



{¶2} Appellants filed a complaint in negligence, which included a loss of consortium claim, based on the injuries Mikaela suffered in an automobile collision. Mikaela was a rear-seat passenger in the Kirkpatrick vehicle, which was struck by a vehicle driven by Magan M. Cave.<sup>1</sup>

{¶3} Motions for summary judgment were filed in this case by appellants, by the Kirkpatricks, and by third-party defendant, Dallas Brent Marshall, fiduciary of the estate of Magan M. Cave, deceased. The trial court granted the Kirkpatricks' motion, denied appellants' motion, and "by virtue of [its] decision," granted the motion by the third-party defendant [fiduciary of the estate of Magan Cave]. Appellants appealed, asserting under their single assignment of error that the trial court erred in denying their motion and in granting the Kirkpatricks' motion.

{¶4} For purposes of summary judgment, it does not appear that the parties dispute the following facts submitted through the deposition of Tamara Kirkpatrick (Kirkpatrick). Kirkpatrick testified that her daughter attended the same school as and was friends with Mikaela, who was nine years of age at the time pertinent to this case. The Kirkpatricks and appellants were neighbors and lived an estimated five minutes from the school the two girls attended. The two families would periodically take turns transporting the children from school, if schedules permitted.

{¶5} On February 12, 2007, Kirkpatrick picked up the two children at the end of the school day. She testified that she signed them out of school per school policy and both children were seated in the rear seat of her car. Kirkpatrick testified by deposition that she does not recall checking to see if the children were buckled into their seatbelts, but she had

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1. State Farm Fire & Casualty Company was also listed as a defendant in the first amended complaint. The Kirkpatricks filed a counterclaim against appellants and a third-party complaint against Dallas Brent Marshall, fiduciary of the estate of Magan M. Cave, deceased. Aetna Insurance Company was also later joined as a party plaintiff. State Farm, Aetna, and the estate of Magan Cave are not parties to this appeal.

taught her daughter to use her seatbelt.

{¶6} Kirkpatrick testified that during the trip home, a vehicle swerved out of control as it approached her vehicle from the opposite direction. The other vehicle crossed left of center and struck the front of the Kirkpatrick vehicle. According to the record, three of the four occupants of the other vehicle were fatally injured.

{¶7} All occupants of the Kirkpatrick vehicle received injuries. Appellants allege that Mikaela sustained head and facial injuries because Kirkpatrick failed to ensure that Mikaela was wearing her seat belt. Appellants allege, in part, that Kirkpatrick assumed supervision and control over Mikaela when she transported the child in her car. They argue that this relationship gave rise to a duty to ensure Mikaela was wearing a seatbelt.

{¶8} In ruling on the motions for summary judgment, the trial court found that Kirkpatrick had no legal duty to require or determine whether Mikaela fastened her seat belt, ruled that the theory of negligent supervision was not applicable to the case, and held that appellants had conceded they had no claim against Todd Kirkpatrick for negligent entrustment.

{¶9} A trial court may award summary judgment only when (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, which must be viewed in a light most favorable to the nonmoving party, that reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191. Trial courts must award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. *Id.* This court reviews a trial court's decision to grant summary judgment on a de novo basis, or, in other words, we use the same standard utilized by the trial court. *Carter v. Noble*, Fayette App. Nos. CA2008-05-013, CA2008-05-016, CA2008-05-017, 2009-Ohio-

1010, ¶14.

{¶10} In order to establish an actionable claim of negligence, a plaintiff must prove that the defendant owed the plaintiff a duty, that the defendant breached that duty, that the plaintiff suffered harm and that the harm was proximately caused by the defendant's breach of duty. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

{¶11} Duty refers to the relationship between a plaintiff and a defendant from which an obligation arises 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.

{¶12} The duty element of negligence may be established by common law, by legislative enactment, or by the particular circumstances of a given case, but the concept of duty in negligence law "is at times an elusive one." *Id.* Whether a defendant owes a plaintiff a duty is a threshold question of law for the court to determine. *Id.* at ¶22.

{¶13} Construing the evidence most favorably for the nonmoving party, and based upon the law in effect for the time at issue in this case, we find that reasonable minds could come to but one conclusion and that conclusion is adverse to appellants on the issue of Kirkpatrick's duty. *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 95-96; *Foulke v. Beogher*, 166 Ohio App.3d 435, 2006-Ohio-1411, ¶9 (negligence in motor vehicle cases, as in negligence cases generally, is the failure to exercise ordinary care so as to avoid injury to others); *Welco* at 346 (summary judgment is appropriate where a plaintiff fails to produce evidence supporting the essentials of its claim); see R.C. 4513.263 (applicable version of statute for occupant restraining device, which at time covered operator and occupant riding in front seat of vehicle); see R.C. 4511.81 (applicable version of motor vehicle child restraint statute for accident at issue, which at the time provided that restraints were required for children either

less than four years of age or weighing less than 40 pounds).<sup>2</sup>

{¶14} Further, we find not applicable appellants' claims of negligent supervision and negligent entrustment. See *Gay v. O.F. Mossberg & Sons, Inc.*, Portage App. No. 2008-P-0006, 2009-Ohio-2954, ¶55-56 (negligent supervision); see *Gulla v. Straus* (1950), 154 Ohio St. 193, paragraph three of the syllabus (negligent entrustment).

{¶15} Appellants' motion for summary judgment was properly denied. The Kirkpatricks were properly granted summary judgment. While the result of this case may be harsh, we are unable to hold that Kirkpatrick, who was not at fault in causing the collision, had a legal duty at the time to ascertain and ensure Mikaela was using her seatbelt, and we decline to establish such a policy under the specific facts of this case. Appellants' single assignment of error is overruled.

{¶16} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.

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2. We are aware that within two months of this vehicle accident, R.C. 4511.81 was amended, effective April 2007, to require the operator of a motor vehicle to have a child who is at least four years of age but not older than fifteen years of age properly restrained in a child restraint system or occupant restraining device.

[Cite as *Howard v. Kirkpatrick*, 2009-Ohio-3686.]