ORIGINAL

IN THE SUPREME COURT OF OHIO

BRIAN WALLACE, ADMINISTRATOR OF THE ESTATE OF NORMAN E. WALLACE,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
Plaintiff-Appellant,	:	Court of Appeals
v.	:	Case No. CA-08-092046 09-1817
BISWANATH HALDER, ET AL.	:	Ohio Supreme Court Case No. _____
Defendants-Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BRIAN WALLACE, ADMINISTRATOR OF THE ESTATE OF NORMAN E. WALLACE

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Table of Contents

TABLE OF AUTHORITIES

Cases

Rules

Treatises

I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

This case emanated from the May 9, 2003, nationally publicized shooting rampage at the Weatherhead School of Management, in the Peter B. Lewis building, on the campus of Case Western Reserve University ("CWRU" or "the University"). On that date Biswanath Halder, a former student of CWRU's Weatherhead School, entered a classroom building and shot to death Norman E. Wallace, a thirty year old graduate student.

As is characteristic of such rampage shootings at our country's educational institutions, this was not a random act by Halder. The true tragedy is that his rampage was foreseeable and preventable – by CWRU. There had been clear warning and notice to CWRU in June 2002 that if Halder lost his civil case regarding the intentional destruction of his computer files against a CWRU employee on appeal, he was "going to fuck those fuckers up" and kill people at the Weatherhead School. Halder made this threat of death while he displayed the hand gesture of shooting with a gun which was then communicated to CWRU, thereby placing it on actual notice of his death threat, and giving rise to a concomitant duty to protect students, staff and faculty.

Halder was a clear and present danger, known by CWRU and its Weatherhead School since about 1999. The record before the Court of Common Pleas in opposition to CWRU's motion for summary judgment established that Halder had engaged in a protracted legal dispute with CWRU right up until the time of the shooting of Appellant's decedent. The record further established that CWRU did not treat Halder's claim seriously. On April 29, 2003, the Eighth Circuit Court of Appeals dismissed Halder's appeal of the dismissal of his lawsuit. A few days later, Halder carried out his threat as promised, by going on a shooting rampage at the Weatherhead School.

This case merits the attention of this Court because the public has a very great and understandable interest in seeing that educational institutions in Ohio will not ignore the safety of their students, staff and faculty when these institutions are put on notice of death threats and substantial dangers, like those that Appellant demonstrated existed in this case when his decedent was gunned down. The holding of the Eighth District Court of Appeals affirming summary judgment for CWRU on the grounds that it had no duty because Halder's actions were not foreseeable jeopardizes campus safety throughout the State. This decision is not only contrary to the national trend in campus rampage shootings, but it turned a blind eye to the wealth of evidence which showed CWRU was put on notice of the real and substantial threat Halder, a former graduate student, posed. Ohio courts of appeals are split on the appropriate test for foreseeability in a premises liability case based on criminal conduct, and this Court has not yet had occasion to adopt a standard for academic institutions. Until this Court clarifies the foreseeability standard and provides guidance for its proper application in an academic setting, school administrators will assume that they need do nothing to protect students, staff and faculty even in the face of clear death threats, based on the Court of Appeals decision in this case.

The second issue in this case involves an issue that is critically important to all civil litigants. The court of appeals affirmed the trial court's preclusion of the affidavit of Appellant's expert, Dr. Stephen Miller, because this affidavit was submitted after the final deadline set for submission of expert reports. However, Appellant had the "unconditional right" to use and rely on Dr. Miller's affidavit in opposition to summary judgment because it fell under the category of rebuttal testimony. As such, its exclusion conflicts with this Court's precedent, and warrants review on the merits.

II. STATEMENT OF THE CASE AND FACTS

This case arises from a wrongful death and survivorship action predicated on premises liability and negligence theories from the Mary 9, 2003, shooting death of Norman E. Wallace, a graduate student at CWRU's Weatherhead School of Management. The shooting occurred in the Peter B. Lewis Building. Norman was a 2004 candidate for a Master's in Business Administration. He was a student leader and the only African American male in the class of 2004, as well as a longtime academic standout and newly elected president of the Black MBA Student Association. The underlying action was filed by the executor of Norman's estate, his brother Brian, one of Norman's ten siblings. Norman was a product of the Mt. Calvary Pentecostal high school and had earned a Bachelor of Science degree in business administration from Youngstown State University in 1996.

From 1996 to 1999 Biswanath 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. As part of his studies, he used the computer lab on CWRU's campus. 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 discovered that his email account had been hacked into, and all his computer files had been deleted. Halder accused Shawn Miller, a computer technician employed by CWRU, as the individual whom he believed had hacked into his computer and deleted his life's (intellectual) work

In June 2001, Halder sued Shawn Miller in the Cuyahogo County Court of Common Please, claiming he hacked into Halder's website. CWRU, even though not a party to the matter, provided a defense for Miller since the incident was directly related to his employment with CWRU, and Miller also counterclaimed for defamation of character and intenetional inflciton of emotional distress. When Miller was sued, he spoke to Marion Hogue, Dean of Students at CWRU. Hogue had CWRU defend Miller and fight Halder's claims, and referred Miller to the University's legal counsel. Hogue did not provide any counsel or assistance to Halder even though a CWRU personnel had destroyed his files.

Halder was a pro se litigant for much of his case, giving him direct personal involvment with the University attorneys. Halder also continued to live at the same address, near many CWRU students, and he discussed it with his neighbors, CWRU law students, who in turn discussed it with other CWRU students and employees. Rather than undertake an approprate investiagation of Halder's accusations that a CWRU employee had destroyed his lifes work, CWRU wrote Halder a letter in Novermber 2001 abruptly terminating his computer lab privileges over a spam email that Halder did not send. In May 2002, the Universtiy also successfully fought Halder's motion to compel discovery and his motion to add the University as a defendant. In January 2003, at Miller's behest, the court ordered Halder to delete statements from his website – a further loss of Halder's intellecutual work – in a way that he thought denied his due process. In Febuary 2003, when Miller's lawyer was insisting on Halder's compliance, he protested to the court that he had been misinformed about his opportunty to respond.[1]

[1] The critical point is that even though Halder was no longer physically present on campus, the contact between Halder and his institution enemy was substantial, ongoing and recent. In fact during oral argument in the Court of Appeals counsel for CWRU stated CWRU is an inner city urban campus and Halder resided within in area directly adjacent to CWRU.

Significantly, CWRU also knew its employees had **actually** hacked into Halder's website and **intentionally** provoked him. The record on summary judgment established that Chris Fenton, manager of the Weatherhad computer lab, and his girlfriend, Janis Kaghazwala, also a CWRU employee, had asserted their privilege against self incrimaintion at Halder's criminal trial in response to questions concerning whether they had hacked into and destroyed Halder's website or posted derogatory information concerning Halder on his website. Knowledge of this intentional provocation of Halder was imputable to CWRU, although the trial court and court of appeals failed to do so.

In May 2002, while Halder was struggling to add CWRU and other defendants to his lawsuit, Halder told CWRU law student Paul Helon that if he lost the court battle he would "fuck those fuckers up." Halder even clearly made a gesture with his hand as a gun, showing he was going to shoot the people at CWRU Weatherhead School if he lost his appeal. Helon was so concerned for Miller's safety that he sought out Miller and told him about Halder's threat. Miller then reported the threat to his CWRU supervisor Roger Bielefield,[2] saying "apparently Halder is interested in killing us." Bielefield merely told Miller not to worry and that Haldier "probaby would not do anythng." However, Miller's concern for his safety did not dissapate.

Although Bielefeld received a letter from Halder, he met only once with Halder. Bielefeld provided Halder with absolutely no investigatory informaton Halder requested of him. Bielefeld also received an August 27, 2000 email from Halder broadcast to the University at CWRU stating that the "evil man" Shawn Miller, an employee of CWRU Weatherhead School, deleted in a few seconds everything it took Halder a lifetime to create.

[2] Bielefeld is CWRU's Director of Research Computing and Information Technology at the Weatherhead School of Management.

Since the death threat by Halder was prefaced on Halder losing his civil appeal in his case with Miller which was being defended by CWRU, Miller's concern for his safetly dramatically elevated in late April 2003 when Halder lost his appeal. At that time Miller was so concerned Halder would try to seriously physcially harm him, that he even went to his residential police force, the Cleveland Heights Police Department, for protection. He did this since CWRU and Bielefeld had done nothing to protect him from Halder. Miller also made his immediate supervisor at CWRU aware of these threats. Miller also told his co-worker Chris Fenton of the Weatherhead Computer Lab of Halder's threat soon after he learned of it. Based on his review of the computer trail evidence, Miller believed Fenton was actually the person who had hacked into Halder's computer and maliciously deleted the files that contained Halder's perceived life work.[3]

Thus, many managerial, supervisroy, and employee personnel at CWRU were on actual notice of the direct threat of deadly harm at the Weatherhead School by Halder should he lose his civil appeal. Further, CWRU employees (Chris Fenton and Janis Kaghazwala) had acutally hacked into Halder's website and intentionally provoked Halder. However, the trial court and court of appeals failed to impute any of this knowledge and acts of CWRU employees to CWRU

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[3] Chris Fenton lived with girlfriend, Janis Kaghazwala, who was another CWRU employee. An investigation conducted by Halder's attorney in his lawsuit against Miller uncovered the telephone number from which Halder's computer was hacked, and this number was traced to the home of Kaghazwala. In March 2002 Halder moved to join Weatherhead School of Management into his lawsuit, and attempted to compel discovery from Weatherhead. CWRU opposed both motions and both were denied. In May 2002 Halder moved to join Kaghazwala, and that motion was also denied.

During Halder's trial for murder in 2005, Miller, who admitted that he hated Halder, testified that he figured out the identity of the culprit after his deposition was taken in Halder's civil lawsuit and that he revealed Chris Fenton's name to his attorney. At the murder trial both Fenton and Kaghazwala asserted their privilege against self incrimination when asked about the hacking. After the trial, CWRU fired both of them.

in connection with the courts' analysis of the facts known to CWRU at the time of Halder's rampage. The court of appeals concluded:

> While hindsignt clearly suggests that Bielefeld should have inquired further inder Halder's alleged threats and activites 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."... [paragraph] We are also not convinced by Wallace's argument that CWRU failed to take Halder's accusations of computer hacking seriously, and therefore, somehow 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.

Court of Appeals Decision, at P38.

The court of appeals also affirmed the trial court's preclusion of the Affidavit of Dr. Stephen Miller because Appellant submitted this expert's affidavit after the final deadline set for submission of expert reports. *Id.* at P21.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

<u>Proposition of Law No. 1</u>: A university owes a duty to students, staff and faculty on campus to protect them from the criminal conduct of third persons when the university knows or should have known in the exercise of ordinary care that such acts present a risk of serious physical harm to such invitees. This duty is breached when notice of a death threat by a disgruntled former student is given to the university's supervisory personnel, but the university does nothing to protect against this threat, and the former student carries it out through a murderous rampage on campus.

Under Ohio law, a business owes a duty to prevent a third person from harming another when a "special relationship" exists between the actor and the other. *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St. 3d 77, 458 N.E.2d 1262 (adopting 2 Restatement of the Law 2d, Torts (1965) 122, Section 315(b)). Such a "special relationship" exists between a business

like CWRU, and its invitee, like Norman Wallace. *See Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App. 3d 188, 583 N.E.2d 1071; *see, also, Baldauf v. Kent State University* (1988), 49 Ohio App. 3d 46, 47-48, 550 N.E.2d 517 (student's presence on university campus undisputedly accorded her status of invitee). As part of this duty to invitees, this Court has also declared that "a business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner." *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St. 3d 130, 135, 652 N.E.2d 70. In other words, a duty exists where a risk is reasonably foreseeable. *See Menifee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St. 3d 75, 77, 472 N.E.2d 707, 710; *see also Semadeni v. Ohio Dep't of Transp.* (1996), 75 Ohio St. 3d 128, 661 N.E.2d 1013 (where decedent was killed by an object thrown from an overpass court held state highway department had a duty to foreseeable travelers to take adequate measures to timely install protective fencing on overpasses).

The Ohio Courts of Appeal "are split on the appropriate test for foreseeability" with respect to criminal acts of third parties. *Whisman v. Gator Invest. Properties, Inc.*, 149 Ohio App.3d 225, 234, 776 N.E.2d 1126, citing *Heys v. Blevins* (June 13, 1997), Montgomery App. No. 16291, 1997 Ohio App. LEXIS 2536. As the *Whisman* court explained: "The totality-of-the-circumstances test takes into consideration not only past experiences but also 'such factors as the location of the business and the character of the business to determine whether the danger was foreseeable.'" *Id.*, quoting *Heys, citing Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, 193, *jurisdictional motion overruled*, 52 Ohio St. 3d 704, 556 N.E.2d 529. "Under this test, the totality of the circumstances must be 'somewhat overwhelming' to result in a duty to protect third parties against criminal acts of others." *Whisman*, at 234, quoting *Reitz*, at 193-194.

However, "under the other test, 'the occurrence of prior similar acts suggests that the danger was foreseeable.'" *Whisman*, at 234, citing *Heys*. *See, also, McKee v. Gilg* (1994), 96 Ohio App.3d 764, 767, 645 N.E.2d 1320 (wherein court discussed "totality of the circumstances" and "prior similar acts" tests of foreseeability); *Haralson v. Banc One Corp.* (Apr. 16, 1998), Franklin App. No. 97APE08-1134, 1998 Ohio App. LEXIS 1631, *appeal not allowed*, 83 Ohio St. 3d 1419, 698 N.E.2d 1007 (discussing "totality of the circumstances" and "prior similar acts" tests of foreseeability).

Appellant respectfully submits that the existence of a duty to protect students, staff and faculty at a university from the criminal acts of others should turn on whether the university knew or should have known that the third party presented a danger to these invitees on campus. Additionally, the "'foreseeability of criminal acts will depend on the knowledge of the [university], which must be determined from the totality of the circumstances.'" *Maier v. Serv-All Maintenance, Inc.* (1997), 124 Ohio App.3d 215, 222, 705 N.E. 1268, 1272 (quoting *Feichtner v. City of Cleveland* (1994), 95 Ohio App. 3d 388, 396, 642 N.E.2d 657.

Thus, in this case the relevant inquiry should be whether CWRU knew or should have known from the **totality of the circumstances** that Halder posed a threat of harm to its invitees, which necessarily includes their student Norman E. Wallace. This means that the court must take into account the special nature of the academic enterprise and the special nature of risk that is attendant to this enterprise. Professor Helen DeHaven, who has undertaken an in depth study of rampage shootings in higher education, made the following pertinent observations with respect to several such circumstances in this case – circumstances which neither which neither the trial court nor the court of appeals took into account in ruling CWRU had no responsibility for Halder's rampage:

> First, the analysis...adopted by the court does not take account of the special nature of the academic enterprise, nor the nature of the risk involved. Respect for intellectual work of others is a traditional academic value about which there is a high level of consensus in the academic community. It is a necessary component of academic freedom and scholarly productivity. It is common to all academic communities, especially high-ranking research universities like CWRU. When the college or university guards and implements such a value for the scholarly community (and, in terms of the business model trades on it), it is to be expected that it will maintain professional standards of conduct and accountability in the computer labs where intellectual work is pursued. If a person's intellectual work is nevertheless deliberately destroyed [as in Halder's case], a college or university should be at least as diligent in discovering the culprits as defending against false complaints. If it negligently fails to take appropriate action, its inattention can contribute to significant disorder and dysfunction not least by disappointing the legitimate expectations of its students with respect to the safety of their work. Second, the analysis [by the trial court in granting CWRU's motion for summary judgment against Appellant] does not take into account the special risks of academic life. Scholars may become deeply disturbed over issues involving their intellectual work product. In the [Norman E.] Wallace litigation, the University made much of the fact that Halder had no history of violent or criminal behavior and was not known to own a gun, but the same can be said of most academic rampagers, few of whom make direct threats. Guns are easy to obtain. Every rampage killer also has obtained his weapons quickly and lawfully. Murders that occur as a result of academic-related conflicts are most likely to occur at the Institution, not at the victim's home or some other place. In a rampage, innocent people are always hurt. Given the academy's experience with violent graduate students, a reasonable jury might find that a prudent college or university should take it seriously when a student with known grievances and frustrations about the destruction of his work actually threatens to kill those responsible. A jury might well find it imprudent for a school to let its employees treat threats by students as purely personal conflicts, with only personal safety implications. On the other hand, it is both prudent and consistent with a school's educational mission to discourage threatening behavior.
>
> Third, the premises liability analysis [undertaken by the trial court in this case] elevates location over relationship in a way that does not necessarily comport with the realities of the situation. In terms of the foreseeability of his attack on the school, the analysis adopted by the court placed far greater emphasis on the fact that Halder left campus in August 2000 than on the substantial, and increasingly negative, relationship that continued through his litigation against the University and its personnel.

Helen DeHaven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, J. of College and Inst. Law, at 601-603 (footnotes omitted).

In this case, Appellant presented a wealth of evidence in response to CWRU's summary judgment which showed CWRU actually knew and should have known that Halder posed a threat of the very danger that occurred. From nearly the beginning of his relationship with CWRU, Halder waived red flag after red flag which should have alerted CWRU to his propensity to cause harm to others. That red flag turned into a flare gun and the notice of the danger he posed was far more than "somewhat overwhelming" when Haler made his specific threat of shooting people at the Weatherhead School should he lose his appeal. Therefore, the shooting incident of May 9, 2003 was certainly foreseeable to CWRU.

Unfortunately, the trial court and the court of appeals failed to impute knowledge of CWRU's supervisory employees to CWRU in connection with both courts' analysis of the facts known to CWRU at the time of Halder's rampage. This failure was contrary to well-established Ohio law, under which knowledge of employees should be imputed to an employer if the knowledge was acquired by the employee while acting within the scope of employment. *American Financial Corp. v. Fireman's Fund Ins. Co.* (1968), 15 Ohio St. 2d 171, 174, 239 N.E.2d 33. Because the courts below did not adhere to this basic rule of law, they did not take key evidence into account in ruling on CWRU's motion for summary judgment.

To summarize this evidence, the record on summary judgment established that a CWRU computer lab employee deliberately hacked the website of Halder in July 2000, while Halder was still a student in good standing at the University. Halder thereafter engaged in a protracted dispute with CWRU right up until the time of the shooting of Appellant's decedent. Halder sent broadcast emails, filed complaints with University and law enforcement officials concerning his grievances against CWRU, and eventually filed litigation against CWRU employee, Shaw Miller. CWRU financed Miller's defense, and also successfully fought Halder's attempt to

obtain discovery and join CWRU in the action. Halder communicated death threats to CWRU that were of such a disturbing nature that law student Phil Helon warned Shaw Miller, who then reported the threats to his supervisor in the computer lab. Later, upon Halder's case against Miller being dismissed, Halder's threats produced such fear that Miller requested both through CWRU and local police, additional security for his home and family. Critically, these activities occurred in close proximity – there was no "lengthy gap between Halder's last contact with CWRU in August 2000 and the shooting death of Norman Wallace in May 2003" as the court of appeals mistakenly found in concluding that Halder's actions were not foreseeable to CWRU. Court of Appeals Decision, at P40. Further, CWRU knew Chris Fenton and his girlfriend accomplice had actually intentionally provoked Halder deleting his files, because Fenton and his girlfriend's knowledge should have been imputed to CWRU.

The trial court failed to consider the foregoing evidence in opposition to the summary judgment motion. The grant of summary judgment to CWRU thus not only wrongfully deprived Appellant of his right to a jury trial, but this erroneous application of the premises liability standards threatens the safety of college campuses in this State as long as this decision stands. Accordingly, Appellant urges this Court to accept this important case for review on the merits.

<u>Proposition of Law No. 2</u>: The trial court committed reversible error when it granted summary judgment without considering rebuttal testimony from Appellant's expert.

Under Rule 56, all admissible evidence should be considered in opposition to a motion for summary judgment. *See Norwalk v. Cochran* (1995), 108 Ohio App. 3d 181, 670 N.E.2d 493 (court's failure to consider all the evidence before it on summary judgment always constitutes reversible error). In *Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356, 604 N.E.2d 138, the syllabus, the Ohio Supreme Court held as follows:

> Civ.R. 56(C) places a mandatory duty on a trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. The failure of a trial court to comply with this requirement constitutes reversible error.

In this case, the trial court refused to consider the affidavit of Dr. Stephen Miller on the grounds that it was expert testimony and Appellant did not provide an expert report summarizing the expecting testimony of Dr. Miller prior to the deadline set by the court under Cuyahoga County Common Pleas Court Local Rule 21.1. ("L.R. 21.1").[4] The trial court's reliance upon this rule was initially mistaken because the affidavit of Dr. Miller was used as part of motion practice, not trial. *Stewart v. Cleveland Clinic Found.* (1999) 136 Ohio App. 3d 244, 254-255, 736 N.E.2d 491 (because L.R. 21.1 did not apply to motion practice, it did not prevent consideration on summary judgment affidavit of expert whose report that was not submitted in compliance with L.R. 21.1).

Moreover, the trial court's handling of Dr. Miller's report did not comply with Local Rule 21.1. Under that rule, a non-party expert report may be submitted up until thirty days in advance of trial. Rule 21.1(B). Here the Affidavit of Dr. Miller, a rebuttal expert witness, was not considered by the trial court, even through under L.R. 21.1, Dr. Miller would have been able to testify at trial provided his report was submitted to CWRU thirty days in advance of trial, a point

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[4] Local Rule 21.1, entitled "Trial Witnesses," provides in relevant part:

> (B) A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. It is counsel's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the non-party expert's opinion. However, unless good cause is shown, all supplemental reports must be supplied no later than thirty (30) days prior to trial. The report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report.

in time far removed from the date when the Affidavit was submitted opposition her. See L.R. 21.1(B).

Further, "[a] party has an unconditional right to present rebuttal testimony on matters which are addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief." *Phung v. Waste Management, Inc.* (1994), 71 Ohio St. 3d 408, 644 N.E.2d 286. The affidavit of Dr. Stephen Miller, the substance of which was not considered at all by the trial court in determining CWRU's summary judgment motion, clearly falls into the category of rebuttal testimony. The trial court thus committed reversible error in not considering it. *See id.; Murphy v. Reynoldsburg, supra.*

CWRU's expert here, Dr. Monahan, advanced a theory that circumstances did not exist surrounding the shooting on CWRU's campus of Appellant's decedent by Biswanath Halder to have rendered it appropriate to conduct a forensic risk assessment of Halder. This theory was not essential to Appellant's case in chief and not essential to proving that that Halder's acts were foreseeable. Nonetheless, the trial court, in violation of L.R. 21.1 and this Court's precedent, would not permit Dr. Miller's Affidavit to be used to oppose CWRU's motion. This refusal was erroneous and also warrants reversal of the court of appeals' decision. *See Phung v. Waste Management, Inc., supra; Murphy v. Reynoldsburg, supra.*

IV. CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by electronic mail and ordinary U.S. mail to counsel for appellees, Kevin M. Norchi, Norchi Forbes, LLC, 23240 Chagrin Boulevard, Suite 600, Beachwood, Ohio 44122 and Biswanath Halder, on October 8, 2009.

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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

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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.:

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

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.

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.

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.

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.

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.

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.

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.

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."

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.

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.

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.

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

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 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

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

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

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

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.

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.

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."

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.

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

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.

"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

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[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.

conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

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.

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.

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.

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.

"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.

"'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.

"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.

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.

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.

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."

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.

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.

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.

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.

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.)

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.

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 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.

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.

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[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.

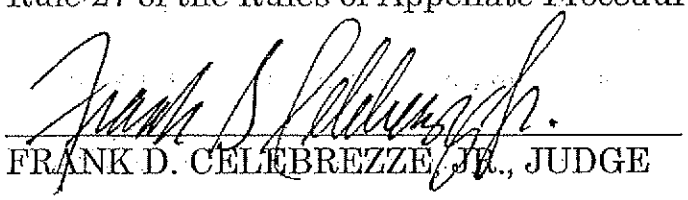
Judgment affirmed.

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