. Feichtner v. Cleveland, 95 Ohio App.3d 388, 394, 642 N.E.2d 657 (8th Dist. 1994); Keister v. Park Centre Lanes, 3 Ohio App.3d 19, 443 N.E.2d 532 (5th Dist. 1981).

{¶ 52} In the case sub judice, the parties primarily dispute whether appellee possessed a duty to protect appellant from Marino's criminal conduct.

1

DUTY

{¶ 53} "'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

[3] Even if we agree with appellee that the evidence is not proper Civ.R. 56 evidence, the result of our decision would not be different.

toward the plaintiff.'" Wallace v. Ohio Dept. of Commerce, 96 Ohio St.3d 266, 733 N.E.2d 1018, ¶23, quoting Commerce & Industry Ins. Co. v. Toledo, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989).

{¶ 54} "Duty is a threshold question in a negligence case." Martin v. Lambert, 2014-Ohio-715, 8 N.E.3d 1024 (4th Dist.) ¶16. "'If there is no duty, then no legal liability can arise on account of negligence. Where there is no obligation of care or caution, there can be no actionable negligence.'" Jeffers v. Olexo, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989), quoting 70 Ohio Jurisprudence 3d (1986) 53-54, Negligence, Section 13 (footnotes omitted).

{¶ 55} Whether a duty exists in a negligence action is generally a question of law for a court to decide. Wallace at ¶22; Mussivand v. David, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989); Simpson v. Concord United Methodist Church, 2nd Dist. Montgomery No. 20382, 2005-Ohio-4532, ¶25 (stating that whether defendant knew or should have known of danger and thus had a duty to warn is a question of law). A "question of law" is "'[a]n issue to be decided by the judge, concerning the application or interpretation of the law.'" Henley v. Youngstown Bd. Of Zoning Appeals, 90 Ohio St.3d 142, 148, 735 N.E.2d 433 (2000), quoting Black's Law Dictionary (7th Ed. 1999) 1260. A question of law does not become a question of fact simply because a court must consider facts or evidence. Id.; State v. Williams, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶25 ("That facts are involved in the analysis does not make the issue a question of fact deserving of deference to a trial court."); Ruta v. Breckenridge-Remy Co., 69 Ohio St.2d 66, 68, 430 N.E.2d 935 (1982) (stating that "simply because resolution of a question of law involves a consideration of the evidence does not mean that the question of law is converted into a question of fact or that a factual issue is raised"). As stated in O'Day v. Webb, 29 Ohio St.2d 215, 280

N.E.2d 896 (1972), paragraph two of the syllabus: "The fact that a question of law involves a consideration of facts or the evidence, does not turn it into a question of fact or raise a factual issue; nor does that consideration involve the court in weighing the evidence or passing upon its credibility." Thus, "[w]ith respect to questions of law, O'Day requires a court to consider both facts and evidence in reaching its legal determination and enjoins the court from weighing the evidence or passing on issues of credibility." Pangle v. Joyce, 76 Ohio St.3d 389, 391, 667 N.E.2d 1202 (1996) (citation omitted). Consequently, if facts needed for a court to determine a question of law remain disputed, then the fact finder must resolve those factual disputes before a court can fully consider the question of law. Wagner v. Ohio State Univ. Med. Ctr., 188 Ohio App.3d 65, 2010-Ohio-2561, 934 N.E.2d 394, 37 (10th Dist.) ("While the question of the existence of a duty is a question of law, the resolution of that question must await the resolution of the factual disputes concerning foreseeability."); see State v. White, 2013-Ohio-51, 988 N.E.2d 595 (6th Dist.) ¶82 (stating that "immunity is rendered a question of law only when there are no disputes over material facts relevant to its entitlement that would be outcome determinative").[4]

[4] To state that an issue is a question of law only if no material facts remain disputed does not seem to be an accurate statement of the law. If an issue, such as immunity or duty, is a question of law, then it is a question of law regardless of whether facts are disputed. If facts needed to decide the question of law remain disputed, it may be more appropriate to think of the issue as a mixed question of law and fact. The fact finder determines the relevant facts. The court then determines the question of law in light of those facts. We do note, however, that the Ohio Supreme Court has sent mixed messages regarding this issue. Compare Wallace and Mussivand, supra, with Grover v. Eli Lilly & Co., 63 Ohio St.3d 756, 762, 591 N.E.2d 696 (1992) ("The existence of a legal duty is a question for the court, unless alternate inferences are feasible based on the facts."); Fed. Steel & Wire Corp. v. Ruhlin Const. Co., 45 Ohio St.3d 171, 543 N.E.2d 769 (1989) (stating that whether contractor owed special duty was a jury question); Colarossi v. Anderson

2

DUTY TO PROTECT AGAINST CRIMINAL ACTS

{¶ 56} "Ordinarily, there is no duty to control the conduct of a third person by preventing him or her from causing harm to another, except in cases where there exists a special relationship between the actor and the third person which gives rise to a duty to control, or between the actor and another which gives the other the right to protection. Thus, liability in negligence will not lie in the absence of a special duty owed by a particular defendant." Fed. Steel & Wire Corp. v. Ruhlin Constr. Co., 45 Ohio St.3d 171, 173-144, 543 N.E.2d 769 (1989) (citations omitted). One type of special relationship that may give rise to a duty to prevent a third person from causing harm to another is that between a business owner and invitee. Simpson v. Big Bear Stores Co., 73 Ohio St.3d 130, 134, 652 N.E.2d 702 (1995); Reitz v. May Co. Dept. Stores, 66 Ohio App.3d 188, 191, 583 N.E.2d 1071 (8th Dist. 1990).

{¶ 57} In the case sub judice, the parties do not dispute that appellant, a college student living on appellee's premises, was a business invitee to whom appellee owed a duty of ordinary care. See Desir v. Mallett, 10th Dist. Franklin No. 14AP-766, 2015-Ohio-2124, ¶23; Wheeler v. Ohio State Univ., 10th Dist. Franklin No. 11AP-289, 2011-Ohio-6295, ¶17; Shivers v. Univ. of Cincinnati, 10th Dist. Franklin No. 06AP–209, 2006–Ohio–5518, ¶6, citing Kleisch v. Cleveland State Univ., 10th Dist. Franklin No. 05AP-289, 2005-Ohio-1300. A business premises owner generally owes a business invitee a duty to exercise ordinary care and to protect the invitee by maintaining the premises in a reasonably safe condition. Lang v. Holly Hill Motel, Inc., 122 Ohio

---

Concrete Corp., 175 Ohio St. 321, 326, 194 N.E.2d 768, 772 (1963) (holding that "reasonable minds could come to different conclusions as to whether defendant owed plaintiff a duty of reasonable care").

St.3d 120, 2009-Ohio-2495, 909 N.E.2d 102; Bennett v. Stanley, 92 Ohio St.3d 35, 38, 748 N.E.2d 41 (2001); Light v. Ohio Univ., 28 Ohio St.3d 66, 68, 502 N.E.2d 611 (1986); Presley v. Norwood, 36 Ohio St.2d 29, 31, 303 N.E.2d 81 (1973). "The basis of liability in such case is the owner's superior knowledge of existing dangers or perils to persons going upon the property. It is only when there are perils or dangers known to the owner and not known to the person injured that liability may be established and recovery permitted." Englehardt v. Philipps, 136 Ohio St. 73, 78, 23 N.E.2d 829, 831 (1939).

{¶ 58} A premises owner is not, however, an insurer of an invitee's safety. Howard v. Rogers, 19 Ohio St.2d 42, 249 N.E.2d 804 (1969), paragraph two of the syllabus. Thus, the duty of ordinary care does not require a business owner "to warn or protect its business invitees from criminal acts of third parties [unless] the business knows or should that there is a substantial risk of harm to its invitees * * * ." Simpson at syllabus.

> "[T]here is no common-law duty to anticipate or foresee criminal activity. Thus, the law usually does not require the prudent person to expect the criminal activity of others. As a result, the duty to protect against injury caused by third parties, which may be imposed where a special relationship exists, is expressed as an exception to the general rule of no liability."

Federal Steel, 45 Ohio St.3d at 174 (citations and footnote omitted).

{¶ 59} If a third party's criminal act is not foreseeable, no duty arises, and a business owner cannot be held liable in negligence for failing to protect or warn its invitee. Shivers at ¶6. "Thus, where an occupier of premises for business purposes does not, and could not in the exercise of ordinary care, know of a danger which causes injury to his business invitee, he is not liable

therefor." Howard v. Rogers, 19 Ohio St.2d 42, 47, 249 N.E.2d 804 (1969). In other words: "A business or property owner has a duty to protect others from injury due to criminal activity only if substantial evidence exists to demonstrate that the owner could foresee that the criminal activity would occur and that people would be injured by the criminal activity." Walters v. Oberling Ford, Inc., 4th Dist. Scioto No. 97CA2513 (Sept. 29, 1997). Accordingly, the foreseeability of the risk of harm determines the scope of a premises owner's duty to protect its invitees against harm from a third person's criminal act. See Cromer v. Children's Hosp. Med. Ctr. of Akron, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶26-29 (stating that "the foreseeability of one's duty to a particular person does not necessarily determine the foreseeability of a risk of harm, and it therefore does not end the inquiry into the scope of an actor's duty to another person" and explaining that foreseeability of harm is relevant when determining the scope of a physician's duty to a patient). Therefore, if a substantial risk of harm from a third person's criminal act is not foreseeable, a premises owner's duty to an invitee does not include protecting the invitee from or warning the invitee of the third person's criminal conduct.

{¶ 60} Generally, a risk of harm is foreseeable if "a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." Menifee, 15 Ohio St.3d at 77; e.g., Texler, supra; Federal Steel & Wire Corp., 45 Ohio St.3d at 174. The law limits liability in negligence to those risks which a reasonably prudent person would have anticipated as a result of his conduct. See Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99 (N.Y.App. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed * * *."). Accordingly, "[t]he foreseeability of harm usually depends on the defendant's knowledge." Menifee, 15 Ohio St.3d at 77 (citations omitted).

{¶ 61} We further note that "[t]he test for foreseeability is one of likelihood, not mere possibility." Shadler v. Double D. Ventures, Inc., 6th Dist. Lucas No. L-03-1278, 2004-Ohio-4802, ¶31 (stating that simply because fights occasionally occur in some bars does not mean that "a fight is imminent and foreseeable every day in every bar").

> "'[T]he mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant.' Prosser & Keeton, [Law of Torts (5 Ed.1984)] at 305. Rather, '[i]t is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed.' Id. at 313."

Evans v. Ohio State Univ., 112 Ohio App.3d 724, 740, 680 N.E.2d 161 (10th Dist. 1996); accord Wagner v. Ohio State Univ. Med. Ctr., 188 Ohio App.3d 65, 71, 2010-Ohio-2561, 934 N.E.2d 394, 399, ¶25 (10th Dist.). "As a society, we expect people to exercise reasonable precautions against the risks that a reasonably prudent person would anticipate. Conversely, we do not expect people to guard against risks that the reasonable person would not foresee." Cromer at ¶24 (citation omitted.); Gedeon v. East Ohio Gas Co., 128 Ohio St. 335, 338, 190 N.E. 924 (1934) ("No one is bound to take care to prevent consequences, which, in the light of human experience, are beyond the range of probability."). "[I]n determining whether the defendant should recognize the risks which are involved in his conduct as being unreasonable, only those circumstances which the defendant perceives or should perceive at the time he acts or fails to act are to be considered." Englehardt, 136 Ohio St at 78.

> "'Foresight, not retrospect, is the standard of diligence. It is nearly always

> easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated. Reasonable anticipation is that expectation created in the mind of the ordinarily prudent and competent person as the consequence of his reaction to any given set of circumstances. If such expectation carries recognition that the given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence. On the contrary, there is no duty to guard when there is no danger reasonably to be apprehended. Negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. Reasonable apprehension does not include anticipation of every conceivable injury. There is no duty to guard against remote and doubtful dangers.'"

Hetrick v. Marion-Res. Power Co., 141 Ohio St. 347, 358-59, 48 N.E.2d 103 (1943), quoting 1 Shearman and Redfield on Negligence, Rev.Ed., 50, Section 24. Consequently, whether a business premises owner has a duty to protect its invitees from a third person's criminal conduct depends upon whether a reasonably prudent person would have anticipated that criminal conduct posed a substantial risk of harm to an invitee. Simpson, supra (stating that business owner's duty to invitee with respect to third party's criminal conduct depends upon whether the business owner knew or should know of "a substantial risk of harm to its invitees").

{¶ 62} In general terms, "[t]he foreseeability of the risk of harm is not affected by the magnitude, severity, or exact probability of a particular harm, but instead by the question of whether some risk of harm would be foreseeable to the reasonably prudent person." Cromer at ¶24♥(citations omitted); accord Queen City Terminals, Inc. v. Gen. Am. Transp. Corp., 73 Ohio St.3d 609, 619, 653 N.E.2d 661 (1995) ("[A] particular defendant need not foresee the specific harm caused by its negligence, if the harm would have been foreseeable to a reasonably prudent person."). "It is enough that the probability of injury to those in the plaintiff's general situation should have been perceived by a reasonably prudent and careful person." Gedeon, 128 Ohio St. at

339. "Accordingly, the existence and scope of a person's legal duty is determined by the reasonably foreseeable, general risk of harm that is involved." Cromer at ¶24.

{¶ 63} In the context of a premises owner's duty to protect its invitees from a third person's criminal conduct, Ohio courts appear to have taken a strict approach to the foreseeability analysis: "'To show foreseeability [of a third person's criminal act], one must demonstrate that the specific harm at issue was foreseeable.'" Heimberger v. Zeal Hotel Group, Ltd., 10th Dist. Franklin No. 15AP-99, 2015-Ohio-3845, ¶25, quoting Maier v. Serv–All Maintenance, Inc., 124 Ohio App.3d 215, 224, 705 N.E.2d 1268 (8th Dist.1997).

> "[T]here must appear from the facts and the circumstances of the case presented that the defendant had some prior knowledge or experience of the type of occurrence which occasioned the plaintiff's injuries, as alleged, or that the defendant should reasonably have known of or anticipated the type of danger or acts of third persons which resulted in the injuries sustained by the plaintiff."

Townsley v. Cincinnati Gardens, Inc., 39 Ohio App.2d 5, 7-8, 314 N.E.2d 409 (1st Dist.1974); Johnson v. Spectrum of Supportive Services, 8th Dist. Cuyahoga No. 82267, 2003-Ohio-4404, ¶21 (citations omitted) (stating that foreseeability of criminal acts standard "requires more than knowledge of a potential future problem based on past occurrences. It requires (1) specific knowledge of a potential future problem based on past occurrences along with (2) a substantial likelihood that such an incident would occur"). Under this analysis, therefore, it is not enough for an invitee to show that a premises owner should have foreseen a substantial risk of general harm to the invitee, but instead, the invitee must demonstrate that a premises owner should have foreseen a substantial risk of the precise harm that befell the invitee. The Ohio Supreme Court has not yet, to our knowledge, specifically weighed in on this issue as it relates to a premises owner's duty to

protect an invitee from a third person's criminal act.[5] Regardless, under any foreseeability analysis (specific harm or general harm),[6] we do not believe that the evidence in the case sub judice shows that a reasonable person would have anticipated that criminal conduct posed a substantial risk of harm to appellant.

{¶ 64} Some Ohio courts have adopted a totality of the circumstances approach to determine whether a risk of harm from a third person's criminal act is foreseeable. Shivers at ¶7 ("The foreseeability of criminal acts, examined under the test of whether a reasonably prudent person would have anticipated an injury was likely to occur, will depend upon the totality of the circumstances."); Reitz, 66 Ohio App.3d at 193. Others have applied a "prior-similar-acts-test" to determine the foreseeability that a third person's criminal act would harm an invitee. Whisman v. Gator Invest. Properties, Inc., 149 Ohio App.3d 225, 2002-Ohio-1850, 776 N.E.2d 1126, (2nd Dist.)

---

[5] Simpson and Howard v. Rogers may support the theory that the foreseeability of criminal acts is judged by whether the premises owner should have foreseen the specific harm that the invitee suffered. The Simpson court explained Howard and stated that in Howard, the evidence failed to show that the premises owner should have foreseen "the danger that a fight could take place." Id. at 132. This statement suggests that it is the specific harm courts must consider when examining the foreseeability of criminal acts.

[6] Comment f to Section 344 of the Restatement of the Law 2d, Torts (1965) seems to support the theory that the foreseeability of criminal conduct should be assessed by examining whether the premises owner should have seen a substantial risk of general harm:

> "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."

Quoted in Reitz v. May Co. Dept. Stores, 66 Ohio App.3d 188, 193, 583 N.E.2d 1071 (8th Dist.1990).

25.

{¶ 65} This court previously applied the totality of the circumstances approach, and we do so again in the case sub judice. Walters, supra. The totality of the circumstances test allows consideration of all relevant evidence, which may include (1) prior similar incidents; (2) other criminal activity occurring on or near the premises; and (3) the location and character of the business. Heimberger at ¶25, citing Clark v. BP Oil, 6th Dist. No. L-04-1218, 2005-Ohio-1383, ¶11; Reitz, 66 Ohio App.3d at 193.

{¶ 66} We note, however, that "criminal behavior of third persons is not predictable to any degree of certainty" and is thus generally unforeseeable. Reitz, 66 Ohio App.3d at 193. Consequently, "the totality of the circumstances must be somewhat overwhelming before a business will be held to be on notice of and therefore under the duty to protect against the criminal acts of others." Rietz, 66 Ohio App.3d at 193-194; accord Walters.

{¶ 67} We observe that a lack of prior similar incidents, prior incidents that are too remote in time, a lack of violent crime, and a lack of crime in general tend to establish the unforeseeability of a violent criminal act. Moreover, even if multiple crimes occurred on a given set of premises, courts have been unwilling to find foreseeability when those offenses were non-violent and differed in nature from the criminal conduct at issue. Walters, supra; accord Maier, 124 Ohio App.3d at 224; Boyd v. Lourexis, Inc., 8th Dist. Cuyahoga No. 98028, 2012-Ohio-4595, ¶¶20-21 (evidence did not show that premises owner knew or should have known that person would be "brutally killed" on its premises when no prior similar incident had occurred, even though premises located in "high crime area" and prior theft crimes had occurred on premises); Sullivan v. Heritage Lounge, 10th Dist. Franklin No. 04AP-1261, 2005-Ohio-4675, ¶32 (concluding that evidence of

prior, minor criminal activity did not sufficiently foreshadow violent, unprovoked assault); Cole ex rel. Estate of Kopaitich v. Pine Ridge Apts. Co. II, 11th Dist. Lake No. 2000-L-020, 2001-Ohio-8788 (various incidents of minor property crimes and some domestic violence incidents insufficient to show that defendant knew or should have known that plaintiff would be murdered); Barnes v. N. Shore Car Wash, 8th Dist. Cuyahoga No. 73142, 1998 WL 842075 (Dec. 3, 1998)(murder at car wash not foreseeable even though the car wash was in a high-crime area where previous crimes on and around the premises included vandalism, robberies, and thefts); Stone v. Shell Oil Co., 8th Dist. Cuyahoga No. 68807, 1996 WL 239864 (May 9, 1996) (murder at gas station not foreseeable, even though gas station might have been in a high-crime area, where previous criminal acts involved thefts but not violent assaults of a similar nature); Hickman v. Warehouse Beer Systems, 86 Ohio App.3d 271, 620 N.E.2d 949 (2nd Dist. 1993) (concluding that shooting was not foreseeable when past crimes involved burglaries and vandalism and not armed robbery or other violent crimes). Additionally, courts have been reluctant to find foreseeability if the past violent crimes are different in form, i.e., dissimilar to the violent crime that caused the plaintiff's injury. Adkins v. RLJ Management, 5th Dist. Muskingum No. CT2011-0012, 2011-Ohio-6609 (finding tenant's rape unforeseeable when past crimes involved a shooting and a stabbing "by acquaintances and/or spouses" and domestic violence) Mack v. Ravenna Men's Civic Club, 11th Dist. Portage No. 2006-P-0044, 2007-Ohio-2431, ¶22 (occasional incidents of fighting did not demonstrate that shooting was foreseeable when no evidence that a gun had been involved in prior incidents); Duncan v. B & B, Inc., 6th Dist. Lucas No. L–02–1131, 2002-Ohio-7302, 2002 WL 31888169 (stabbing at bar not foreseeable where, although there were approximately 12 fist fights at the bar in the previous four years, a knife had not been involved in an altercation for at

least ten years); Townsley, 39 Ohio App.2d at 8-9 ("evidence of a few instances where patrons had been assaulted by other patrons" did not show foreseeability of "assaults in washrooms during which boys may have been seeking money, and upon being refused had beaten up the ones approached").

{¶ 68} In Walters, we determined that a car lot owner should not have foreseen that vandals would cut a vehicle's brake line even though prior vandalism had occurred on premises. We noted that none of the prior vandalism placed customers in danger, but instead, involved theft and glass breakage. We thus concluded that the car lot owner did not have a duty to protect potential purchasers from harm resulting from vandalism to its vehicles.

{¶ 69} In Maier, the court determined that a murder was not foreseeable when the prior crimes consisted of computer and petty thefts. In Maier, an intoxicated employee of a cleaning company hired to clean an office building murdered an employee of one of the building's tenants. The decedent's husband filed a negligence action against the security company hired to guard the lobby of the building, Progressive Insurance Company (another tenant in the building), and the security company hired to protect Progressive. Evidence established that Progressive previously experienced computer and petty thefts and was aware that a computer theft might lead to a violent confrontation. The court nevertheless determined that none of the allegedly negligent parties should have foreseen the murder. The court explained that "[c]omputer thefts and petty thefts are nonviolent crimes which do not render a murder foreseeable." Id. at 222. The court further explained that simply because an assault was possible did not mean that it was probable or likely to happen. Id. The court additionally observed that the following circumstances existed: (1) Progressive set a trap to attempt to catch a computer thief by placing computer near a surveillance

camera; (2) Progressive left doors unlocked; (3) Progressive knew that a theft could possibly result in violent confrontation; and (4) Progressive knew that in the 1980s, a double murder occurred in its offices in state of California. Id. at 224. The court nevertheless determined that the foregoing circumstances did not sufficiently establish the foreseeability of the employee's murder. The court stated that "a computer theft was foreseeable, but an assault and murder were not." Id. The court determined that the California murders "were too remote in location and time to render a murder foreseeable" at the office building. Id. at 224. The court also observed that no prior assaults had occurred in the building and that building was not located in a high-crime area. Id. The court thus concluded that the plaintiff could not establish that any of the defendants owed a duty to protect the employee from being murdered.

{¶ 70} In Reitz, the court determined that the totality of the circumstances failed to show that the business premises owner should have foreseen the plaintiff's stabbing during a car theft from the defendant's parking lot. During the three-year period before the plaintiff's attack, thirty-seven car thefts were reported, along with episodes of fights, vandalism, and drug transactions. Additionally, a "nearly identical incident" occurred slightly more than three years earlier. Id. at 190. The court determined that the more-than-three-year gap between the plaintiff's injury and the prior similar incident, along with evidence of past non-violent crimes, did not sufficiently establish the foreseeability of her injury. The court explained:

> "Car thefts were fairly infrequent, less than one per month, considering (1) the lot was unguarded, (2) the lot was large, and (3) the lot/store was open nearly three hundred sixty-five days a year and they did not involve personal injury. May Company was not located in a high crime area, and although there were some

juvenile disturbances and other nonviolent incidents, there was only one prior similar incident which occurred over three years before the crime to [the plaintiff]." Id. at 194.

{¶ 71} In Shivers, the court concluded that the plaintiff failed to establish that the university should have foreseen a rape that occurred in her dormitory bathroom. The plaintiff asserted that the university's knowledge that prior crimes had occurred in the dormitories helped establish the foreseeability of her rape. The court, however, discounted evidence regarding the prior crimes. The court determined that the majority of the prior crimes were non-violent crimes, such as burglary or theft, with only "four abstract and undefined assaults." Id. at ¶14. The court thus found the prior crimes to be "dissimilar to plaintiff's rape, [and therefore] insufficient as a matter of law to prove defendant knew or should have known that the rape was likely to occur in [the plaintiff's dorm]." Id. The court also noted that two years earlier a rape had occurred on campus, but observed that it happened in the music hall and not in a dormitory. The court concluded that "[t]he temporal and spatial separation between the music hall and [the plaintiff's dorm] renders such evidence insufficient as a matter of law to demonstrate the foreseeability of the rape in this case." Id. at ¶13.

{¶ 72} The plaintiff also alleged that the university should have foreseen her rape due to its knowledge that unauthorized individuals could access her dormitory. The court disagreed and stated that the university's knowledge that unauthorized persons could access the dorm "may raise the possibility that rape will occur," but the evidence failed to indicate that unauthorized persons previously accessed the dorm and committed a rape or other violent crime. Id. at ¶15. The court thus determined that even though the university knew that unauthorized persons could gain access

to the plaintiff's dormitory, it should not have foreseen that an unauthorized individual would enter the dormitory and commit a rape or other violent crime.

{¶ 73} In the case at bar, we do not believe that the totality of the circumstances shows that appellee should have known that criminal conduct presented a substantial risk of harm to appellant. The first factor under the totality of the circumstances (whether prior similar incidents occurred on the premises) fails to support a foreseeability finding. Although a rape was reported in 1992, that event is too remote to be relevant to show that appellee should have foreseen a rape some seventeen years later. The November 2008 rape, while close in time to appellant's, differed in nature. The November 2008 rape did not result from a criminal unlawfully gaining access to a student's dorm room. Instead, it involved a female student who had returned to a male student's Parsons Hall dorm room and subsequently was raped. Thus, assuming, arugendo, appellee should have foreseen a substantial likelihood that a female student who returned to a male student's dorm room would be raped, this does not mean that appellee should have foreseen a substantial likelihood that a criminal would unlawfully access a student's dorm room and rape the student. While assuming, arugendo, that appellee had a duty to caution its female students regarding the dangers of returning to a male student's dorm room, it did not have any notice that it should caution students or protect them from criminals who unlawfully entered student dorm rooms and committed violent crimes.

{¶ 74} To the extent appellant believes that two other rapes occurred in Parsons hall the year before her rape, no evidence supports her belief. Instead, it is based upon speculation.[7]

[7] Likewise, her belief that appellee concealed or destroyed evidence regarding the two other rapes is speculation. The lack of evidence is not evidence that appellee is guilty of wrongdoing. See our discussion, infra, regarding appellant's spoliation claim.

Even if we were to speculate, however, that two other rapes occurred in Parsons Hall, we cannot state that they were similar in degree or form to appellant's rape so as to place appellee on notice that trespassers were entering Parsons Hall and committing violent crimes against its students. There is simply no evidence to support any finding that the two other rapes were similar in degree or form to appellant's rape (according to appellee, no documentation regarding these two other rapes ever was produced).[8] We are unwilling to engage in further speculation that the two other rapes were similar in degree or form to appellant's rape.

{¶ 75} The second factor (the existence of other crimes) also does not support a foreseeability finding. Appellant submitted MCPD incident reports documenting prior burglaries, thefts, and assaults occurring in Parsons Hall during a six-year period leading up to her rape and cites to specific incidents to demonstrate that her rape was foreseeable. However, none of those crimes were similar in degree or form to appellant's rape. Shivers (finding that prior non-violent crimes did not render appellant's rape foreseeable). The vast majority of burglaries occurred when students were not present in their dorm rooms. Because appellant does not point to evidence to show that any burglaries occurred while a student was present, appellee should not have reasonably expected that a burglary would pose a substantial risk of harm to one of its students. Appellee

---

[8] An August 8, 2013 letter from appellee's counsel to appellant regarding supplemental discovery states:

> "We have provided you with all information which the College has regarding sexual assaults or rapes on campus. Although the Clery Report for 2008 notes that there were three sexual assaults/ rapes in the residence halls, the College has no documentation related to two of these incidents. The only sexual assaults or rapes that generate documentation are those that area actually investigated. The other two were most likely confidential reports made to Student Life. In those cases, the victim does not want the matter investigated or any charges brought. These incidents may have been date rapes. There are no files maintained and there is nothing available to produce. However, these incidents are required to be included in the Clery Report."

may have known that a burglary would deprive a student of property, but appellee did not have reason to expect that a burglary would harm a student. While appellant may believe that it was only a matter of time before a burglary would turn violent, her belief is based upon speculation.

{¶ 76} Other events of a criminal nature occurred over time. A Parsons Hall resident reported a theft of her bicycle, but it was subsequently discovered that another student had "borrowed" it.

{¶ 77} Appellant additionally points to evidence that prior assaults that occurred in Parsons Hall as demonstrating the foreseeability that a criminal act would harm appellant. Just like the burglaries and theft, however, the assaults were not similar in degree or form to appellant's rape. An assault was reported after a non-student slapped a male resident of Parsons Hall. The non-student, a female, apparently blamed the male resident for her miscarriage.

{¶ 78} Appellant further asserts that multiple instances of criminal trespass were reported, thus demonstrating appellee's knowledge that criminals could unlawfully access Parsons Hall. None of those reports, however, involved a criminal allegedly climbing Parsons Hall's exterior balcony railing. Furthermore, none involved a criminal breaking into a students room and causing that student harm. Instead, the criminal trespass incidents resulted from jilted lovers, intoxicated guests, and partygoers.

{¶ 79} In sum, appellant did not point to any evidence to demonstrate that criminals unlawfully entered Parsons Hall and committed random acts of violence against students. Without some evidence that appellee should have expected that criminal conduct had a substantial likelihood of causing harm to students, appellant cannot demonstrate that appellant's rape was foreseeable.

{¶ 80} The third factor under the totality of the circumstances test (the location and the character of the premises) also shows that appellant's rape was unforeseeable. Appellee's campus is located in Marietta, Ohio. Appellant presented no evidence that the campus is located in a high crime area or is particularly prone to violent crime. In fact, even Marino testified that "Marietta is a pretty quiet town. I don't think anybody really would have thought that anybody would do something like I did."

{¶ 81} Appellant nevertheless claims that the alleged security deficiencies at Parsons Hall made it easily accessible to criminals and increased the risk that a student could be harmed. Assuming, arugendo, that Parsons Hall suffered from the security deficiencies as appellant alleges, appellee's knowledge of these alleged deficiencies demonstrates that it was aware that criminals could enter the building and could harm a student. Like the Shivers court, we conclude that knowledge that unauthorized persons can enter a building does not lead to anything other than a mere possibility that a rape or other violent crime could occur. We therefore do not believe that appellee's knowledge that unauthorized persons could access Parsons Hall demonstrates the foreseeability of appellant's rape. What might possibly happen is not the same as showing a substantial likelihood that it would happen. Thus, even if appellee should have known that criminals could easily access Parsons Hall and could harm students, the mere possibility is insufficient to establish foreseeability.

{¶ 82} Appellant asserts that Ruth's testimony establishes that her rape was foreseeable. Appellant notes that Ruth testified that she believed a rape was foreseeable and that she warned the college administration of her security concerns regarding Parsons Hall. We, however, do not agree that Ruth's testimony shows that appellee should have foreseen appellant's rape.

{¶ 83} We observe that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." Evid.R. 704. A lay witness's opinion testimony is limited to those opinions or inferences that are "(1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Evid.R. 701. Thus, "[l]ay witnesses * * * may only testify as to their personal knowledge, i.e., '"knowledge gained through firsthand observation or experience * * *."' Bonacorsi at ¶26 (quoting Black's Law Dictionary (7th ed.1999)). Questions of law are outside of the realm of firsthand knowledge, and thus, a lay witness may not offer legal conclusions." Woods v. Capital Univ., 10th Dist. Franklin No. 09AP–166, 2009–Ohio–5672, ¶71.

{¶ 84} In the case sub judice, whether appellee should have foreseen appellant's rape is a component of determining whether appellee had a duty to protect appellant from Marino's conduct. Duty, as we stated, supra, is a question of law for a court to decide. Therefore, it is not an appropriate subject matter for lay witness testimony. Thus, Ruth's testimony that appellee should have foreseen the rape is nothing more than a legal conclusion that attempts to answer a question for the court. Consequently, Ruth's belief that the rape was foreseeable is not determinative of whether appellee had a duty to protect appellant from Marino's criminal act. See Sabat v. Garfield Mall Assoc., 8th Dist. Cuyahoga No. 87227, 2006-Ohio-4764 (concluding that plaintiff's assault was not foreseeable even though plaintiff presented expert testimony regarding the foreseeability of a criminal act).

{¶ 85} Moreover, Ruth's testimony that she warned appellee of her concerns does not demonstrate foreseeability. We note that foreseeability of criminal conduct is judged according to

what a reasonably prudent person would have foreseen. It is well-established that "[t]he reasonable person standard is an objective standard." Columbus v. Kim, 118 Ohio St.3d 93, 2008-Ohio-1817, 886 N.E.2d 217, ¶23 (O'Donnell, J., concurring); Kraynak v. Youngstown City Sch. Dist. Bd. Of Edn., 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, ¶16 (stating that "'knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect,' [is] a clearly objective standard"). Accordingly, Ruth's subjective belief is irrelevant to determining what a reasonable person should have foreseen.

{¶ 86} To the extent appellant asserts that Ruth's belief that a rape was foreseeable is imputed to appellee and demonstrates that appellee knew that a rape was foreseeable, we do not believe that an employee's opinion is imputable to an employer. In Hallowell v. County of Athens, 4th Dist. Athens No. 03CA29, 2004-Ohio-4257, we stated:

> "An employee's knowledge is imputed to his employer only if the employee obtained the knowledge while acting within the scope of his employment. See American Financial Corp. v. Fireman's Fund Ins. Co. (1968), 15 Ohio St.2d 171, 174, 239 N.E.2d 33 ('It is a basic rule of law that knowledge as to an employer's business received by an employee in the ordinary scope of business is imputed to the employer.') (Emphasis added.) See, also, Fay v. Swicker (1950), 154 Ohio St. 341, 96 N.E.3d 196, paragraph one of the syllabus ('At common law, ordinarily the knowledge of an agent, received while he is acting within the scope of his authority and in reference to a matter over which his authority extends, is imputed to such agent's principal.')"

Id. at ¶11 (Emphasis added); see also discussion, supra, regarding personal knowledge requirement.

{¶ 87} In the case at bar, Ruth's belief is not "knowledge." Instead, it is her opinion based upon her assessment of the facts. Therefore, Ruth's opinion that she believed that a rape was foreseeable is not "knowledge" imputable to her employer.

{¶ 88} Consequently, we disagree with appellant that the totality of the circumstances

reveal that appellee should have foreseen that Marino would rape appellant. No prior similar incidents occurred on campus. The past crimes are not similar in degree or form and suggest only that (1) criminals could access student dorm rooms while students were absent from their rooms, or that (2) some students had volatile encounters or relationships with non-students they knew. Even if appellee was aware that trespassers were burglarizing students' Parsons Hall dorm rooms, no evidence exists that the burglaries placed students in harm's way. Thus, while appellee may have foreseen the likelihood that students' possessions may be stolen, appellee did not also foresee a substantial likelihood that one of its students would be physically harmed or violated. The past crimes do not suggest that a criminal was substantially likely to trespass in Parsons Hall and commit a rape or other random violent crime against a Parsons Hall resident.

{¶ 89} Additionally, appellee's alleged knowledge that non-students accessed Parsons Hall by climbing the balcony does not establish the foreseeability of appellant's rape. This alleged knowledge simply shows that appellee should have foreseen that non-students could enter Parsons Hall. That those persons were substantially likely to then commit a violent crime cannot be presumed from simply knowing that they could access the premises. Instead, this knowledge shows nothing more than a possibility that a violent crime could occur.

{¶ 90} Accordingly, the trial court properly determined that appellee did not have a duty to protect appellant from Marino's criminal act.

C

VOLUNTARILY ASSUMED DUTY

{¶ 91} Appellant argues that the trial court erred by failing to consider whether appellee voluntarily assumed a duty under Section 323 of the Restatement of the Law 2d, Torts (1) to

"properly monitor and respond to security alerts" at the dormitories, (2) to replace the interior door locks, (3) to provide a police force to protect students, and (4) "to provide a Residence Life staff member in each dormitory to monitor the safety of the dorm and respond to the safety needs of the students."

Section 323 states:

> One 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
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

{¶ 92} "Cases interpreting Section 323(a) have made clear that the increase in the risk of harm required is not simply that which occurs when a person fails to do something that he or she reasonably should have" because "the risk of harm to the beneficiary of a service is always greater when the service is performed without due care." Wissel v. Ohio High School Athletic Assn., 78 Ohio App.3d 529, 540, 605 N.E.2d 458 (1st Dist.1992). Instead, Section 323(a) "applies only when the defendant's actions increased the risk of harm to the plaintiff relative to the risk that would have existed had the defendant never provided the services initially." Id., citing Turbe v. Govt. of Virgin Islands, 938 F.2d 427, 432 (3d Cir.1991). A "defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun the performance." Id. at 529. To prevail, a plaintiff must "identify sins of commission rather than omission." Id. at 529.

{¶ 93} To impose liability under Section 323(b), courts have generally required that a plaintiff "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.'" Power v. Boles, 110 Ohio App.3d 29, 36, 673 N.E.2d 617 (10th Dist.1996), quoting Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 807 (Minn.1979).

{¶ 94} In the case sub judice, appellant did not specifically raise Section 323 during the trial court proceedings, and, thus, did not afford the trial court an opportunity to rule upon its applicability. A party may not raise any new issues or legal theories for the first time on appeal. Stores Realty Co. v. Cleveland, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Thus, a litigant who fails to raise an argument before the trial court forfeits the right to raise that issue on appeal. Garvey v. Vermilion, 9th Dist. Lorain No. 10CA009873, 2012–Ohio–1258, ¶33, quoting Stefano & Assoc., Inc. v. Global Lending Group, Inc., 9th Dist. Summit No. 23799, 2008–Ohio–177, ¶18, citing State v. Byrd, 32 Ohio St.3d 79, 87, 512 N.E.2d 611 (1987). "Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process." Mark v. Mellott Mfg. Co., Inc., 106 Ohio App.3d 571, 589, 666 N.E.2d 631 (4th Dist. 1995).

{¶ 95} We observe that appellate courts have discretion to recognize a forfeited error as plain error. However, "[t]he plain error doctrine should never be applied to reverse a civil judgment * * * to allow litigation of issues which could easily have been raised and determined in the initial trial." Goldfuss v. Davidson, 79 Ohio St.3d 116, 122, 1997♥Ohio♥401, 679 N.E.2d 1099 (1997).

{¶ 96} In the case at bar, appellant claims that she properly argued before the trial court the applicability of Section 323. However, our review of the record reveals otherwise. At most, appellant made passing references to appellee's alleged duties. Appellant did not cite where she specifically mentioned or argued the applicability of Section 323, and our review did not uncover

any mention of Section 323. Consequently, appellant's failure to raise Section 323 before the trial court bars her from raising it on appeal, and her attempt to place blame upon the trial court for not considering an issue she never brought to its attention rings hollow. We therefore do not consider whether Section 323 has any applicability to the case sub judice.

D

Spoliation

{¶ 97} Appellant next argues that the trial court improperly entered summary judgment in appellee's favor regarding her spoliation of evidence claim. Appellant contends that appellee (1) willfully destroyed or concealed emails, (2) willfully destroyed and altered Parsons Hall, and (3) willfully destroyed or concealed Creed Citations and the "arrest/citation log" for the three-year period before appellant's rape. With respect to the destroyed or concealed emails, appellant asserts that appellee failed to meet its burden to show the absence of a material fact regarding whether the emails disrupted appellant's case. Appellant argues that appellee "neglected" to review the results of an email search that its employee performed and, thus, failed to demonstrate that it did not conceal emails that disrupted appellant's case. Appellant claims that the alteration and destruction of Parsons Hall deprived her of "the opportunity to inspect doors, locks[, and] the other methods of ingress/egress that criminals * * * used to commit crimes." Appellant also alleges that the Creed Citations and the "arrest/citation log" "could have shown the prior knowledge of college officials."

{¶ 98} Appellant further argues that appellee's "conduct regarding its litigation hold presents a jury question." Appellant asserts that "[a]ppellee's description of the actions taken to preserve evidence in anticipation of litigation is relatively vague and reveals a number of

discrepancies." (Appellant does not, however, cite anything to show these alleged discrepancies.) Appellant contends that reasonable minds could conclude that appellee "did not place an adequate litigation hold on responsive emails, failed to produce and/or preserve responsive emails, and that emails might have been deliberately destroyed due to the inadequacy or absence of a litigation hold, or the retroactive protection of a sham document retention plan that required none of the existing documents be retained."

{¶ 99} Appellant additionally asserts that appellee's failure to produce evidence that would have helped establish the foreseeability of Marino's criminal act creates a genuine issue of material fact regarding whether appellee had a duty to protect appellant from or to warn appellant of Marino's criminal act. Appellant claims that appellee cannot blame appellant for failing to demonstrate the duty element of her negligence claim when appellee failed to produce the documents that would have allowed her to do so.

{¶ 100} Appellee asserts that no genuine issues of material fact remain regarding appellant's spoliation claim. With respect to appellant's argument that appellee willfully altered Parsons Hall, appellee admits that some alterations were made before it received notice that appellant intended to pursue litigation, but states that the alterations were part of a campus-wide plan to update dorm room locks and not in an effort to disrupt appellant's case. Appellee further asserts that any alteration of the locking systems in Parsons Hall did not disrupt appellant's ability to prove her negligence action. Appellee argues that evidence regarding the locking mechanisms in Parsons Hall do not help establish the foreseeability of Marino's violent criminal act. Appellee also asserts that it did not willfully destroy Parsons Hall in an attempt to disrupt appellant's case, and that in any event, appellant did examine Parsons Hall before its demolition.

{¶ 101} Appellee additionally contends that it produced the arrest and citation log for the years 2008 through 2011, and that appellant failed to show that appellee failed to produce relevant emails. Appellee further argues that even if it destroyed Creed Citations, those citations possibly would show only that students climbed the exterior balcony; they would not show that criminal trespassers climbed the exterior balcony. Appellee additionally disputes appellant's allegation that any failure to properly implement a litigation hold demonstrates willful destruction of evidence designed to disrupt appellant's case. Appellee asserts that any alleged failures it made in implementing the litigation hold would be negligent, at best, and that negligence does not suffice to prove a spoliation of evidence claim. Appellee also contends that appellant cannot rely upon the absence of documents to prove an element of her claim when she only speculates that the documents even existed. Appellee argues: "Her argument is premised upon speculation that some phantom documents containing some meaningful, but unspecified, information may not have been produced, may not be privileged, may have been deleted, may now be inaccessible, and the absence of the document might impact her case."

{¶ 102} To survive a properly supported summary judgment motion regarding a spoliation of evidence claim, the opposing party must demonstrate that genuine issues of material fact remain concerning each of the following elements:

> "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts[.]"

Smith v. Howard Johnson Co., Inc., 67 Ohio St.3d 28, 29, 615 N.E.2d 1037 (1993).

{¶ 103} In the case at bar, the parties primarily dispute the third and fourth elements,

i.e., whether appellee willfully destroyed evidence so as to disrupt appellant's case and whether appellant's case actually was disrupted.

{¶ 104} Initially, we observe that this court and others have declined to extend spoliation of evidence claims to assertions that a party has concealed evidence. Tate v. Adena Regional Med. Ctr., 155 Ohio App.3d 524, 2003-Ohio-7042, 801 N.E.2d 930 (4th Dist.); accord Sivinski v. Kelley, 8th Dist. Cuyahoga No. 94296, 2011-Ohio-2145, ¶24, citing Bugg v. Am. Standard, Inc., 8th Dist. Cuyahoga No. 84829, 2005–Ohio–2613, and O'Brien v. Olmsted Falls, 8th Dist. Cuyahoga Nos. 89966 and 90336, 2008–Ohio–2658 (stating that "mere concealment or misrepresentation, without any factual allegation of destruction or alteration of evidence, is insufficient to state a claim for spoliation"); Pratt v. Payne, 153 Ohio App.3d 450, 2003–Ohio–3777, 794 N.E.2d 723 (2nd Dist.); Allstate Ins. Co. v. QED Consultants, Inc., 5th Dist. Knox No. 09CA14, 2009–Ohio–4896, ¶19 (listing Ohio cases refusing to recognize spoliation claims that do not involve destruction or alteration of physical evidence). Thus, in Tate, this court rejected the appellant's argument that appellee's alleged concealment of evidence and interference with discovery constituted spoliation of evidence. Id. at 533. Therefore, we summarily reject appellant's argument regarding her spoliation of evidence claims based upon appellee's alleged concealment of evidence.

{¶ 105} Additionally, to sustain a spoliation of evidence claim, the plaintiff must offer proof that the defendant destroyed evidence that actually existed. A spoliation claim cannot be based upon conjecture that evidence might have existed and that a party might have destroyed it. Keen v. Hardin Mem. Hosp., 3rd Dist. Hardin No. 6-03-08, 2003-Ohio-6707, ¶16 (stating that "[n]on-existent evidence, by its very nature, cannot be spoilated"). "Rather, * * * causes of action

for spoliation of evidence are designed to place responsibility and accountability on parties who were actually in possession of evidence that existed at one time but who later do not provide this evidence and do not provide an adequate explanation for failing to do so." Id. If a party fails to present evidence that allegedly destroyed documents or other materials actually existed, the spoliation of evidence claim must fail. Id.

{¶ 106} In the case at bar, appellant has not offered any evidence to create a genuine issue of material fact as to whether emails relevant to her claim ever existed. Instead, she speculates that relevant emails existed based upon the deposition testimony of a college employee who conducted an email search. This employee stated that he searched appellee's email system using search terms relevant to appellant's cause of action and then provided a disk of those search results to his boss. Appellant extrapolates from this testimony to conclude that appellee did not review the disk and failed to produce or destroyed relevant emails. We observe that appellant does not cite to any part of the record that shows appellee did not review the disk and destroyed relevant emails. Moreover, as we indicated above, appellant cannot base her spoliation claim upon an alleged failure to produce evidence, i.e., concealment. Thus, appellant offers nothing other than speculation that appellee destroyed relevant emails. Her speculation is insufficient to support a spoliation of evidence claim.

{¶ 107} For similar reasons, appellant's spoliation of evidence claim based upon appellee's alleged destruction of evidence regarding the two other rapes reported in 2008 must fail. Appellee offered affidavit evidence that no documentation ever was generated regarding the two rapes. Appellant's speculation that appellee is hiding or destroyed evidence regarding the two rapes is insufficient to demonstrate that such evidence in fact existed at one point but was

destroyed. Furthermore, as we already stated, appellant cannot base a spoliation claim upon alleged concealment of evidence.

{¶ 108} We therefore reject appellant's argument that the trial court wrongly entered summary judgment in appellee's favor regarding her spoliation of evidence claims based upon appellee's alleged destruction of relevant emails and "Clery Act" documentation. Appellant cannot maintain a spoliation of evidence claim when she has no proof that certain evidence ever even existed. Her speculation does not suffice.

{¶ 109} In addition to proving that allegedly willfully destroyed evidence in fact existed, a plaintiff who alleges that a defendant spoilated evidence must show that the defendant acted willfully so as to disrupt the plaintiff's case. The term "willful," as used in "willful destruction of evidence by defendant designed to disrupt the plaintiff's case," "necessarily contemplates more than mere negligence or failure to conform to standards of practice, but instead anticipates an intentional, wrongful act." White v. Ford Motor Co., 142 Ohio App.3d 384, 387-88, 755 N.E.2d 954 (10th Dist. 2001), citing Drawl v. Cornicelli, 124 Ohio App.3d 562, 706 N.E.2d 849 (11th Dist. 1997). In Drawl, the court explained the term "willful" as follows:

> "[T]he term 'willful' * * * include[s] the following: 'Premeditated; malicious; done with evil intent, or with a bad motive or purpose * * *. An act * * * is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids * * *; that is to say, with bad purpose * * *.'"

Id. at 567, quoting Black's Law Dictionary (6 Ed.1990) 1599.

{¶ 110} A party alleging a spoliation claim must set forth evidence showing willful destruction evidence designed to disrupt the party's case. Speculation and allegations that evidence was willfully destroyed so as to disrupt the party's case will not suffice to create a

genuine issue of material fact that precludes summary judgment. See Fifth Third Bank v. Gen. Bag Corp., 8th Dist. Cuyahoga No. 92783, 2010-Ohio-2086 (upholding trial court's decision to deny motion to amend complaint to include spoliation of evidence claim when appellants offered no evidence that opposing party acted willfully); Sutliff v. Cleveland Clinic Found., 8th Dist. Cuyahoga No. 91337, 2009-Ohio-352, ¶33 (implying that mere destruction of evidence does not lead to natural conclusion that evidence was willfully destroyed and stating that a party's speculation that evidence was willfully destroyed is not sufficient to prevent summary judgment; instead, party must produce evidence); Niskanen v. Giant Eagle, Inc., 9th Dist. Summit No. 23445, 2008-Ohio-1385, ¶¶42-45, reversed on other grounds 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595 (stating that even though evidence existed that defendant had destroyed some evidence, no evidence that defendant willfully destroyed evidence so as to disrupt plaintiff's case); McLeod v. Mt. Sinai Med. Ctr., 166 Ohio App.3d 647, 2006-Ohio-2206, 852 N.E.2d 1235, ¶55 (8th Dist.) aff'd in part, rev'd in part on other grounds sub nom. Harris v. Mt. Sinai Med. Ctr., 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201 (explaining that spoliation claim cannot be based upon "innuendo" and allegation that evidence is "missing 'without explanation'"); Woodell v. Ormet Primary Aluminum Corp., 7th Dist. Monroe No. 03MO7, 2005-Ohio-4372, ¶65 (stating that "mere allegations" that evidence was willfully destroyed is insufficient to sustain spoliation of evidence claim); Ciganik v. Kaley, 11th Dist. Portage No. 2004-P-001, 2004-Ohio-6029, ¶38 (concluding that summary judgment was proper when appellant offered no proof that appellee wrongfully destroyed any evidence but instead only speculated); see Thermodyn Corp. v. 3M Co., 593 F.Supp.2d 972, 979 (N.D.Ohio 2008) (stating that "conjecture is insufficient" to prove deliberate destruction of evidence).

{¶ 111} Furthermore, to show that willfully destroyed evidence disrupted the plaintiff's case, the plaintiff must prove "that the evidence which was destroyed was of such a nature that it would have enabled the plaintiff successfully to purse the * * * civil action." Tomas v. Nationwide Mut. Ins. Co., 79 Ohio App.3d 624, 631, 607 N.E.2d 944, 948 (10th Dist. 1992). Speculation that willfully destroyed evidence would have helped the plaintiff's case is insufficient. Id. at 633 ("Speculation based upon possibility is too tender a reed upon which to base a claim for relief.").

{¶ 112} In the case at bar, appellant has not pointed to any affirmative evidence to show that appellee acted willfully. Appellant instead can only speculate and relies upon innuendos and suppositions, which are insufficient to create a genuine issue of material fact. McLeod; see Continenza v. Tablack, 7th Dist. Mahoning No. 02CA250, 2003-Ohio6719, ¶45; Wheeler v. Wise, 133 Ohio App.3d 564, 574, 729 N.E.2d 413 (10th Dist. 1999).

{¶ 113} Moreover, even if a genuine issue of material fact exists as to whether appellee acted willfully, appellant cannot show that any allegedly willfully destroyed evidence would have shown that appellee owed a duty to protect and warn appellant from Marino. Appellant complains that appellee willfully destroyed emails, Parsons Hall, Creed Citations, and "documentation regarding the 2008 Clery Act statistics."

{¶ 114} First, as we already noted, appellant has not offered anything other than speculation that relevant emails and "Clery Act" documentation even existed. Even if they did exist, however, she can only speculate that such documents would have helped establish that appellee possessed a duty to protect appellant from and warn appellant of Marino.

{¶ 115} Appellant alleges that appellee willfully destroyed emails concerning

"security and safety" at Parsons Hall. Appellant apparently believes that emails concerning Parsons Hall security and safety would be relevant to establishing the foreseeability of appellant's rape. Even if emails regarding security and safety at Parsons Hall existed but were willfully destroyed, and if those emails showed that appellee knew of a general security risk at Parsons, as we discussed supra, knowledge of a general security risk is not the same as recognizing a substantial likelihood that a student would be raped or violently assaulted by a stranger. It is pure speculation to state that any emails containing the search terms would have shown that appellee should have foreseen Marino's criminal act. The search terms could have appeared in the emails for any number of reasons and would not have necessarily shown that random violent criminal conduct committed by trespassers was a frequent and well-known occurrence in and around Parsons Hall.

{¶ 116} It is also pure speculation to state that any documents regarding the 2008 rapes would have shown the foreseeability of Marino's criminal act. Appellant speculates that the other two rapes occurred in Parsons Hall, but further speculation would be required to find Marino's criminal act foreseeable. What is reported as a "rape" may encompass not only violent rapes committed by criminals, but also what is commonly known as "date rape." Thus, even if we indulged in appellant's speculation that the two other 2008 rapes occurred in Parsons Hall, we will not further speculate that the two other rapes were similar in degree or form to Marino's actions so as to place appellee on notice that violent crimes or rapes committed by non-student criminal trespassers were occurring in and around Parsons Hall.

{¶ 117} With respect to appellant's assertion that appellee willfully destroyed Parsons Hall, we note that the evidence clearly shows that appellant was given an opportunity to

inspect Parsons Hall. Moreover, even if appellee had willfully altered Parsons Hall before appellant inspected it, appellant cannot demonstrate that appellee willfully altered it so as to disrupt appellant's case. Instead, appellee presented evidence that it changed the locks in Parsons Hall as part of a campus-wide plan. Additionally, we fail to see how anything appellant may have observed in Parsons Hall before any alterations occurred would have established the foreseeability of appellant's rape. Appellant appears to suggest that she could have inspected the door locks as they existed at the time of appellant's rape. If her inspection showed that the doors did not properly lock and posed a security risk, this fact would help show only that appellee should have known that the doors could be opened by non-students. Whether the doors properly locked would not demonstrate that appellee should have known that a criminal would enter a student's room and rape a student. While such evidence may show a possibility that a criminal could enter a student's room to commit rape, as we stated earlier, possibility is insufficient to demonstrate a substantial likelihood that a criminal act would occur.

{¶ 118} Appellant further complains that appellee willfully destroyed Creed Citations. The Creed Citations allegedly destroyed, however, would not show that criminal trespassers climbed the exterior balcony. Instead, the evidence in the record shows that the college issued Creed Citations to students, not to non-students. Thus, the missing Creed Citations may have shown that appellee should have known that students climbed Parsons Hall's exterior balcony, but they would not have shown that appellee should have known that criminal trespassers would climb the exterior balcony and commit a violent crime against a student living in Parsons Hall. At most, the Creed Citations would show a mere possibility that criminal trespassers could climb the exterior balcony.

{¶ 119} Appellant additionally contends that appellee did not properly implement a litigation hold. While the precise reasoning of appellant's argument is not clear, she seems to suggest that appellee did not preserve evidence. What is clear, however, is that appellant has offered nothing other than speculation to suggest that appellee willfully destroyed evidence.

{¶ 120} Consequently, appellant has failed to show any genuine issues of material fact regarding her spoliation of evidence claim. Thus, her assertion that her "spoliation claim creates a material issue for her negligence claim" is devoid of merit.

{¶ 121} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 122} In her second assignment of error, appellant asserts that the trial court abused its discretion by failing to sanction appellee and by failing to require appellee to pay for a third-party vendor email search. Appellant contends that the court should have sanctioned appellee by granting appellant's "motion for an adverse inference instruction that the unproduced emails would have shown that Appellant's rape was foreseeable."

{¶ 123} On July 22, 2013, appellant filed a "renewed motion to compel and for sanctions. Appellant requested the court to order appellee to produce "any and all electronic correspondence" regarding appellant's rape, campus security, crimes and incidents on campus, resident hall safety, and the MCPD. Appellant further requested the court to order appellee to provide "a complete explanation of how previous searches for electronic correspondence were conducted in response to [appellant]'s discovery requests" and "complete list of all search terms used in previous searches for electronic correspondence * * * and an explanation from a Rule 30(b)

deponent as to how the search was conducted and why it only resulted in the production of five em-mails." Appellant also requested the court to impose Civ.R. 37 sanctions (1) by compelling appellant "to pay an outside vender [sic] to search all computer hard drives of [appellee] for all responsive electronic communications and conduct forensic imaging of all hard drives that could have contained any of the electronic correspondence [appellant] has requested," and (2) "by permitting an adverse inference instruction at trial that [appellee] destroyed electronic correspondence that was damaging to [appellee]'s defense and critical for [appellant] to prove her claims." Appellant asserted that Ruth's deposition testimony shows that appellee lied that no relevant emails existed. Ruth indicated that numerous emails were exchanged regarding safety, security, and "rapes and sexual assaults on campus."

{¶ 124} On August 2, 2013, the court granted appellant's renewed motion in part. The court noted that the parties disputed whether additional relevant emails existed. The court stated: "In the interest of fairness, this Court will allow [appellant] (at [appellant]'s expense) to have an e-mail search conducted through a search vendor."

{¶ 125} Civ.R. 37 provides trial courts with broad discretion to impose sanctions when a party fails to comply with discovery orders. Vaught v. Cleveland Clinic Found., 98 Ohio St.3d 485, 2003-Ohio-2181, 787 N.E.2d 631, syllabus. Thus, appellate courts will not reverse a trial court's decision concerning a motion for sanctions unless the court abused its discretion. Id. at ¶13. In order to constitute an abuse of discretion, "'the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias.'" Id., quoting Nakoff v. Fairview Gen. Hosp., 75 Ohio St.3d 254, 256, 662 N.E.2d 1 (1996).

{¶ 126} Civ.R. 37(B)(2) authorizes trial courts to sanction a party for failing "to obey an order to provide or permit discovery" and provides a non-exhaustive list of sanctions a court may impose. Civ.R. 37(D) permits trial courts to sanction a party for, among other things, failing "to serve answers or objections to interrogatories submitted under Rule 33," or "to serve a written response to a request for inspection submitted under Rule 34."

{¶ 127} In the case sub judice, the trial court did not find that appellee failed to comply with a discovery order. Moreover, the court did not find that appellee failed "to serve answers or objections to interrogatories submitted under Rule 33," or "to serve a written response to a request for inspection submitted under Rule 34." Instead, the court determined that the parties disputed whether any additional emails existed and authorized appellant, at her expense, to obtain a third-party vendor to search appellee's email system for any additional emails. We find absolutely nothing unreasonable regarding the court's decision. In the absence of a finding that appellee violated a discovery order, the trial court had no reason to impose sanctions upon appellee, such as ordering appellee to pay for the third-party vendor search or ordering that appellant be entitled to an adverse inference instruction at trial.[9] See HK New Plan Exchange Property Owner II, L.L.C.

[9] In Vidovic v. Hoynes, 2015-Ohio-712, 29 N.E.3d 338 (11th Dist.), the court explained the "adverse inference" concept as follows:

> "'An adverse inference may arise where a party who has control of a piece of evidence fails to provide the evidence without satisfactory explanation. * * * Under those circumstances, the jury may draw an inference that would be unfavorable to the party who has failed to produce the evidence in question.' (Citations omitted.) [Schwaller v. Maguire, 1st Dist. Hamilton No. C—020555, 2003-Ohio-6917, 2003 WL 22976339] at ¶24. This allows for courts to give such a charge where there is a showing of 'malfeasance' or 'gross neglect.' Id.
>
> The adverse inference concept addressed above relates to the inference that can be made against a party, when weighing the facts, when that party fails to provide evidence. It does not impact the claim for Spoliation raised

v. Hamilton Cty. Bd. of Revision, 122 Ohio St.3d 438, 2009-Ohio-3546, 912 N.E.2d 95, ¶18 (2009) (recognizing that Civ.R. 37 "sanctions are usually available only when an order compelling discovery has been violated"). Furthermore, we note that appellant's argument rests upon her accusation that appellee's counsel lied. Inasmuch as this is a credibility matter for the trial court to evaluate, we have no basis to conclude that appellee's counsel, in fact, lied.

{¶ 128} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

---

under the Complaint, nor does it justify a request for sanctions. Thus, we fail to see how this applies to uphold the Spoliation claim dismissed by the trial court."

Id. at ¶¶78-79.

Harsha, J., concurring:

{¶ 129} I concur in the judgment and excellent opinion, but emphasize that the existence of a duty is a question of law for a court to decide, even if resolving that question requires the court to consider the facts or evidence. *See Jackson v. Board of Pike Co. Comm.* 2010-Ohio-4875, ¶ 32, Harsha, J. concurring and the cases cited there. *See also, Ruta v. Breckenridge–Remy Co.*, 69 Ohio St.2d 66, 68, 23 O.O.3d 115, 430 N.E.2d 935 (1982) ("Simply because resolution of a question of law involves a consideration of the evidence does not mean that the question of law is converted into a question of fact or that a factual issue is raised."); and *O'Day v. Webb*, 29 Ohio St.2d 215, 219, 280 N.E.2d 896 (1972) ("[A] review of the evidence is more often than not vital to the resolution of a question of law. But the fact that a question of law involves a consideration of the facts or the evidence does not turn it into a question of fact."). Thus, I would not defer to a jury to determine any questions of fact that might be necessary to decide whether a duty exists in a particular situation.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J: Concurs in Judgment & Opinion
Harsha, J.: Concurs in Judgment & Opinion with Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.