IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

KIMBERLY R. DALTON,	:	APPEAL NO. C-180671 TRIAL NO. A-1606904
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
BUTEN, INC., d.b.a. CAR-X,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant Kimberly Dalton appeals the trial court's judgment entering summary judgment in favor of Buten, Inc., d.b.a. Car-X on her claim of negligence. We affirm the trial court's judgment.

Dalton sued Car-X for negligence after she fell and injured her ankle on their property. Dalton, who possesses a handicap placard, arrived at Car-X in her roommate's car (her car had been towed to Car-X) and noticed that both handicap parking spaces in front of Car-X's entrance were occupied by automobiles that did not have a special license plate or a handicap placard displayed in the front window. Because both spaces were occupied, Dalton decided to park in an unmarked space near the store. When she exited from the vehicle, she stepped on a crumbling concrete curb and fell. She testified in her deposition that she did not look down at the ground before she exited from the car, but that if she had done so, she would have noticed the crumbling concrete and parked elsewhere.

Chris Burkhardt, the manager at the Car-X location where Dalton was injured, testified that he had parked his personal vehicle in one of the handicap parking spaces and that he does not have a handicap placard or special license plate. He then explained that he had also parked a customer's vehicle, which also did not have a handicap placard displayed or a special license plate, in the remaining handicap parking space so he could move Dalton's car into the service bay.

Dalton first assigns as error the trial court's grant of summary judgment in favor of Car-X. She maintains that the court erred by failing to find (1) that Car-X, through the actions of its employee, had violated R.C. 4511.69(F)—the Ohio statute prohibiting a person from parking any motor vehicle in a handicapped parking space when that motor vehicle does not have a handicap placard displayed or special license plates; (2) that Car-X's violation of R.C. 4511.69(F) was negligence per se; and (3) that the violation of R.C. 4511.69 (F) was the proximate cause of Dalton's injury.

We review a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriately granted when there exists no genuine issue of material fact, the party moving for summary judgment is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion, which is adverse to that party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589 639 N.E.2d 1189 (1994).

Here, the trial court did not give its reasons for granting summary judgment in favor of Car-X. Nevertheless, upon a review of the record, it is apparent that Car-X, through the actions of its employee, Burkhardt, violated R.C. 4511.69(F).

Dalton argues that a violation of R.C. 4511.69(F) is negligence per se. Negligence per se arises "[w]here, for the safety of others, a legislative enactment commands or prohibits the doing of a specific act, and there is a violation of such an enactment by one whom has a duty to obey it." *Kooyman v. Saffco Constr., Inc.*, 189 Ohio App.3d 48, 2010-Ohio-2268, 937 N.E.2d 576, ¶ 19 (2d Dist.). Even if we presume that a violation of

R.C. 4511.69(F) is negligence per se, we hold that Car-X is not liable to Dalton because Car-X's breach of its duty—wrongfully parking a customer's car in a handicap parking space—was not the proximate cause of Dalton's injury. Instead, Dalton's choice to park in an unmarked spot and then step onto crumbling concrete was the proximate cause of her injury. *See Heard v. Dayton View Commons Homes*, 2d Dist. Montgomery, 2018-Ohio-606, 106 N.E.3d 327, ¶ 12 (proximate cause is established where an original act is wrongful, and in a natural and continuous sequence, unbroken by any new, independent cause, produces a result that would not have taken place without the act). Accordingly, we overrule the first assignment of error.

In her second assignment, Dalton contends that the trial court erred by failing to apply Ohio law that a finding of negligence per se precludes the application of the open-and-obvious doctrine. *See Robinson v. Bates,* 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 25. We overrule this assignment of error. The open-and-obvious doctrine, when applied, operates to free a landowner from a duty of care to individuals lawfully on the premises. *Id.* at 11. Here, the record demonstrates that the trial court properly granted summary judgment in favor of Car-X, not by eliminating Car-X's duty to Dalton, but by determining that Car-X's breach of its duty was not the proximate cause of Dalton's injury.

In her final assignment of error, Dalton argues that the trial court erred by granting summary judgment in favor of Car-X on the erroneous belief that Dalton was required to sue Burkhardt, Car-X's employee, in order to hold Car-X liable for Dalton's injury. We agree with Dalton that she did not have to name Burkhardt in her lawsuit against Car-X. Under the doctrine of respondeat superior, if an employee commits a wrongful or negligent act while he was acting within the scope of his employment, the injured party may sue either the employee or the employer or both. *Tisdale v. Toledo Hosp*. 197 Ohio App.3d 316, 2012-Ohio-1110, 967 N.E.2d 2810, ¶ 15 (6th Dist.); *see Meehan v. AMN Healthcare, Inc.*, 1st Dist. Hamilton No. C-110442, 2012-Ohio-557, ¶ 11. The only exception to this rule occurs in some cases where a physician or attorney is

being sued for professional misconduct. *See generally Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939.

As we noted, the trial court did not provide its reasons for entering summary judgment in favor of Car-X. Even if its reasoning had been under the mistaken belief that Dalton had to name Burkhardt as a defendant in her lawsuit to hold Car-X liable for her injury, the trial court's judgment would still be right but for the wrong reason. As we held above, the record demonstrates that a grant of summary judgment in favor of Car-X was proper because Car-X's breach of its duty was not the proximate cause of Dalton's injury. Accordingly, we overrule the third assignment of error.

The judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., MYERS and **CROUSE, JJ.**

To the clerk:

Enter upon the journal of the court on December 18, 2019
per order of the court_____.

Presiding Judge