[Cite as *Wallace v. Halder*, 2009-Ohio-3738.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92046

BRIAN WALLACE, ADMINISTRATOR OF THE ESTATE OF NORMAN E. WALLACE

PLAINTIFF-APPELLANT

vs.

BISWANATH HALDER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-591169

BEFORE: Celebrezze, J., Blackmon, P.J., and Stewart, J.

RELEASED: July 30, 2009
JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Brian Wallace ("Wallace"), brings this appeal challenging the trial court's grant of summary judgment in favor of appellee, Case Western Reserve University ("CWRU"). After a thorough review of the record, and for the reasons set forth below, we affirm.

Background

{¶ 2} The lengthy sequence of events leading up to this appeal are extensive and require discussion. From 1996 to 1999, Biswanath Halder ("Halder") was enrolled as a graduate student at the CWRU Weatherhead School of Management. After his graduation in 1999, Halder continued his studies at CWRU by enrolling in the MBA-Plus program for the Fall 1999 and Spring 2000 semesters. As part of his studies, he used the computer lab located in the Enterprise Building on CWRU's campus.

{¶ 3} Halder was known to cause problems in the computer lab. On occasion, Halder logged onto up to three computers in the lab at one time, thereby preventing computer access to other students. On another occasion, a female student complained that Halder was harassing her in the lab, insisting she proofread his personal documents. In July 2000, Halder allegedly discovered that his email account had been hacked into, and all his files had been deleted. Halder accused Shawn Miller ("Miller"), a computer technician employed by

CWRU, as the individual who he believed had hacked into his computer and deleted his life's work. Halder made several complaints to CWRU personnel, including Roger Bielefeld, Director of Information Technology at the Weatherhead School of Management. A formal investigation was undertaken by CWRU personnel, but the matter remained unresolved as far as Halder was concerned.

{¶ 4} On August 29, 2000, Halder sent a mass email from his campus account to CWRU students and alumni, which laid out his accusations against Miller and CWRU. As a consequence, CWRU considered terminating Halder's university computer privileges permanently, but decided to wait until it was determined whether Halder would register for Fall 2000 classes. When Halder did not register for classes, his computer privileges automatically lapsed. The last known occasion that Halder used the CWRU computer system or was on campus was in August 2000.

{¶ 5} On June 7, 2001, Halder filed a civil lawsuit against Miller, alleging that Miller infiltrated his computer account and deleted his files. CWRU assisted Miller by paying his attorney fees. While the matter was pending in the common pleas court, Phillip Helon, one of Halder's housemates, engaged in several conversations with Halder about the litigation and Halder's belief that Miller was the individual who infiltrated his computer files. In his deposition, Helon stated that Halder told him if he "lost his appeal," he would "f* * * those f*

* *ers up." Helon stated that he told Miller about the vague threats because Halder had indicated to Helon that he believed Miller was behind the computer hacking.

{¶ 6} In Miller's deposition, he stated that he had talked to Bielefeld on a prior occasion about Halder and how other students in the computer lab complained about Halder's behavior. Miller also stated that when Helon told him what Halder said, Miller was concerned for his safety, although he was not immediately afraid because the pending lawsuit had not yet been resolved at the trial court level. Miller stated that he had discussed the problems relating to Halder with Bielefeld on several occasions.

{¶ 7} While Halder's lawsuit against Miller was pending, CWRU students and alumni received another mass email, allegedly from Halder's student account, which labeled Miller as "an evil man" and intimated that CWRU was "an evil empire." CWRU's investigation determined that the email was not sent from any CWRU computer account, and no determination was made that Halder was responsible for the email. Nonetheless, on November 29, 2001, Bielefeld and Julia Grant, Associate Dean of the Weatherhead School, sent Halder a letter officially terminating his computer privileges.

{¶ 8} Deposition testimony from several CWRU administrators indicates that they knew Halder was disruptive in the computer lab; that Halder had initiated an investigation when he believed his computer account had been

infiltrated; that he had filed a civil lawsuit against Miller; and that Halder used spam emails to communicate his disappointment with the lack of cooperation he was receiving from CWRU. This testimony also indicated that no administrator had been made aware of Halder's continuing threats against Miller and CWRU after November 2001.

{¶ 9} In April 2003, Halder's appeal of his civil lawsuit against Miller was dismissed. Shortly after Miller learned that the appeal had been dismissed, he received two hang-ups on his home phone. Miller contacted the Cleveland Heights police, explained to them his concerns about Halder, and asked them to increase security on his street. Miller notified his immediate supervisor, Carleen Bobrowski, as well as Chris Fenton, another employee in the computer lab, of his concerns because Miller believed Fenton was involved with hacking into Halder's account. However, Miller testified, "I made no official appeal to anyone at CWRU for protection in regard to Biswanath Halder."

{¶ 10} On May 9, 2003, at approximately 4:00 p.m., Halder entered the Peter B. Lewis Weatherhead School of Management building by using a sledgehammer to break through a glass door. Halder proceeded to shoot and kill graduate student Norman Wallace, shoot and injure two other occupants of the building, and hold hostages in the building for approximately seven hours. Halder was later found guilty of the murder of Norman Wallace.

{¶ 11} On May 6, 2006,[1] Brian Wallace, as Administrator of the Estate of Norman E. Wallace, filed a lawsuit against Biswanath Halder, John Does 1 through 10, and CWRU. In his complaint, he alleged causes of action against CWRU for survivorship; wrongful death; and negligent hiring, supervision, and performance of CWRU security services. At the close of discovery, CWRU filed a motion for summary judgment, arguing that Wallace's theory of premises liability must fail as a matter of law because Halder's actions on May 9, 2003 were not reasonably foreseeable, and therefore, CWRU had no duty to protect Norman Wallace against Halder's criminal acts.

{¶ 12} In his brief in opposition to summary judgment, Wallace argued that several employees had knowledge of Halder's threats of violence against certain individuals and CWRU, that their knowledge is imputed to CWRU, and that CWRU breached its duty to Norman Wallace by not taking the threats Halder made seriously and providing better security. In support of his opposition, Wallace submitted expert reports from Ralph Witherspoon and Dr. Steven Miller.

{¶ 13} On August 27, 2008, the trial court granted summary judgment in favor of CWRU. It found that Halder's actions and statements did not "constitute 'somewhat overwhelming' facts and circumstances that a reasonably

[1]Wallace filed a prior complaint on May 6, 2005, which was identical in substance to this complaint, filed a year later.

prudent person would foresee the probability that [Halder] would cause serious physical harm to others." On September 5, 2008, Wallace filed his notice of appeal, raising one assignment of error for our review.

Review and Analysis

{¶ 14} "I. The trial court erred when it granted the motion of appellee Case Western Reserve University for summary judgment."

{¶ 15} Wallace argues that Halder's actions were foreseeable, that CWRU is imputed with the knowledge of its employees, and that the court should not have excluded one of his expert reports.

Expert Report

{¶ 16} We first address whether the trial court properly excluded Dr. Steven Miller's expert report.

{¶ 17} After numerous extensions of time, the trial court imposed a final deadline of January 18, 2008 for submission of expert reports. As of that date, Wallace had submitted one expert report from Ralph Witherspoon. CWRU's motion for summary judgment was filed on February 1, 2008. On February 14, 2008, Wallace attempted to file an expert report prepared by Dr. Steven Miller. The trial court excluded the report as untimely filed. Wallace claims that the trial court abused its discretion by excluding the report and that, had the trial court considered Dr. Miller's report, it would not have granted summary judgment.

{¶ 18} Our standard of review on the admission of evidence is whether the trial court abused its discretion. *Barnett v. Sexten*, 10th Dist No. 05AP-871, 2006-Ohio-2271, citing *Dunkelberger v. Hay*, 10th Dist. No. 04AP-773, 2005-Ohio-3102. An "abuse of discretion" means more than an error of law or judgment. Rather, an abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶ 19} Loc.R. 21.1(A) provides in pertinent part: "Each counsel shall exchange with all other counsel written reports of medical and expert witnesses expected to testify in advance of trial. The parties shall submit expert reports in accord with the time schedule established at the Case Management Conference. * * * Upon good cause shown, the court may grant the parties additional time within which to submit expert reports."

{¶ 20} Given the numerous extensions of time granted to the parties by the court,[2] we do not find that the trial court abused its discretion by excluding Dr. Miller's report.

{¶ 21} As such, the trial court should not have considered Dr. Miller's report in reviewing CWRU's motion for summary judgment. An expert report

[2]The original cutoff date for Wallace's expert report was August 1, 2007, and at least five extensions were granted at Wallace's request.

may properly be excluded for purposes of summary judgment where it has been excluded for trial as a discovery sanction. *Clarke v. Cleveland Clinic Foundation* (July 7, 1994), Cuyahoga App. No. 65749.

Foreseeability of Harm

{¶ 22} Next we address the trial court's grant of summary judgment on the basis that Halder's actions were not foreseeable, and CWRU did not owe Norman Wallace a duty greater than that of ordinary care.

{¶ 23} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined 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) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 24} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 25} In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim*." Id. at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 26} This court reviews the lower court's grant of summary judgment de novo. *Brown v. Scioto County Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party * * *. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

{¶ 27} Wallace asserts his claims against CWRU on a premises liability theory; that is, that CWRU should have foreseen the events of May 9, 2003 and acted to prevent the murder of Norman Wallace.

{¶ 28} "To 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, 697 N.E.2d 198, reconsideration denied, 83 Ohio St.3d 1453, 700 N.E.2d 334, citing *Wellman v. E. Ohio Gas Co.* (1953), 160 Ohio St. 103, 108-109, 113 N.E.2d 629.

{¶ 29} "'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*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, quoting *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98, 543 N.E.2d 1188. 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, 544 N.E.2d 265.

{¶ 30} "The duty element of negligence may be established by common law, by legislative enactment, or by the particular circumstances of a given case." *Wallace*, supra at ¶23; *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 119 N.E.2d 440, paragraph one of the syllabus. The existence of a duty depends on

foreseeability of harm. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. "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." Id.; see, also, *Wallace*, at ¶23. Foreseeability of harm usually depends on a defendant's knowledge. *Menifee*, at 77.

{¶ 31} Under Ohio common law of premises liability, the status of the person who enters upon the land of another – specifically, trespasser, licensee, or invitee – defines the scope of the legal duty that a landowner owes the entrant. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287, reconsideration denied, 75 Ohio St.3d 1452, 663 N.E.2d 333, citing *Shump v. First Continental-Robinwood Assocs.*, 71 Ohio St.3d 414, 417, 1994-Ohio-427, 644 N.E.2d 291. "[I]nvitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Gladon*, at 315.

{¶ 32} In *Kleisch v. Cleveland State Univ.*, Franklin App. No. 05AP-289, 2006-Ohio-1300, the Tenth District concluded that a university student who was raped while studying in a classroom on university property was afforded the status of an invitee, and therefore, the university owed her a duty to exercise ordinary care and protection by maintaining the premises in a safe condition.

See, also, *Baldauf v. Kent State Univ.* (1988), 49 Ohio App.3d 46, 47, 550 N.E.2d 517; *Bennett v. Stanley*, 92 Ohio St.3d 35, 38, 2001-Ohio-128, 748 N.E.2d 41.

{¶ 33} In *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, however, this court explained: "In addition to the totality of the circumstances presented, a court must be mindful of two other factors when evaluating whether a duty is owed * * *. The first is that a business is not an absolute insurer of the safety of its customers. The second is that criminal behavior of third persons is not predictable to any particular degree of certainty. It would be unreasonable, therefore, to hold a party liable for acts that are for the most part unforeseeable. Thus, 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."

{¶ 34} We find that Halder's actions on May 9, 2003 were not reasonably foreseeable such that CWRU was on notice of, and under a duty to protect, Norman Wallace from Halder's shooting rampage.

{¶ 35} According to CWRU employees and the information they had, with the exception of sending one mass email in August 2000, Halder was seeking redress through lawful and legitimate avenues. Halder had contacted CWRU administrators and internal computer security personnel with his hacking allegations. He had also filed a lawsuit against Miller, which was proceeding

normally through the proper legal channels. Until the tragedy of May 9, 2003, Halder did not have a violent history and had no criminal record.

{¶ 36} Wallace points to the statements Halder made to his housemate, Phillip Helon, about CWRU and Miller; however, these statements do not amount to notice to CWRU. Even Miller testified that when Helon told him Halder seemed obsessed with Miller, Miller was not concerned for his safety and did not believe Halder would harm him. He stated that, at most, he thought Halder might do some property damage to CWRU. Furthermore, Miller was not afraid of Halder at that time because the lawsuit was still pending at the trial level when Halder made comments that he wanted to "stop" Miller.

{¶ 37} Wallace also focuses on Miller's earlier notice to Bielefeld and through Bielefeld to Grant. The testimony of Bielefeld and Grant does not support a finding that CWRU was on notice that Halder had made threats to harm anyone. Bielefeld and Grant knew Halder had caused some problems in the computer lab in 1999 and 2000; they knew Halder had sent a mass email to CWRU students and alumni in August 2000; they knew Halder had a pending lawsuit against Miller; and, most significantly, they knew that Halder had had no contact with any CWRU employee since 2001.

{¶ 38} While hindsight clearly suggests Bielefeld should have inquired further into Halder's alleged threats and activities after August 2000, as the trial court stated in its opinion, "the court must focus on the facts and

circumstances at the time in which they arose and should refrain from using the additional illumination of hindsight in performing its analysis." Journal Entry and Opinion, p.8, citing *Hetrick v. Marion-Reserve Power Co.* (1943), 141 Ohio St. 347 ([N]egligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent people under the same circumstances would or should, in the exercise of reasonable care, have anticipated.)

{¶ 39} Furthermore, CWRU did employ security personnel, and Halder did not lawfully enter the Peter B. Lewis building, but instead broke in by breaking though a glass door. We are also not convinced by Witherspoon's conclusion that, based on its knowledge, CWRU was required to put armed security guards in that or any other campus building.

{¶ 40} We are persuaded that the lengthy gap between Halder's last contact with CWRU in August 2000[3] and the shooting death of Norman Wallace in May 2003 is another factor that prevents this court from finding that Halder's criminal act was reasonably foreseeable to CWRU. Under the totality of the circumstances available to CWRU personnel, the evidence is not "somewhat overwhelming" that Halder would embark on a shooting rampage on campus. We are also not convinced by Wallace's argument that CWRU failed to take Halder's accusations of computer hacking seriously, and therefore, somehow

[3]We are not convinced that the spam email sent in November 2001 came from Halder since an investigation determined that it was not sent internally, and there was no evidence presented as to its origination.

became responsible for his violent rage. Not everyone seeking redress for a grievance receives the justice they hope for; however, this does not entitle them to seek violent retribution and shift the blame from themselves.

{¶ 41} The facts before us are not "somewhat overwhelming" in creating in CWRU a duty to protect Norman Wallace from the tragic, yet unforeseeable, criminal shooting death at Halder's hands. We find that the trial court properly granted summary judgment in favor of CWRU, and we overrule Wallace's sole assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
MELODY J. STEWART, J., CONCUR