

[Cite as *Wheeler v. Ohio State Univ.*, 2011-Ohio-6295.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Miriam Wheeler,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-289
v.	:	(C.C. No. 2009-08748)
	:	
Ohio State University,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on December 8, 2011

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*Mason, Mason & Kearns, and Thomas L. Mason, for appellant.*

*Michael DeWine, Attorney General, and Peter E. DeMarco, for appellee.*

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APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶1} Plaintiff-appellant, Miriam Wheeler ("appellant"), appeals the judgment of the Court of Claims of Ohio, which granted a motion for summary judgment in favor of defendant-appellee, The Ohio State University ("OSU"). For the following reasons, we affirm.

## I. BACKGROUND

{¶2} On November 6, 2008, appellant was a student at OSU, Mansfield Campus, sitting in a chemistry class, when a student sitting behind her put his or her foot on the back of appellant's chair and slid her chair forward. Appellant is not sure whether Jesse Wolfe or Emily Frazier pushed her chair because both were sitting behind her. All the items on her desk fell on the floor and she went "flying towards the floor" and had to use her hand to catch herself. (Deposition 42.) Immediately, appellant's wrist and knee began hurting and as class continued, her neck and back hurt.

{¶3} The next day, appellant complained to OSU's Chief Student Life Officer, Donna Hight. OSU moved Wolfe and Frazier to seats further away during the lecture class and arranged for them to attend the Thursday laboratory class since appellant was attending the Tuesday laboratory class. The students asked to apologize to appellant, but appellant refused. The students were asked to have no contact with appellant.

{¶4} Appellant testified in her deposition that Wolfe continued to harass her by blocking her path. She wanted OSU to expel him. She asked OSU if she could take her exams away from the other students, and she was accommodated. She also requested a handicap parking sticker, but she was told she needed to contact the department of motor vehicles. Appellant testified that OSU "taunted [her] mentally and emotionally," and she believes it was racially motivated. (Deposition 82.)

{¶5} Appellant filed a complaint in the Court of Claims of Ohio against OSU, alleging assault that caused permanent physical injury. Appellant alleged that OSU tolerated the assault, failed to take any action preventing the assault, took no action against the perpetrator, and tolerated intimidation by the perpetrator after the assault. Appellant sought damages because she suffered permanent physical injury, medical bills, and the loss of education and career opportunity because she was unable to complete her education.

{¶6} OSU filed a motion for summary judgment, which the court of claims granted.

## II. ASSIGNMENT OF ERROR

{¶7} Appellant filed a timely appeal and raised the following assignment of error:

The trial court erred by granting Summary Judgment to the Defendant when there were disputed issues of material fact and as a matter of law.

## III. DISCUSSION

{¶8} To prevail on a motion for summary judgment, the moving party must demonstrate that, when the evidence is construed most strongly in favor of the non-moving party, no genuine issue of material fact remains to be litigated and that it is entitled to judgment as a matter of law. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. A genuine issue of material fact exists unless it is clear that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Williams v. First United Church of Christ*

(1974), 37 Ohio St.2d 150, 151. Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously, with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶9} When an appellate court reviews a trial court's disposition of a summary judgment motion, the appellate court applies the same standard as applied by the trial court. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107. An appellate court's review of a summary judgment disposition is independent and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Thus, in determining whether a trial court properly granted a summary judgment motion, an appellate court must review the evidence in accordance with the standard set forth in Civ.R. 56, as well as the applicable law. *Murphy*.

{¶10} In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, the Supreme Court of Ohio stated that the moving party, on the ground that the non-moving party cannot prove its case, has the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the non-moving party's claim. Once the moving party satisfies this initial burden, the non-moving party has a reciprocal burden to set forth specific facts showing there is a genuine issue for trial. The issue presented by a motion for summary judgment is not the weight of the evidence, but whether there is sufficient evidence of the character and quality set forth in Civ.R. 56 to show the existence or non-existence of genuine issues of fact.

{¶11} As an initial matter, we note that appellant's brief exceeds the 35-page limit by 16 pages. See App.Loc.R. 7(B). In the interest of justice, we will address appellant's arguments.

{¶12} Appellant argues first, that she was attending OSU pursuant to a contract and that OSU breached the contractual duty owed to her to protect her from the harmful conduct of other students. The court of claims found that Civ.R. 10(D)(1) requires that "[w]hen any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading." Appellant did not attach the contract to her complaint, nor did she introduce other evidence regarding the breach of contract claim. Because appellant did not attach anything to her complaint and failed to respond to appellee's motion for summary judgment with any evidence to support her argument regarding a contractual duty, the court of claims found she could not prevail on her breach of contract claim. We conclude that the court of claims did not err in this regard. As already stated, the non-moving party has a reciprocal burden to set forth specific facts showing there is a genuine issue for trial.

{¶13} In her brief to this court, appellant argues that the court of claims could not grant summary judgment in this case because the negligence was per se and appellant alleged that she suffered injury from the assault. Appellant contends that the specific requirement that the university suspend or expel a student who commits a violent act, such as assault, renders this a case of negligence per se. Appellant seems to argue

that the university's duty is established by legislative enactment to provide public safety and this duty imposes strict liability. However, appellant's argument is not specific to these facts.

{¶14} Under the law of negligence, a defendant's duty to a plaintiff depends on the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 645, 1992-Ohio-42. "[T]o recover on a negligence claim, a plaintiff must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, and (3) that the breach of the duty proximately caused the plaintiff's injury." *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184, citing *Wellman v. E. Ohio Gas Co.* (1953), 160 Ohio St. 103, 108-09.

{¶15} "'Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.'" *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶23, quoting *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98. The determination of whether a duty exists in a negligence action is a question of law for a court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

{¶16} "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Meniffee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77. Foreseeability of harm usually depends on a defendant's knowledge. *Id.*

{¶17} As a student at OSU, appellant's legal status was a business invitee. *Baldauf v. Kent State Univ.* (1988), 49 Ohio App.3d 46. As a business invitee, the university owed her a duty "to exercise ordinary care and to protect [her] by maintaining the premises in a safe condition." *Bennett v. Stanley*, 92 Ohio St.3d 35, 38, 2001-Ohio-128, quoting *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68. In *Simpson v. Big Bear Stores Co.* (Dec. 30, 1993), 10th Dist. No. 93AP-852, affirmed, 73 Ohio St.3d 130, 1995-Ohio-203, this court explained the duty to a business invitee to prevent harm from third parties, as follows:

\* \* \* Under Ohio law, ordinarily no duty exists to prevent a third person from harming another unless a "special relationship" exists between the actor and the other. \* \* \* Such a "special relationship" exists between a business and its business invitees. \* \* \* Thus, a business may be subject to liability for harm caused to a business invitee by the criminal conduct of third persons. \* \* \* Nonetheless, a business is not an insurer of the safety of its business invitees while they are on its premises. \* \* \* Consequently, a business has a duty to warn or protect its business invitees from criminal acts of third persons only where the business knows or should know in the exercise of ordinary care that such acts present a danger to its business invitees. \* \* \*

(Citations omitted.) Furthermore, "[b]ecause criminal acts are largely unpredictable, the totality of the circumstances must be 'somewhat overwhelming' in order to create a duty." *Shivers v. Univ. of Cincinnati*, 10th Dist. No. 06AP-209, 2006-Ohio-5518, ¶7, citing *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, 194.

{¶18} Applying *Simpson* here, the question is whether appellant's injury was reasonably foreseeable and whether OSU breached a duty of ordinary care by failing to take measures to protect appellant from being assaulted. In support of its position that

appellant's injury was not foreseeable, OSU submitted appellant's deposition. Appellant admitted that Wolfe and Frazier had never previously assaulted her, no other student had previously assaulted her, she had not been threatened, and she had not reported any problems to OSU. Appellant presented no evidence that OSU was aware of any prior assaults or threats by Wolfe against any other student at OSU.

{¶19} Given the state of the evidence, a reasonable fact-finder could only conclude that the incident was not foreseeable. There was no evidence to support an inference that OSU had any knowledge that a threat existed, and OSU had no way to foresee the events. Because no reasonably prudent person could have foreseen the incident, given no warning, there is no evidence that OSU breached any duty to exercise ordinary care. Accordingly, appellant has failed to demonstrate that OSU owed her a duty under the law, that OSU failed to act in accordance with a duty or that OSU's conduct proximately caused her injury.

{¶20} The court of claims also concluded that appellant failed to prove intentional infliction of emotional distress. The Supreme Court of Ohio has defined that cause of action to impose liability upon "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another." *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.* (1983), 6 Ohio St.3d 369, syllabus, abrogated on other grounds, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451. To be actionable, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."



*Yeager* at 375. We agree with the trial court that no reasonable fact-finder could conclude that OSU's actions toward appellant were in any way outrageous or extreme.

{¶21} Finally, appellant argues that the court of claims could not consider Hight's affidavit, because it does not state that it is made on personal knowledge or that she is competent to testify to the matters stated in the affidavit. Civ.R. 56(E) requires that supporting affidavits be made on personal knowledge, set forth facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. However, the court of claims relied on appellant's deposition, not Hight's affidavit, to establish the facts, as did we. Thus, the fact that the affidavit does not state that it was made on personal knowledge is irrelevant.

#### IV. CONCLUSION

{¶22} For the foregoing reasons, we conclude that the court of claims did not err in granting appellee's motion for summary judgment. Accordingly, we overrule appellant's single assignment of error and affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

BRYANT, P.J., and SADLER, J., concur.

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