[Cite as *Brown v. Miller*, 2012-Ohio-5223.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STEPHANIE BROWN, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
		CASE NO. 2012-G-3055
- vs -	:	
BARBIE MILLER, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 11P000480.

Judgment: Affirmed in part, reversed in part, and remanded.

Kevin L. Lenson and *Kimberly C. Young*, and *Ryan M. Harrell,* Elk & Elk Co., Ltd., 6105 Parkland Boulevard, Mayfield Heights, OH 44124 (For Plaintiffs-Appellants).

Janet L. Speece, 9953 Thwing Road, P.O. Box 23016, Chagrin Falls, OH 44023 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiffs-appellants, Stephanie and Kevin Brown, appeal from the judgment of the Geauga County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, Barbie and Martin Miller, on all claims raised in the Browns' Complaint. The issues to be determined by this court are whether a trial court abuses its discretion in denying a motion to conduct additional discovery pursuant to Civ.R. 56(F) when the party has failed to be diligent in pursuing discovery and whether res judicata is waived when a party fails to join another party necessary for litigation in a

prior lawsuit. For the following reasons, we affirm in part, reverse in part, and remand the decision of the trial court.

{¶2} On May 2, 2011, Stephanie and Kevin Brown filed a Complaint in the Geauga County Court of Common Pleas, against Barbie Miller, Martin Miller, and Nationwide Property and Casualty Insurance Company (Nationwide). The Complaint asserted that Stephanie was injured in a motor vehicle accident caused by Barbie's negligence. In Count One, the Complaint raised a negligence claim, asserting that Barbie had negligently operated a vehicle and that Martin negligently entrusted Barbie to operate that vehicle. Count Two asserted a loss of consortium claim on behalf of Kevin, as Stephanie's husband. Count Three asserted an uninsured/underinsured motorist claim.

{¶3} On June 30, 2011, the Browns filed a Notice of Partial Dismissal Without Prejudice, voluntarily dismissing the claims against Nationwide.

{¶4} The Millers filed a Motion for Summary Judgment on October 28, 2011. In this Motion, they argued that the doctrine of negligent entrustment did not apply to Martin Miller, Barbie's father, because Barbie was operating a horse-drawn buggy at the time of the accident, not a motor vehicle. The Millers also asserted that all claims were barred by the doctrine of res judicata, since judgment had been entered in a prior Chardon Municipal Court case, where Nationwide and Kevin asserted several claims against Barbie arising from the same accident. The Millers attached various documents from the Chardon Municipal Court case to their Motion.

{¶5} According to the attached materials from the Chardon Municipal Court, on August 26, 2010, in case number 2010 CVE 01240, Nationwide and Kevin Brown filed a

Complaint against Barbie and Robert Miller.[1] The Complaint stated that Nationwide "was the insurer, assignee and subrogee of Plaintiff Stephanie Brown and Kevin Brown." It alleged that Barbie or Robert Miller "negligently operated a moving vehicle in such a manner so as to damage Plaintiff Nationwide Insurance Company's insured's motor vehicle." It asserted that the insured's motor vehicle was damaged in the amount of $3,231.48 and that Nationwide paid $2,731.53 on behalf of the insured. The Complaint also asserted that Nationwide's insureds were injured and incurred medical expenses in the total of $2,000, which Nationwide paid. Finally, the Complaint asserted that Kevin sustained "an unreimbursed loss in the amount of $500."

{¶6} In the Millers' Answer to the Complaint in the Chardon case, they raised, among other arguments, the affirmative defense of failure to join all necessary parties under Civil Rule 19 or 19.1. Subsequently, the matter was referred to mediation by the court and on January 28, 2011, a Notice of Dismissal was filed by the plaintiffs in the Chardon Municipal Court, dismissing the Complaint with prejudice.

{¶7} On November 15, 2011, the Browns filed a Memorandum in Opposition to Defendants' Motion for Summary Judgment. The Browns argued that the Millers had waived the defense of res judicata because they failed to ensure that all necessary parties were joined in the first action, Chardon case 2010 CVE 01240. In addition to responding to the arguments regarding res judicata, within their Memorandum in Opposition, the Browns also asserted that they needed additional time to conduct discovery on the negligent entrustment claims and moved the court to provide additional time for discovery under Civ.R. 56(F). Attached to the Memorandum was an Affidavit of

1. It is unclear from the record who Robert Miller is or what role he played in the accident. The Complaint in the Chardon court case did not include Martin Miller in the caption but the body of the Complaint did state that judgment should be rendered against Barbie, Robert, and "Marty" Miller.

Counsel Pursuant to Civ.R. 56(F), in which counsel attested to the fact that he needed additional time to conduct discovery and that no discovery responses had been provided by the defendants in response to requests for discovery and depositions.

{¶8} On February 2, 2012, the trial court issued an Order, granting summary judgment in favor of Barbie and Martin Miller and denying the Browns' request for additional time to conduct discovery, finding that Civ.R. 56(F) was inapplicable. The trial court ruled that summary judgment should be granted as to Martin on the negligent entrustment claim because Barbie did not have a driver's license and Martin did not give permission to Barbie to drive the horse-drawn buggy.

{¶9} Regarding the claims against Barbie, the court rendered summary judgment in favor of her against both Kevin and Stephanie. The court found that Kevin was barred by res judicata from raising claims against Barbie because final judgment had previously been entered on the merits of the Chardon case, in which Kevin was a plaintiff. Regarding Stephanie, the court found that she was not a party to the prior lawsuit. However, because Stephanie is married to Kevin and is insured by Nationwide, she was in privity with those parties and her claims were also barred by res judicata.

{¶10} The Browns timely appeal and raise the following assignments of error:

{¶11} "[1.] The Trial Court Erred by Denying Plaintiff's Motion for Additional Time to Obtain Discovery Pursuant to Civ.R. 56(F).

{¶12} "[2.] The Trial Court Erred by Holding Plaintiff Stephanie Brown's Claims were Barred by the Doctrine of Collateral Estoppel or Res Judicata Where Defendants Failed to Join her as a Party to the Prior Action."

{¶13} In their first assignment of error, the Browns argue that their request for additional time for discovery, pursuant to Civ.R. 56(F), on the negligent entrustment claim and the arguments related to that claim raised by the Millers in their Motion for Summary Judgment, was improperly denied by the trial court. The Browns argue that although they responded to the res judicata arguments in their Memorandum in Opposition to the Motion for Summary Judgment, there was nothing precluding them from seeking additional time for discovery and filing a separate response related only to the issue of negligent entrustment.

{¶14} The Millers argue that the Browns had sufficient time to conduct discovery and failed to do so.

{¶15} Since "a request for additional time under Civ.R. 56(F) involves a matter of discovery, the disposition of such a request falls within the sound discretion of a trial court." *Marshall v. Silsby*, 11th Dist. No. 2004-L-094, 2005-Ohio-5609, ¶ 19; *Wescott v. Associated Estates Realty Corp.*, 11th Dist. Nos. 2003-L-059 and 2003-L-060, 2004-Ohio- 6183, ¶ 17 ("the trial court's decisions on discovery matters will not be reversed absent an abuse of discretion").

{¶16} "Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." Civ.R. 56(F).

{¶17} In the present matter, the Browns filed a Memorandum in Opposition to the Millers' Motion for Summary Judgment, addressing issues related to the defense of

res judicata. They did not address the other issue raised on summary judgment, whether they could prevail on the negligent entrustment claim. Instead they requested, in their Memorandum, that they be given "additional time, pursuant to Civ.R. 56(F) to obtain discovery from Defendants." Attached to the memorandum was an affidavit, asserting that discovery requests had been served on the defendants and that no discovery responses had been provided. The trial court found that because the Browns had already filed a response to the motion for summary judgment, Civ.R. 56(F) did not apply and denied the request for additional time to conduct discovery.

{¶18} Pursuant to Geauga County Court of Common Pleas Local Rule 7(D), "[b]riefs and appropriate evidentiary material in opposition to motions for summary judgment shall be served upon all other parties and filed with the Court within thirty (30) days after service of the motion for summary judgment. There shall be no further reply or response briefs without leave of court."

{¶19} As an initial matter, it appears that Geauga Loc.R. 7 does not prohibit the trial court from allowing a party to file two separate briefs or responses to a motion for summary judgment and would not be in conflict with Civ.R. 56(F). While Loc.R. 7 gives the court discretion to grant leave to file any additional brief, this is similar to Civ.R. 56(F), which allows a trial court to grant a continuance of the issue of summary judgment, but does not require the court to do so. Provided the trial court found that granting a continuance for discovery was necessary in this case under Civ.R. 56(F), it could also have chosen to grant leave for a separate response brief by the Browns as to the issue of negligent entrustment. Moreover, there is no prohibition in that rule, or any

other rule cited by the trial court, that a party cannot file a partial response to a motion for summary judgment but still request time to conduct discovery under Civ.R. 56(F).

{¶20} In light of this consideration, this court must consider whether it was an abuse of discretion under Civ.R. 56(F) for the trial court to deny the Browns' request for further discovery.

{¶21} In interpreting Civ.R. 56(F), this court has indicated that a trial court should apply the rule liberally to ensure that the nonmoving party in any summary judgment exercise has sufficient time to discover any fact which is needed to properly rebut the argument of the moving party. *King v. Zell*, 11th Dist. No. 97-T-0186, 1998 Ohio App. LEXIS 6364, *10 (Dec. 31, 1998). "However, the nonmoving party does not have an absolute right to be given additional discovery time in every instance. To be entitled to a continuance under the rule, the nonmoving party has the burden of establishing a sufficient reason for the additional time. * * * That is, the party requesting more time must show that the additional discovery will actually aid in either the demonstration or negation of a fact relevant to an issue raised in the motion for summary judgment." (Citations omitted.) *Marshall*, 2005-Ohio-5609, at ¶ 18.

{¶22} In the present case, it was not an abuse of discretion to deny the request for an extension of time to conduct discovery. The Browns' request for additional time to conduct discovery was based on counsel's assertion that they had not received a response to a discovery request filed on July 12, 2011, asking for answers to interrogatories and production of documents. They also asserted that they had "expressed an intent to depose" defendants in a letter. The Browns did follow the procedure for requesting a continuance to conduct discovery under Civ.R. 56(F), by

filing an affidavit with the court. However, they were not diligent in attempting to conduct discovery in this matter, which is a factor that undermines any claim that sufficient reasons exist to grant a continuance. *Doriott v. MVHE, Inc.*, 2nd Dist. No. 20040, 2004-Ohio-867, ¶ 47. The Browns filed their Complaint in May of 2011 and requested interrogatories and documents on July 12, 2011. Although the Browns assert that they did not receive a response to this request, they did not attempt to follow up on this issue until after the Motion for Summary Judgment was filed, over three and a half months later. In addition, the accident giving rise to the claim had occurred in February of 2010 and had been the subject of a prior lawsuit, giving the Browns ample time to conduct prior discovery as to the circumstances surrounding the accident.

{¶23} Regarding the assertion that they were not provided with a chance to take depositions, the Browns had not filed a request or a notice of deposition prior to the filing of the Motion for Summary Judgment. They filed a Notice of Deposition on January 27, 2012, several months after the Motion for Summary Judgment was filed, stating that depositions of Barbie and Martin Miller would be taken on March 6, 2012. Although there was a lapse of two and a half months between filing the request for an extension of time and the Judgment Entry denying the request, no further action was taken and no attempt was made to schedule the deposition prior to February 9, 2012, which was the date discovery was initially due to be completed pursuant to a pretrial order. At the time the deposition was scheduled, ten months would have passed from when the Browns filed suit. This is beyond sufficient time to have conducted discovery and past the date that had been set for discovery to have been completed. *See Wescott*, 2004-Ohio-6183, at ¶ 19 (where appellant had approximately eleven months

to conduct discovery, she had sufficient time to depose witnesses and it was not an abuse of discretion to deny her request for additional time to conduct discovery).

{¶24} In addition to the foregoing, it does not appear that the Browns showed how the discovery would lead to the demonstration or negation of a fact relevant to an issue raised in the motion for summary judgment. *King,* 1998 Ohio App. LEXIS 6364, at *11 ("where discovery proceedings would not, if allowed to proceed, aid in the establishment or negation of facts relating to the issue to be resolved, Ohio's appellate courts have been reluctant to find that the trial court abused its discretion by granting a motion for summary judgment before the discovery proceedings were completed"). In their affidavit, the Browns asserted no facts that would have disputed the issues raised by the Millers in the Motion for Summary Judgment. Even in the brief before this court, the Browns generally state that their ability to present evidence of a claim of negligent entrustment was dependent on their ability to conduct discovery and depose Martin Miller, but fail to assert any specific facts that would have negated those raised in the Motion. *See Marshall*, 2005-Ohio-5609, at ¶ 20 ("appellants' assertion that it was not necessary for them to specify the facts they needed to discover is simply erroneous"). The only potential assertion they make is that they needed to obtain a deposition of Martin, who had already submitted an affidavit stating that none of the allegations made in the Complaint were true and that he did not allow Barbie to drive the buggy. It is unclear how a deposition of Martin would have been favorable or demonstrated a fact necessary to prevail against the Motion for Summary Judgment. It is similarly unclear what helpful information could have been obtained through submission of answers to the interrogatories since they were not submitted into the record.

{¶25} The dissent argues that the "critical dates for consideration" are the case management dates set by the trial court, including the date for discovery cutoff, although no law is provided to support the proposition that a party must be given until the set discovery cutoff date to complete discovery and respond to a motion for summary judgment. Courts have found that an "appellant was not entitled to rely on the discovery cut-off date with respect to appellees' summary judgment motion," as it related to responding to the motion or seeking further discovery. *Whiteside v. Conroy*, 10th Dist. No. 05AP-123, 2005-Ohio-5098, ¶ 38, citing *Doriott*, 2004-Ohio-867, at ¶ 45 (holding that the trial court did not abuse its discretion by failing to grant an appellant's Civ.R. 56(F) request for a continuance to conduct discovery when the appellee's motion for summary judgment was filed several months prior to the discovery cutoff date). Based on the foregoing, since we find both that the Browns were not diligent in pursuing discovery and that they did not show how further discovery would have established or negated facts related to the motion for summary judgment, we cannot find that it was an abuse of discretion to deny their request for a continuance to conduct additional discovery.

{¶26} The Browns also raise an argument disputing whether the Millers improperly argued that a claim for negligent entrustment cannot be viable when a horse-drawn buggy is operated, as opposed to a motor vehicle. However, this issue was not addressed or relied upon by the trial court in holding that there was no evidence to support a finding that Martin negligently entrusted the buggy to Barbie and, therefore, did not give rise to any error.

{¶27} The first assignment of error is without merit.

{¶28} In their second assignment of error, the Browns argue that the claims against the Millers are not barred by res judicata or collateral estoppel.

{¶29} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" 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 that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor."

{¶30} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "An appellate court must independently review the record to determine if summary judgment was appropriate. Therefore, an appellate court affords no deference to the trial court's decision while making its own judgment." *Reddick v. Said*, 11th Dist. No. 2011-L-067, 2012-Ohio-1885, ¶ 30, citing *Schwartz v. Bank One, Portsmouth, N.A*., 84 Ohio App.3d 806, 809, 619 N.E.2d 10 (4th Dist.1992).

{¶31} "In Ohio, '[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel.' *O'Nesti v. DeBartolo Realty Corp.,* 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. 'Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action,' whereas issue

preclusion, or collateral estoppel, 'precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action.' *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140." *State ex rel. Nickoli v. Erie Metroparks*, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588, ¶ 21.

{¶32} "The doctrine of res judicata [or claim preclusion] applies when (1) the judgment of a prior case is valid, final and was decided on the merits; (2) the judgment in the prior case was issued by a court of competent jurisdiction; (3) both the prior and present suit involve the same parties or those whose interest are adequately close to demonstrate a relationship of privity; and (4) both the prior and present case arose from the same transaction or occurrence." (Citation omitted.) *Harris v. Pristera*, 194 Ohio App.3d 120, 2011-Ohio-2089, 954 N.E.2d 1272, ¶ 18 (11th Dist.). "For res judicata to apply, 'one of the requirements is that the parties to the subsequent action must be identical to or in privity with those in the former action.'" (Citation omitted.) *Nickoli* at ¶ 22.

{¶33} As has been explained by the Ohio Supreme Court, for the purposes of a res judicata defense, privity may be established by "active participation in the original lawsuit," as well as having the right to control the proceedings. *O'Nesti* at ¶ 9. Further, a "'mutuality of interest, including an identity of desired result,' might also support a finding of privity." *Id.*, citing *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000).

{¶34} In the present matter, the trial court found that the claims raised by Stephanie were barred because she was in privity with Kevin and Nationwide. However, we find that the record lacks evidentiary material to show that Stephanie was in privity with these parties for the purposes of applying a res judicata defense.

{¶35} As an initial matter, we note that Stephanie cannot be found to have been a party in the prior proceedings, since she was not listed as a party in the Chardon Complaint caption, nor was she listed as a party on the court's docket.[2] Turning to the issue of privity, there is no indication that Stephanie actively participated in the prior lawsuit or made an appearance in that case. The record is not clear as to whether the damages recovered by Nationwide include damages suffered by Stephanie, such that it can be determined that she had an interest in the outcome. Additionally, there is no indication that a release was signed after the settlement in the prior action, precluding Stephanie from recovering separate damages in her own lawsuit.

{¶36} A review of Stephanie's Complaint in the present matter shows that she seeks damages because she "suffered severe and permanent personal injuries, suffered a loss of time and income from employment, suffered great pain of body and mind, a loss of enjoyment of life, mental anguish, required medical care and treatment in the past, and will continue to suffer said losses in the future." Although the Complaint in the prior case requested damages for medical bills, it did not address any of these other damages suffered by Stephanie or request compensation for such damages.

{¶37} Moreover, although the Millers argue otherwise, when the factors discussed above are not present, the law does not support a finding that Stephanie was

2. Although Stephanie was referred to as a Plaintiff in the body of the Chardon Complaint, the damages requested were on behalf of either Nationwide or Kevin, and neither appellant nor appellee assert that Stephanie was a party in that case.

in privity with Kevin merely because she is his wife. *See Kraut v. Cleveland Ry. Co.*, 132 Ohio St. 125, 126-127, 5 N.E.2d 324 (1936) (finding no privity between a husband and wife in the assertion of their respective lawsuits); *Sayre v. Davis*, 111 Ohio App. 471, 472-473, 170 N.E.2d 276 (10th Dist.1960). To the extent that the Millers also argue that Stephanie was in privity with Nationwide, we note again that the evidentiary materials do not show that the factors necessary for privity were present, such that we can find that Stephanie had an interest in the prior case or was in privity with Nationwide.

{¶38} Therefore, we find that the trial court erred in finding that Stephanie was in privity with Nationwide and Kevin for the purposes of finding her claims to be barred by res judicata.

{¶39} The Browns additionally assert that, although their claims were found to be barred by res judicata by the trial court, the Millers failed to join all parties having claims against them in the initial action, case number 2010 CVE 01240, and, therefore, waived the right to raise a res judicata defense in the present matter.

{¶40} The Millers assert that they did not waive their right to raise the defense of res judicata because they included an affirmative defense of failure to join necessary parties in their Answer in the Chardon Municipal Court case, but the case was settled before joinder could occur.

{¶41} Regarding the issue of whether a party must be joined, Civ.R. 19(A) states, in pertinent part, that "[a] person who is subject to service of process shall be joined as a party in the action if * * * he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee. If he has not been so joined,

the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7)." Additionally, Civ.R. 19.1(A)(2) states that "[a] person who is subject to service of process shall be joined as a party in the action * * * if the person has an interest in or a claim arising out of * * * [p]ersonal injury or property damage to a husband or wife and a claim of the spouse for loss of consortium or expenses or property damage if caused by the same wrongful act."

{¶42} For the purposes of joinder, it appears that Stephanie was a subrogor of Nationwide, which the Millers themselves assert. In addition, she is the wife of Kevin, who has asserted claims related to his property damage and for loss of consortium due to her personal injuries. The Millers do not dispute that Stephanie was a party required to be joined in the initial case pursuant to either Civ.R. 19 or 19.1. Instead, they argue that since they raised the defense of joinder in their Answer in the Chardon case, it was incumbent upon the court to order that Stephanie be joined and they did not waive the right to raise a defense of res judicata as to Stephanie in the present matter.

{¶43} In the initial case, the Millers did include an affirmative defense of failure to join all necessary parties in their Answer, although it did not state the name of any specific party to be joined. We hold that they waived this defense and cannot assert res judicata against Stephanie, since they did not ensure that Stephanie was joined prior to dismissal of the first Complaint due to the settlement. Several districts have found that, regarding the defense of joinder, merely asserting a claim that a party must be joined is insufficient to raise this defense and parties asserting this defense must take action to both identify specific parties to be joined and further prosecute or pursue their claims that joinder is required. *Allason v. Gailey*, 189 Ohio App.3d 491, 2010-Ohio-4952, 939

N.E.2d 206, ¶ 62 (7th Dist.) (“merely raising the defense [of joinder] in an answer without further affirmative action to prosecute the raised defense results in a waiver of the defense”) (citation omitted); *Std. Plumbing & Heating Co. v. Farina*, 5th Dist. Nos. 2001CA00018 and 2001CA00034, 2001 Ohio App. LEXIS 4197, *12-13 (Sept. 17, 2001) (a “cursory statement” raising failure to join an indispensable party in answer to a complaint without providing necessary information to adjudge the defense waives that defense). This has also been found to be true in cases with facts similar to the present case, where the defendant raised the issue of joinder but then settled the case prior to the court taking action to join any additional parties. *Nationwide Mut. Fire Ins. Co. v. Logan*, 12th Dist. No. CA2005-07-206, 2006-Ohio-2512, ¶ 32 (“[b]y settling the case, appellants essentially removed any opportunity for the court to compel proper joinder of a necessary party”).

{¶44} As has been held by courts considering this issue, a party cannot benefit from the defense of res judicata when they waive such protection by failing to ensure all necessary parties are joined in the initial lawsuit in the matter, pursuant to either Civ.R. 19 and 19.1. *Id.* (it is improper for a party to benefit from res judicata in a second action when they waived such protection by failing to ensure the appropriate party was joined in the first action); *Garcia v. O’Rourke*, 4th Dist. No. 04CA7, 2005-Ohio-1034, ¶ 20-21 (failure to pursue a joinder defense in first lawsuit waived defense of res judicata in second action against the same defendants by the parties not joined in the first suit). *See also Layne v. Huffman*, 42 Ohio St.2d 287, 290, 327 N.E.2d 767 (1975) (defendant’s failure to raise a Civ.R. 19.1(A) defense of failure to join a party before reaching a settlement in an earlier suit for personal injury and property damage by

injured husband waived any right to object to a separate but related action brought by injured party's wife). In the present matter, since the Millers did not take proper action to ensure that Stephanie was joined and settled the lawsuit prior to joinder, they cannot now claim the defense of res judicata against Stephanie as a party in privity with both Kevin and Nationwide.

{¶45} Finally, the Browns argue that because Martin Miller was not a party to the initial action, the claims against him, which were premised on the theory of negligent entrustment, cannot be barred by res judicata. However, the trial court did not dismiss claims related to Martin because of res judicata. The court instead dismissed the claims against Martin because there was no negligent entrustment and because it found that there was a "lack of negligence" by Martin. Since the court made no finding that the claims against Martin were barred by the doctrine of res judicata, we cannot find that an error was made as to this issue.

{¶46} Based on the foregoing, we find that the claims raised by Stephanie against Barbie were not barred by res judicata, because the evidentiary materials did not show she was in privity with Kevin and Nationwide and because the defense was waived. Therefore, we find that the claims against Barbie may be pursued, since they are not barred by res judicata. However, as discussed above, the claims related to negligent entrustment as they relate to Martin have been ruled upon on the merits. There is no ground stated for overturning the ruling granting summary judgment in favor of Martin on the issue of negligent entrustment.

{¶47} The second assignment of error is with merit, to the extent discussed above.

{¶48} For the foregoing reasons, the judgment of Geauga County Court of Common Pleas, granting summary judgment in favor of the Millers on all claims raised in the Complaint, is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Costs to be taxed against the parties equally.

TIMOTHY P. CANNON, P.J., concurs,

MARY JANE TRAPP, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

MARY JANE TRAPP, J., concurring and dissenting.

{¶49} While I agree with the majority's analysis relating to Civ.R. 56(F), vis a vis Geauga's Loc.R. 7(D), and I agree with the disposition of the second assignment of error, I find that the trial court did abuse its discretion in its denial of the Browns' request for an opportunity to conduct further discovery regarding the issue of negligent entrustment before responding further to the motion for summary judgment on that particular issue.

{¶50} The majority finds that the Browns were "not diligent in attempting to conduct discovery in this matter," citing certain benchmarks such as the date of the accident, the date the complaint was filed, and the date the Browns' written discovery was propounded. While these dates are significant, the critical dates for consideration of the propriety of the ruling on the Civ.R. 56(F) motion and evaluation of the movants'

diligence in the conduct of discovery are those case management dates set by the trial court itself after receipt of the parties' case status memoranda.

{¶51} On August 12, 2011, the Browns advised the court and opposing counsel that depositions were "not complete." One day earlier, the Millers advised they were not satisfied with the written discovery responses received from the Browns. The trial court considered these status reports, specifically the status of discovery, and issued a Pretrial Order setting certain reasonable dates in light of the parties' status reports: discovery cutoff of February 9, 2012 and a dispositive motion cutoff of March 16, 2012.

{¶52} In just a little over a month from the date of that pretrial order, the Millers filed their dispositive motion, which left the Browns with no choice other than to respond within the rule and/or seek leave to continue with the discovery needed to attempt to oppose summary judgment on the negligent entrustment claim, even though the Browns were operating under a pretrial order that gave them until February 9, 2012 to complete discovery.

{¶53} The majority writes it is "unclear how a deposition of Martin would have been favorable or demonstrated a fact necessary to prevail against the Motion for Summary Judgment," in light of Mr. Miller's (self-serving) affidavit that none of the allegations in the complaint were true, but, how else could the Browns test or challenge the averments in an affidavit without a deposition? It is inconceivable that any party could successfully oppose summary judgment on a negligent entrustment claim without taking the deposition of the party entrusting the vehicle to the tortfeasor. As the Supreme Court of Ohio observed in the seminal case on Civ.R. 56(F) motions, *Tucker v. Webb Corp*., 4 Ohio St.3d 121 (1983), "[o]ne cannot weigh evidence most strongly in

favor of one opposing a motion for summary judgment when there is a dearth of evidence available in the first place." *Id*. at 123**.** The court found that Tucker was "allotted insufficient time to discover the essential facts surrounding the transactions that took place * * *." *Id*. at 122**.** Thus, the court reversed the decision of the trial court stating, "[t]aking into account the ramifications of a summary disposition, we believe that the courts below should have been more cautious in determining whether any genuine issues of material fact existed * * *." *Id*. at 123.

{¶54} Civ.R. 56(F) "authorizes the trial court to delay decision on a summary judgment motion while the nonmoving party gathers necessary rebuttal data * * * [and] discretion should be exercised liberally in favor of the nonmoving party who proposes any reasonable interval for the production of those materials." *Whiteleather v. Yosowitz,* 10 Ohio App.3d 272, 276 (8th Dist.1983).

{¶55} The Browns, in the abundance of caution, should have pressed on with discovery while the Civ.R. 56(F) motion was pending and not waited until January 27, 2012 to serve a notice of deposition. However, because summary judgment, which denies parties their day in court, is not favored, and the trial court in the exercise of its discretion failed to consider its own trial order giving the nonmovant until February 2012 to complete discovery so that they could respond to any dispositive motion anticipated to be filed *after* the discovery cutoff date, I must conclude that the trial court erred.