[Cite as *Gergich v. S & G Stores II, L.L.C.*, 2026-Ohio-4315.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

WILLIAM R. GERGICH, SR., ADMINISTRATOR OF THE ESTATE OF WILLIAM R. GERGICH, JR., DECEASED, ET AL.

APPELLANTS

V.

S AND G STORES II, LLC, ET AL.

APPELLEES

COURT OF APPEALS NO. {48}L-25-00270

TRIAL COURT NO. CI0202303399

DECISION AND JUDGMENT

Decided: October 30, 2026

.

* * * * *

Kathleen J. St. John, Jordan D. Lebovitz, and Joshua D. Payne, for appellants.

Gregory E. O'Brien and Jennifer L. Molnar, for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} Appellants, William Gergich Sr., administrator of the estate of William Gergich Jr., and Dakota Thomas, appeal the October 9, 2025 decision of the Lucas County Court of Common Pleas granting summary judgment in favor of appellee, S&G Stores II, LLC. For the following reasons, we affirm.

I. Background and Facts

{¶ 2} This case arose following a fatal car accident that occurred around 5:30 p.m. on May 5, 2022. Joshua Whitaker was driving while intoxicated on alcohol and drove left of center. His car collided with a car driven by William Gergich Jr., who died as a result of the accident. Dakota Thomas was William's passenger. He sustained serious injuries from the accident.

{¶ 3} Earlier in the day, Whitaker went to work at an S&G convenience store not far from the crash site. He clocked in around 2:00 p.m. Ray Wuertz, the store manager, was at the store with Whitaker for about 30 minutes before Wuertz left for the day. Whitaker also worked with Daria Murd, the shift supervisor, Cheryl McDowell, and a third employee named Chrissy.

{¶ 4} While he was at the store, Whitaker was drinking vodka mixed with a slushie and would go out to his car to refill his drink. He also drank two White Claws on the way to work. He began drinking to get rid of "the shakes," and when the alcohol finally began affecting him, it "started hitting [him] like a ton of bolts." He recalled that he messed up a lottery transaction, after which Murd said to him, "Josh, we can tell you've been drinking, go home." According to Whitaker, he clocked out, went to his car, realized that he could not drive, looked for his missing cellphone, and then went back into the store to look for his phone. Although Whitaker claimed that he could not find his phone, a photo from the accident shows a cellphone that Whitaker identified as his in the wreckage of his car.

{¶ 5} When Whitaker went back into the store for his phone, someone told him, "you gotta go home." He elaborated,

> Daria said, what are you doing? I thought you were supposed—I told you to go home? I said, well, I'm looking for my phone. She said don't—no, I told you go home, if we find your phone, we'll give it to you tomorrow, because you gotta come talk to Ray anyway, man. You're having to leave, going home drunk, just go take care of yourself, sleep it off and we'll handle it in the morning. I said, okay, well, can I use the work phone? She said, no, just go home. I said, okay.

So, "in [his] own volition," Whitaker drove away from the store. He clocked out around 3:30 p.m.

{¶ 6} After leaving the store, Whitaker drove to his cousin's house, where he had been living. He claimed that he was at his cousin's for ten to 15 minutes and then got back in his car and started driving to his girlfriend's house. As he was driving, he continued to look for his phone and while "reaching in the backseat, trying to find it, [he] actually stepped on the gas and pulled left to center . . . and [he] hit William head-on." He did not drink any alcohol between leaving S&G and getting in the accident.

{¶ 7} Whitaker "kn[e]w for a fact that you're not supposed to drink when you're on duty" at an S&G store. Despite that, he would regularly drink on the job "just to keep the shakes away." He knew of other S&G employees who got in trouble for drinking while at work and were sent home.

{¶ 8} Wuertz, Murd, and McDowell each knew that S&G had a rule prohibiting employees from being under the influence of drugs or alcohol at work and from consuming alcohol while at an S&G store. Wuertz did not receive any training about what to do if an employee was drinking on duty, and S&G did not have a policy

regarding handling an intoxicated employee. There was not a policy regarding employees' use of the store phone beyond using the phone for business purposes only.

{¶ 9} According to Whitaker's timecard report, in February 2022, he came to work with a hangover and went home early. The timecard report also indicates that Whitaker left work early on May 5, with the note "came into work not stable." Despite numerous occasions of Whitaker being tardy and leaving early, Wuertz did not have any issues with him as an employee. He did not have any concerns about Whitaker coming to work intoxicated before May 5, 2022, and did not have any information that led him to believe that Murd or McDowell saw Whitaker drinking while at work. Murd and McDowell confirmed that they did not suspect Whitaker of drinking on the job before May 5, 2022. In fact, Murd did not believe that Whitaker was intoxicated at work the day of the accident. She was near him when he clocked in and did not smell alcohol on him, she did not see him drinking that day, and she did not see him stumble or fall while he was at the store. Murd described him that day as "very troubled. Like he had something preventing him from focusing . . . ." She had seen him like that before, generally because "he was on the outs with his girlfriend." McDowell initially said that Whitaker was "off" and "wasn't himself" the day of the accident, but she did not know if it was because he was intoxicated on drugs or alcohol. After watching surveillance video from the store and hearing comments that she and the other employees made that day, McDowell admitted that both she and Murd knew that Whitaker had been drinking.

{¶ 10} The day of the accident, Murd called Wuertz about Whitaker because she was concerned about his behavior. According to her, "[h]e seemed very distracted . . .

and like he had something on his mind that was preventing him from focusing." After she talked to Wuertz, he called back on the store phone, and Murd gave the phone to Whitaker. She did not know what they talked about, but she heard him say, "I just want to stock the fucking cooler" before hanging up, grabbing his backpack, and leaving the store. McDowell recalled that she called Wuertz to ask about sending Whitaker to the cooler, and "Josh got on the phone with Ray and started using the F-bomb and . . . he handed [her] the phone and left." Wuertz remembered receiving a call from Murd after he left the store for the day. She told him that Whitaker was "disturbing the store" and all he wanted to do was work in the cooler. Wuertz talked to Whitaker on the phone. According to Wuertz, "on the conversation was he cursed at on the phone and [Whitaker] was upset and [Wuertz] asked him to leave and go home."

{¶ 11} At Murd's and McDowell's depositions, they were shown S&G surveillance video with audio from the day of the accident.

{¶ 12} On the video, Murd is heard asking Whitaker, "How fucked up are you today, Josh?" She claimed that she meant that something was weighing on his mind and he could not focus, not that he was intoxicated on alcohol. When Murd and others were talking about Whitaker disappearing several times, she meant that he was "in the bathroom a lot." She did not think that he was in the bathroom drinking. Murd said something on the video about "alcohol" and "going to his car." However, she claimed that she "suspected him of drinking, but not on the job[,]" meaning that he "liked to drink."

{¶ 13} When Whitaker was in his car in the parking lot, Murd heard McDowell say on the video, "he comes in too fucked up." Murd did not think that meant under the influence of alcohol; she thought that "[h]e had something on his mind that was bothering him."

{¶ 14} After Whitaker left the store, he drove around the parking lot. Chrissy, the third employee at the store, went out to talk to him when he parked. While he was parked, someone in the store said, "let's see how bad we can fuck it up for him[.]" Murd did not know what that meant. After talking to Whitaker, Chrissy came back inside and told Murd that she had told Whitaker to get a coffee and sober up, and he was going to call a friend to pick him up. Murd surmised that Chrissy assumed that Whitaker was under the influence of something, but she did not make that assumption. In fact, Murd claimed that she "didn't realize that he was under the influence." After that interaction, Whitaker left. McDowell realized that he had left his phone in the store, and he came back shortly after that to get his phone. Murd did not know how long he was outside before coming to get his phone. After getting his phone, he left the store and drove down the road.

{¶ 15} When she was asked about the surveillance videos, McDowell said that she heard Murd say, "How fucked up are you today" to Whitaker. She believed Murd would ask that because she suspected that Whitaker was under the influence of drugs or alcohol. She also heard Murd say something about Whitaker going out to his car because that was where his alcohol was. She admitted to knowing that Whitaker would mix alcohol into his soft drink cup. McDowell said, "He's too fucked up," which referred to drugs or

alcohol. She could not remember what she meant when she said, "Let's see how bad we can fuck it up for him[.]" When Whitaker came back into the store looking for his phone, someone told him to "just get out."

{¶ 16} Murd and McDowell each recalled that a customer came in around 5:30 or 6:00 p.m. that day and told the workers not to go down a certain road because there had been a bad car accident.

{¶ 17} A few days after the accident, Murd gave S&G a written statement about the incident involving Whitaker. It said,

> On the afternoon of May 5, 2022, Joshua Whitaker was behaving erratically. He appeared to be unable to focus and was having difficulty processing the simplest of Point of Sale transactions. He made numerous errors that required correction. He seemed very distracted and at times confused almost an hour into the shift he had proven himself to be unreliable and unable to perform without supervision. By my observations, my coworker and I agreed to contact the store manager regarding Josh's irregular behavior. After contacting the store manager, he agreed that it would be best for him to leave for the day. After Josh spoke with the manager the content of the conversation was not revealed to me or my coworker. He gathered his belongings, left, circled the building and came back in for reasons unknown to me. He returned a second time after realizing he had left his cell phone behind. After retrieving his phone, he departed the building for the final time that evening, driving at an accelerated rate of speed.

Although Murd said something on the video about Whitaker having alcohol in his backpack, she did not "deem it necessary" to put anything about alcohol in her statement to S&G.

{¶ 18} Several months after the accident, McDowell gave S&G a written statement about that day. It said, "I was working with Josh and he seemed disoriented like his mind was someplace else. He messed up almost every transaction and when he

called Ray, he said he wanted to speak with Josh, and I don't recall what happened after that as we were busy." She told someone from S&G what really happened that day (i.e., that Whitaker was intoxicated on something), but did not include that in her statement.

{¶ 19} Based on these facts, S&G moved for summary judgment. In its motion, S&G first pointed out that Whitaker was not acting within the course and scope of his employment at the time of the accident, and Gergich and Thomas did not raise any vicarious liability claims against S&G. It went on to argue that Gergich and Thomas failed to state a negligence claim because S&G had no duty to them. It claimed that Ohio law does not impose a duty on an employer to control an off-duty employee's driving of a personal vehicle off of the employer's premises. It also claimed that instructing Whitaker to leave the store and allegedly refusing to let him back into the store to call for a ride did not constitute "control" over Whitaker or give rise to any duty to the motoring public. Finally, S&G pointed out that Whitaker successfully drove to his residence before causing the accident, which further negated any claim that it had a duty to control Whitaker's conduct. S&G did not raise the issue of proximate cause in its motion.

{¶ 20} In response, Gergich and Thomas argued that S&G's managerial employees assumed a duty by affirmatively suspending Whitaker mid-shift, instructing him to go home knowing that he would drive intoxicated, and refusing his request to use the store phone to call for a ride. They noted that Murd and McDowell, the managerial employees on duty at the time, made comments about Whitaker going to his car for alcohol and being "too fucked up." After Wuertz spoke to Whitaker and told him to go home, Whitaker was sent home mid-shift. The other employees then watched him drive

around the store's parking lot. When he came back in the store looking for his phone, Whitaker claimed that Murd refused to let him use the store phone to call for a ride. After that, Whitaker left the store, briefly stopped at his cousin's house, and then caused the accident that killed William and severely injured Thomas. They included Whitaker's blood alcohol level from the time of the accident in their response. Gergich and Thomas claimed that S&G's mid-shift suspension of and directive to Whitaker to go home constituted affirmative control over him, which created a duty to protect third parties. They contended that reasonable minds could find that S&G breached that duty by sending Whitaker out knowing about his impairment and by refusing him access to the phone.

{¶ 21} In its reply, S&G argued that no Ohio court has recognized a duty requiring an employer to control an off-duty employee driving a personal vehicle off premises and outside the scope of employment after leaving the employee's own residence. It emphasized that Whitaker was not traveling home from work at the time of the accident—which happened about two hours after Whitaker left the S&G store—but had already returned home and was driving for a second time when the accident occurred. It also contended that it had no duty to provide Whitaker access to a phone and, regardless, Whitaker had his cellphone with him. Thus, any alleged denial of access to the phone could not be a proximate cause of the accident because Whitaker returned home safely. Finally, S&G argued that Murd's testimony that she would have kept Whitaker at the store or arranged a ride for him if she had known that he was intoxicated did not create a duty owed by S&G.

{¶ 22} At the same time that it filed its reply, S&G filed a motion to strike Gergich and Thomas's reference to Whitaker's blood alcohol level. They argued that the results were inadmissible without expert testimony to interpret their significance in the context of a civil case.

{¶ 23} Four days after S&G filed its reply and motion to strike, the trial court granted the motion to strike. Gergich and Thomas did not file a response to the motion in that four-day period.

{¶ 24} Three days later, the trial court filed its judgment entry granting S&G summary judgment. In its decision, the trial court found (based on the facts asserted in Gergich and Thomas's complaint) that Whitaker was employed by S&G at one of their convenience stores, and while on the job on May 5, 2022, he consumed alcohol and became intoxicated. When S&G became aware that Whitaker was intoxicated, it instructed him to leave the premises when it knew or should have known that Whitaker would use his vehicle to do so.

{¶ 25} After S&G told Whitaker to leave the store, Whitaker went to his car to look for his cellphone to call for a ride but could not find it, so he went back into the store to look for it. When Whitaker went back into the store, other employees asked why he was there, told him to leave, and refused his request to use the store phone to call for a ride.

{¶ 26} Around 5:30 p.m. that day, William was driving a car in which Thomas was the passenger. At that time, Whitaker was approaching William's car from the opposite direction at a high rate of speed. Whitaker recklessly operated his car at a high

rate of speed, crossed the center line, and collided with William's car. As a direct and proximate result of the crash, William was killed and Thomas suffered serious and permanent injuries. The court also noted Whitaker's blood alcohol level at the time of the crash and that he was sentenced to prison as a result of the accident.

{¶ 27} Gergich and Thomas alleged that S&G exercised control over Whitaker, which gave rise to a duty to act with reasonable care for the protection of the motoring public, when it instructed Whitaker to leave due to his intoxication, knowing that he would be driving, and denied his request to look for his cellphone or use the store's phone to call for a ride.

{¶ 28} The court did not include any facts from Wuertz's, Murd's, or McDowell's depositions in its recitation of the facts of the case.

{¶ 29} In reaching its decision, the trial court cited Whitaker's testimony and Gergich's responses to requests for admissions. In his testimony, Whitaker admitted that his phone was shown in a photo taken of his car after the accident and that he drove from the S&G store to his cousin's house and then chose to drive a second time. In the requests for admissions, Gergich admitted that the photos of Whitaker's car after the accident were true and accurate copies and that Whitaker drove to his cousin's house before causing the accident.

{¶ 30} Based on those facts, the court concluded that "the chain of liability attached to S&G was broken when Whitaker stopped at [his cousin's] house . . . for an undisclosed period of time. Unfortunately, once the chain of liability was broken there

was no duty on the part of S&G in this case and thus, liability does not extend to S&G."

Thus, the trial court granted S&G's motion for summary judgment.

{¶ 31} Gergich and Thomas now appeal, raising three assignments of error:

> 1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE WITHOUT CONSIDERING APPELLANTS' EVIDENCE.
>
> 2. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON LEGAL GROUNDS NOT SPECIFICALLY DELINEATED, OR SUPPORTED BY LEGAL AUTHORITY, IN APPELLEE'S MOTION, AND WHICH DO NOT JUSTIFY SUMMARY JUDGMENT UNDER THE FACTS OF THIS CASE.
>
> 3. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO STRIKE WITHOUT AFFORDING APPELLANTS TIME TO RESPOND WITHIN THE LIMITS SET FORTH IN CIV. R. 6(C)(1).

II. Law and Analysis

A. Summary judgment standard

{¶ 32} We review summary judgment de novo, using the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129 (9th Dist. 1989). The court can grant a motion for summary judgment only when the moving party demonstrates:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

Harless v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 66 (1978); Civ.R. 56(C).

{¶ 33} The party seeking summary judgment must specifically delineate the basis upon which the motion is brought and identify those portions of the record that

demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996); *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988), syllabus. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79 (1984). The opposing party must do so using "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact . . . ." Civ.R. 56(C). A "material" fact is one that would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304 (6th Dist. 1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 827 (8th Dist. 1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. The record does not support a finding that the trial court failed to consider evidence.

{¶ 34} In their first assignment of error, Gergich and Thomas argue that the trial court "ignored" Wuertz's, Murd's, and McDowell's testimony and portions of Whitaker's testimony that they cited in their opposition to summary judgment and only cited allegations from the complaint and the evidence that S&G included in its motion. They contend that the court committed per se reversible error by failing to consider their evidence before reaching its decision.

{¶ 35} S&G responds that the trial court is presumed to have performed its duty to review all of the summary-judgment evidence unless there is evidence to the contrary in

the record, and there is no evidence to the contrary in the record of this case. Assuming that there was some irregularity in the way the trial court considered the evidence, S&G argues that it was harmless because it would not change the outcome of the case.

{¶ 36} "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." *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356 (1992), syllabus. The trial court is presumed to have met this duty when there is nothing in the record that affirmatively indicates otherwise. *Smith v. Allstate Ins. Co.*, 2019-Ohio-4557, ¶ 18 (9th Dist.). Further, the trial court has no duty to comment on each piece of evidence that it reviews. *Stanley v. Ohio State Univ. Med. Ctr.*, 2013-Ohio-5140, ¶ 50 (10th Dist.).

{¶ 37} Here, Gergich and Thomas do not point to anything in the record that affirmatively indicates that the court did not review all of the evidence before it. The trial court's failure to mention certain evidence in its decision—standing alone—is not enough to show that the court failed to meet its duty to review all of the summary-judgment materials. *Compare, e.g., Hudson v. Hapner*, 2016-Ohio-1347, ¶ 23 (4th Dist.) (trial court stated in its decision that it could not consider the portions of depositions that the parties did not cite in their summary judgment filings and failed to include depositions in the list of materials that it considered); *Kramer v. Brookwood Retirement Community*, 1993 WL 293413, *1 (1st Dist. Aug. 4, 1993) (record contained a sealed deposition with an unbroken seal).

{¶ 38} Because the record does not affirmatively show that the trial court failed to consider any evidence, Gergich and Thomas's first assignment of error is not well-taken.

C. The trial court's error in granting summary judgment based on an issue not raised by S&G was harmless.

{¶ 39} In their second assignment of error, Gergich and Thomas argue that the trial court erred by granting summary judgment on a basis not argued by S&G in their motion for summary judgment. They contend that S&G argued only the issue of duty and did not raise the issue of proximate cause—which the trial court based its decision on—in its motion. And they claim that this was prejudicial to them because the facts of the case do not support a finding of a lack of proximate cause. S&G responds that it did raise proximate cause in its motion for summary judgment by raising the "undisputed temporal-spatial break between its alleged negligence and Plaintiffs' injuries," and Gergich and Thomas responded to the proximate cause argument in their response.

{¶ 40} "'[I]t is reversible error to award summary judgment on grounds not specified in the motion for summary judgment.'" *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 2009-Ohio-1523, ¶ 27, quoting *Patterson v. Ahmed*, 2008-Ohio-362, ¶ 14 (6th Dist.). This is because doing so denies the opposing party a meaningful opportunity to respond to the moving party's arguments. *Id.*, citing *Mitseff*, 38 Ohio St.3d 112, at syllabus. For an issue to be specified in the motion for summary judgment, the moving party "must specifically delineate the basis upon which the motion is brought." *Patterson* at ¶ 13.

{¶ 41} Here, S&G did not raise the issue of proximate cause in its motion for summary judgment. Its arguments in the motion were focused solely on the issue of duty. As a result, Gergich and Thomas's response was also focused only on the issue of

duty. In its reply, S&G mentioned the "undisputed temporal-spatial break between its alleged negligence and Plaintiffs' injuries[.]" However, it related that to the issue of duty, *not* to proximate cause. Further, it is well established that "a party cannot raise an issue for the first time in a reply brief." *Wooster Floral & Gifts, LLC v. Green Thumb Floral & Garden Ctr., Inc.*, 2020-Ohio-5614, ¶ 15. Again, this is because doing so prevents the opposing party from having a meaningful chance to respond. *State v. Ross*, 2017-Ohio-9400, ¶ 17 (4th Dist.). In this case, Gergich and Thomas filed a motion for leave to file a surreply, but the trial court granted S&G's motion for summary judgment without ruling on Gergich and Thomas's motion for leave, thus effectively denying it and denying Gergich and Thomas the opportunity to respond to S&G's new arguments. Under these circumstances, we are compelled to find that the trial court erred by granting summary judgment on an issue not raised by S&G in its motion for summary judgment.

{¶ 42} However, in this case, the error was harmless. S&G argues in the alternative that it did not have a duty to protect third persons from Whitaker's actions.[1] It is well settled that "[a]n appellate court shall affirm a trial court's judgment that is legally correct on other grounds—that is, it achieves the right result for the wrong reason, because such an error is not prejudicial." *Johnson v. Am. Family Ins.*, 2005-Ohio-1776, ¶ 29 (6th Dist.); *Freelon v. GRG Farms, Inc.*, 2024-Ohio-4764, ¶ 47 (6th Dist.). After carefully reviewing the record, we find that the trial court reached the right result for the wrong reason because S&G did not have a duty to third parties.

[1] S&G labels this argument a "cross-assignment of error," but it did not file a cross-appeal under App.R. 3(C).

{¶ 43} To establish negligence, a plaintiff must show a duty, a breach of that duty, and damage that resulted from that breach. *Stachowiak v. Starbucks Corp.*, 2024-Ohio-3345, ¶ 17 (6th Dist.), citing *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989). While negligence actions involve mixed questions of law and fact, the existence of a duty is a question of law for the court. *Id.*, citing *Estate of Ciotto v. Hinkle*, 2019-Ohio-3809, ¶ 13 (6th Dist.), and *Clemets v. Heston*, 20 Ohio App.3d 132, 134-135 (6th Dist. 1985).

{¶ 44} In Ohio, employers generally have no duty to protect third persons from wrongful acts of off-duty employees. In determining the existence of a duty in cases relating to accidents caused by intoxicated or otherwise impaired employees, courts consider whether the employer condoned or encouraged drinking, *Siegel v. Jozac Corp.*, 2001 WL 840375, *4 (8th Dist. July 26, 2001); whether the accident occurred within the course and scope of employment, including whether the employee was operating a company or personal vehicle, *Loftus v. Three Palms Crocker Park, LLC*, 2023-Ohio-926, ¶ 17-18 (8th Dist.); and whether once the employer recognized the employee's impairment it assumed control over the employee. *Fletcher v. Trucking v. Columbus Fair Auto Auction, Inc.*, 1995 WL 360323, *5 (10th Dist. June 13, 1995).

{¶ 45} Gergich and Thomas claim that S&G's duty arose when it assumed control over Whitaker by suspending him mid-shift and telling him to leave the premises and go home knowing that he would drive intoxicated. Gergich and Thomas cite *Fletcher*, where the employee's supervisor suspended the intoxicated employee mid-shift and then ordered him to wait in an employee's mother's car until they could find him a ride home. *Id.* at *1. The employer knew that the employee's driver's license had been revoked or

suspended due to driving under the influence. *Id.* The employee somehow started the vehicle by damaging the steering column and hit another employee's car in the lot. Other employees were surveying the damage when the employee stated that he wanted a light for his cigarette; he was then instructed to get in a consigned vehicle and use the built-in lighter. *Id.* at *2. He drove off in the second vehicle, which had the keys in the ignition (as most of them did), causing a fatal collision. *Id.*

{¶ 46} Reviewing *Fletcher*, this court explained:

> The court of appeals concluded that issues of fact remained as to whether the employer was negligent because it exercised control over the employee by suspending him in the middle of his shift and giving him access to a lot full of vehicles when it could reasonably be determined that they knew he had a prior drunk driving conviction. *Id.* at *5. The court specifically noted: "We express no opinion, however, as to whether an employer has a duty to prevent an employee from leaving in his own car when he is suspended during the middle of a shift." *Id.*
>
> The Tenth Appellate District later cautioned that *Fletcher* "'addresses a particular, narrow issue,'" and its holding "should be confined to the facts of [that] particular case and should not be found to extend beyond it.'" *Lytal v. Crawl for Cancer, Inc.*, 2018-Ohio-2017, 113 N.E.3d 1056, ¶ 15 (10th Dist.), quoting *Fletcher* at 31. (Bowman, J., concurring.).

(Brackets in original.) *Stachowiak* at ¶ 19-20.

{¶ 47} Cited in *Fletcher* and relied upon by Gergich and Thomas is the Texas Supreme Court case *Otis Eng. Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1984). In *Otis*, the employee had a history of drinking problems and on the day of the accident was slurring his words, uncoordinated, and nearly fell onto the machine he operated. *Id.* at 308. His supervisor suggested he go home, escorted him to the parking lot, and after asking if he

could make it home, allowed the employee to leave in his car. *Id*. Thirty minutes later and three miles away from the plant, the employee caused a fatal accident. *Id.*

{¶ 48} In a split decision, five of the justices concluded that where, due to "an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others." *Id.* at 311. The court then concluded that whether the employer's act of sending the employee home when the plant had a nurses' station, or failing to have his wife pick him up or another employee drive him home were "reasonable and prudent" decisions was left to the trier of fact. *Id.*

{¶ 49} The *Otis* dissent stressed that the employer had no legal duty to third persons where at the time of the accident the employee was not acting in the course and scope of his employment and was neither on the premises nor in a vehicle owned by the employer. The dissent concluded that absent a custodial relationship, the employer "did not voluntarily take [the employee] into its custody or assume responsibility for his conduct." *Id.* at 313. *See also Riddle v. Arizona Oncology Services, Inc.*, 924 P.2d 468 (Ariz.App. 1996) (Rejecting the *Otis* majority, the court held that an employer had no duty to third-party motorists where it terminated the shift of an employee high on cocaine, which she consumed both prior to and during her shift, and ordered her to leave the premises.).

{¶ 50} Here, unlike *Fletcher*, in which an intoxicated employee without a valid driver's license was told to sit in a vehicle, caused an accident on workplace property that

was witnessed by other employees, and then left in a consigned vehicle without permission, Whitaker left in his own vehicle after clocking out and caused an accident some two hours later after safely arriving home (approximately one mile from work) and en route to his fiancée's house. To the extent that *Otis* supports appellants' argument, no Ohio law stands for the proposition that S&G assumed responsibility for Whitaker's conduct by asking him to leave the property.

{¶ 51} For all of these reasons, we find that S&G did not have a duty to protect Gergich and Thomas from Whitaker's unlawful acts. Because S&G did not have a duty to Gergich and Thomas, it cannot be liable to them. Accordingly, the trial court reached the correct conclusion by granting summary judgment to S&G. Therefore, Gergich and Thomas's second assignment of error is not well-taken.

D. The trial court prematurely granting the motion to strike was harmless error.

{¶ 52} In their final assignment of error, Gergich and Thomas argue that the trial court erred by granting S&G's motion to strike without giving them time to respond. S&G admits that the trial court granted the motion to strike before the 14-day response period elapsed but argues that any error in granting the motion was harmless because the trial court considered and relied on the evidence of Whitaker's blood alcohol content ("BAC") in issuing its summary judgment decision.

{¶ 53} We review a trial court's decision on a motion to strike for abuse of discretion. *Lenz v. Kerr Bldg., Inc.*, 2022-Ohio-1427, ¶ 13 (6th Dist.). Abuse of discretion means that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State ex rel. Askew v. Goldhart*, 75 Ohio St.3d 608, 610 (1996).

{¶ 54} Under Civ.R. 6(C)(1), an opposing party is given 14 days to file a response to a written, non-summary-judgment motion. Although it is error for a trial court to rule on a motion to strike before the response period has elapsed, that error can be harmless. *See Mason v. Recchie*, 2008-Ohio-1144, ¶ 10 (3d Dist.); *Wallner v. Thorne*, 2010-Ohio-2146, ¶ 21 (9th Dist.).

{¶ 55} Here, we find that the trial court abused its discretion by granting the motion to strike only four days after S&G filed it, but that the error was harmless because the court correctly granted the motion. Evidence of a person's BAC is admissible in a civil case only when it is accompanied by expert testimony explaining the significance of the result. *Clark v. Curnutte*, 2006-Ohio-1545, ¶ 7 (9th Dist.), citing *Parton v. Weilnau*, 169 Ohio St. 145, 151 (1959), and *Am. Select Ins. Co. v. Sunnycalb*, 2005-Ohio-6275, ¶ 7-9 (12th Dist.). Gergich and Thomas did not provide any expert testimony with their response to S&G's summary-judgment motion that would explain the significance of Whitaker's BAC results. Thus, the trial court properly struck the reference to BAC. Because the court properly struck the BAC reference, Gergich and Thomas cannot show that they were prejudiced by the error. *See* Civ.R. 61 ("[N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for . . . vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). Accordingly, Gergich and Thomas's third assignment of error is not well-taken.

III. Conclusion

{¶ 56} Based on the foregoing, the October 9, 2025 decision of the Lucas County Court of Common Pleas is affirmed. Gergich and Thomas are ordered to divide the costs of this appeal equally under App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.

Thomas J. Osowik, P.J.

_____
JUDGE

Charles E. Sulek, J.

_____
JUDGE

Mark C. Miller, V.J.
CONCUR.

_____
JUDGE

Judge Mark C. Miller, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.supremecourt.ohio.gov/ROD/docs/.