[Cite as *Stumpff v. Harris,* 2010-Ohio-1241.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

KENNETH M. STUMPFF, et al.	:	
	:	Appellate Case No. 23354
Plaintiff-Appellants	:	
	:	Trial Court Case No. 08-CV-9664
v.	:	
	:	
RICHARD L. HARRIS, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellees	:	
	:	

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O P I N I O N

Rendered on the 26th day of March, 2010.

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BROGAN, J.

{¶ 1} Kenneth M. Stumpff and Mahaffey's Auto Salvage appeal from the trial court's entry of summary judgment against them on their breach-of-fiduciary-duty complaint against appellees Richard Harris and Valley Auto Parts.

{¶ 2} The appellants advance two assignments of error. First, they contend the trial court erred in permitting Harris and Valley Auto Parts to file an answer out of

time. The appellants assert that the trial court instead should have entered default judgment. Second, the appellants claim the trial court erred in sustaining a motion for summary judgment filed by Harris and Valley Auto Parts on the basis of res judicata.

{¶ 3} The present appeal represents the most recent chapter in a seven-year legal battle between the parties. At one time, Stumpff and Harris jointly operated Mahaffey's Auto Salvage as a corporation. In 2003, their relationship soured. Stumpff sued for breach of fiduciary duty in Mont. C.P. Case No. 2003-CV-5624. Harris counterclaimed in that case for judicial dissolution. A magistrate ruled in favor of Harris on the complaint and counterclaim, ordering judicial dissolution and liquidation of the corporate assets. Stumpff objected to the magistrate's ruling. After objecting, he also moved to amend his complaint to add a claim alleging usurpation of corporate opportunities based on Harris' purchase of property across the street from Mahaffey's to operate Valley Auto Parts as a competing business. The trial court overruled the objections, adopted the magistrate's decision, and implicitly denied Stumpff's motion to amend his complaint. Stumpff appealed, and we affirmed. See *Stumpff v. Harris*, Montgomery App. No. 21407, 2006-Ohio-4796.

{¶ 4} Following our ruling, the trial court attempted to facilitate the orderly liquidation of Mahaffey's assets. It eventually appointed a receiver to do the job. The trial court then ordered a hearing to determine the business assets. At the same time, Stumpff obtained permission to add Valley Auto Parts as a party defendant on the basis that Harris was using Mahaffey's inventory and goodwill to operate the competing business. The appellants contend that during a January 23, 2008, asset hearing, Harris produced an accounting disk showing "that from June 1, 2005, through January 15,

2008, Harris had paid wages to employees working jointly for Mahaffey's and Valley Auto Parts in the amount of $304,100, payroll taxes estimated at $51,697, and health care premiums in the amount of $44,936.25 exclusively from the bank account of Mahaffey's." Following the hearing, the receiver issued proposed findings and Stumpff objected. He argued that Harris had used Mahaffey's money to pay the salary and payroll taxes for Valley Auto Parts' employees. The trial court subsequently adopted the receiver's determination of assets with some modifications. It also ordered the receiver to take possession of the assets and to prepare a liquidation plan. The trial court's ruling did not specifically address Stumpff's allegation about Harris' misuse of Mahaffey's money. Stumpff appealed from the trial court's ruling, but then voluntarily dismissed the appeal.

{¶ 5} On July 2, 2008, Mahaffey's filed a formal "notice of claims," seeking recovery of the funds Harris allegedly had misappropriated for his operation of Valley Auto Parts. The notice of claims included a memorandum in support and an affidavit from counsel for Stumpff and Mahaffey's along with several exhibits. On July 9, 2008, the receiver filed a report in which he noted the liquidation of most of Mahaffey's assets. The receiver also identified twenty-four claims that had been filed against the proceeds of the liquidation. They included the claims Mahaffey's had filed against Harris to reduce his share of the proceeds. The receiver's report failed to identify Mahaffey's claims against Harris as being among those the receiver considered valid. Stumpff objected, arguing, inter alia, that the receiver's proposed distribution plan did not account for Harris' alleged misuse of Mahaffey's money to pay expenses for Valley Auto Parts' employees. On October 7, 2008, the trial court summarily overruled the objections,

adopted the receiver's report, and approved the proposed distributions. Stumpff did not appeal.[1]

{¶ 6} Instead, Stumpff and Mahaffey's filed the present action against Harris and Valley Auto Parts on October 23, 2008. The appellants' complaint accuses Harris of breaching his fiduciary duty to Stumpff and Mahaffey's by using Mahaffey's money to pay wages, taxes, and benefits to himself and other Valley Auto Parts employees for work performed in part for the benefit of Valley Auto Parts. The complaint alleges that Stumpff discovered this misuse of funds during the January 23, 2008, asset hearing mentioned above in connection with Mont. C.P. Case No. 2003-CV-5624. The complaint further alleges that Stumpff's efforts to address the issue in that case proved futile.

{¶ 7} The record reflects that the appellants obtained service of their complaint on Valley Auto Parts on October 25, 2008, and on Harris on October 28, 2008. Thereafter, on November 18, 2008, attorney Alfred Schneble entered an appearance "on behalf of the Defendant Richard L. Harris[.]" At 8:57 a.m. on December 1, 2008, after the time for filing an answer had expired, Stumpff and Mahaffey's moved for a default judgment on their complaint. Their motion indicated that attorney Schneble had been served by e-mail and ordinary mail. At 2:40 p.m. that same day, Schneble filed a motion for leave to file an answer out of time. The brief motion reads: "Now comes the Defendant Richard L. Harris by and through his undersigned counsel and hereby moves this Court for an Order Granting leave to file an Answer out of time. Counsel was

[1]Whether Stumpff could have appealed the trial court's ruling is an issue we will address more fully infra.

recently hired and due to a lengthy trial and busy holiday is requesting for Leave to File an Answer Out of Time." Along with the motion for leave, attorney Schneble also filed an "Answer of Defendants" at 2:40 p.m. on December 1, 2008. The answer identified Schneble as counsel for both defendants and raised a res judicata defense.

{¶ 8} The appellants filed a memorandum opposing the motion for leave to answer. They criticized the motion because it lacked an affidavit. They also argued that Schneble's proffered justifications for a late filing did not constitute excusable neglect under Civ.R. 6(B). On December 5, 2008, the trial court sustained the motion for leave in a one-sentence entry, stating: "Upon Motion of the Defendant and for good cause shown, the Court hereby grants Defendant's Motion for Leave to File an Answer Out of Time." Harris and Valley Auto Parts later filed a combined motion to dismiss, motion for judgment on the pleadings, and motion for summary judgment, raising a res judicata defense. The appellants opposed the motion. After giving the parties notice that it intended to treat the motion solely as one for summary judgment, the trial court sustained the motion on March 17, 2009, finding the appellants' new allegations barred by res judicata. This appeal followed.

{¶ 9} In their first assignment of error, the appellants contend the trial court erred in allowing Harris and Valley Auto Parts to file an answer out of time instead of entering default judgment against them. They raise several arguments in support. First, they contend Valley Auto Parts should not have been permitted to answer because it did not join in Harris' motion for leave to do so. Second, they point out that the trial court's entry granting leave included no finding of "excusable neglect." Third, the appellants stress that Harris did not seek leave until after they moved for default

judgment. Fourth, they contend attorney Schneble's motion for leave failed to establish excusable neglect. Fifth, they reason that "it remains problematical as to whether either appellee has 'filed' an answer at all since leave was given only to Harris, not Valley and no answers were filed thereafter."

{¶ 10} Upon review, we find the foregoing arguments to be unpersuasive. "Civ.R. 12(A)(1) provides that a defendant shall serve his answer within twenty-eight days after service of the complaint. Pursuant to Civ.R. 6(B), *upon motion made after the expiration of the specified period,* the trial court may permit a defendant to file an answer if his failure to do so was the result of excusable neglect. (Emphasis added.) Although Civ.R. 6(B) grants broad discretion to the trial court, its discretion is not unlimited. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214 * * *. Generally, some showing of excusable neglect is a necessary prelude to the filing of an untimely answer." *Alldred v. Alldred* (Nov. 6, 1998), Montgomery App. No. 17043.

{¶ 11} "Neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances." *Davis v. Immediate Medical Services, Inc*., 80 Ohio St.3d 10, 14, 1997-Ohio-363. "The determination of whether neglect is excusable or inexcusable must take into consideration all the surrounding facts and circumstances, and courts must be mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds." *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs*., 72 Ohio St.3d 464, 466, 1995-Ohio-49, citing *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271. "Although excusable neglect cannot be defined in the abstract, the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under

Civ.R. 60(B).” Id.

{¶ 12} In the present case, the appellants first contend Valley Auto Parts should not have been permitted to answer because it did not join in Harris’ motion for leave to do so. As set forth above, the motion for leave filed by attorney Schneble on December 1, 2008 was filed on behalf of “the Defendant Richard L. Harris[.]” The motion makes no mention of defendant Valley Auto Parts. Nevertheless, we note that the answer, which was filed contemporaneously with the motion for leave, was filed by Schneble on behalf of the “Defendants.” While counsel certainly should have been more careful, under these circumstances the motion for leave reasonably may be construed as applying to both Harris and Valley Auto Parts, which the complaint alleges is Harris’ alter ego.

{¶ 13} The appellants next point out that the entry granting leave to file an answer lacked a finding of “excusable neglect.” We agree with this observation. As set forth above, the trial court’s entry stated: “Upon Motion of the Defendant and *for good cause shown*, the Court hereby grants Defendant’s Motion for Leave to File an Answer Out of Time.” (Emphasis added). When the time for performing a required act has not yet expired, Civ.R. 6(B) provides that a trial court may enlarge the time “for cause shown.” The same rule provides, however, that when the time to act has expired, a trial court may “permit the act to be done where the failure to act was the result of excusable neglect.”

{¶ 14} Here the trial court’s reference to “good cause shown” aligns more closely with the standard for extending the time to act when such time has not expired. The parties agree, however, that the time for Harris and Valley Auto Parts to answer the complaint had expired prior to December 1, 2008. Despite the trial court’s word choice,

it cannot have been unaware of the applicability of the excusable-neglect standard. Just two days before the trial court granted leave to answer, the appellants filed a memorandum in opposition specifically citing Civ.R. 6(B) and its excusable-neglect requirement. The trial court's ruling also indicates that it knew the appellees were seeking leave to file out of time. Therefore, we will treat the trial court's reference to "good cause shown" as a finding of "excusable neglect" and proceed to determine whether excusable neglect was demonstrated.

{¶ 15} On the issue of excusable neglect, the appellants stress that Harris did not seek leave until after they moved for default judgment. They also contend attorney Schneble's motion for leave failed to establish excusable neglect. In particular, they criticize Schneble's conclusory reference to a "lengthy trial" and his reliance on a "busy holiday," which they argue is tantamount to an admission of inexcusable neglect.

{¶ 16} Although the issue is close, we cannot say the trial court abused its discretion in allowing Harris and Valley Auto Parts to file an answer a few days out of time. As set forth above, whether neglect is excusable or inexcusable requires consideration all the surrounding facts and circumstances. One of those facts is the existence of the appellants' motion for default judgment, which was filed several hours before the motion for leave to answer. To some extent, the existence of a pending motion for default judgment militates against granting leave. Cf. *Marion Production Credit Assn*, 40 Ohio St.3d at 272 ("Until a motion for default is filed, it is presumed that the complaining party is not entitled to a default judgment, which fact serves to enlarge the discretion of the trial court to allow a delayed responsive pleading."). We note too that some courts have found delays occasioned by a busy trial schedule and holidays

insufficient to constitute excusable neglect. In *Wabeek Leasing Corp. v. Unissco, Inc.* (June 6, 1985), Cuyahoga App. No. 49198, for example, the Eighth District Court of Appeals found no abuse of discretion where the trial court entered default judgment in the face of an untimely motion for leave to answer. The Eighth District reasoned: "Appellants attribute their failure to file a timely answer to the amended complaint to "a demanding trial schedule, the Holiday Season and inadvertance.' [sic]. To accept that explanation would render the civil rules useless."

{¶ 17} On the other hand, the fact that it may not be an abuse of discretion to deny leave based on a busy schedule or a hectic holiday does not mean that it necessarily is an abuse of discretion to grant leave for these reasons. Writing for this court in *Brown v. Household Realty Corp*., Miami App. No. 2003-CA-24, 2003-Ohio-5414, Judge William Wolff astutely observed: "[W]hether a party's action or inaction constitutes excusable neglect is commended to the discretion of the trial court, which means that an appellate court must accord the trial court a certain decisional latitude in determining whether its ruling is an abuse of discretion. *Therefore, in a close case, the trial court's determination of whether certain action or inaction constitutes excusable neglect may be upheld on appeal, regardless of what the trial court determines."* Id. at ¶18 (Emphasis added). We find this principle to be applicable here. Although we would be disinclined to reverse if the trial court had denied leave to answer out of time, we cannot say its act of granting leave was an abuse of discretion. While attorney Schneble's motion would have been more helpful if he had fleshed out his justifications with some details, the trial court did not abuse its discretion in taking his word, as an officer of the court, that his participation in a "lengthy trial" and a "busy

holiday" impacted his ability to file a timely answer. The fact that Schneble had been hired only about a week before the appellees' answer was due also was a relevant consideration, along with the fact that the motion for leave and actual answer were filed only days late.

{¶ 18} Finally, we disagree with the appellants' claim that "it remains problematical as to whether either appellee has 'filed' an answer at all since leave was given only to Harris, not Valley and no answers were filed thereafter." As set forth above, the motion for leave Schneble filed on behalf of Harris reasonably may be construed as applying to Valley Auto Parts as well. Moreover, an answer on behalf of Harris and Valley Auto Parts accompanied the motion for leave. Once the trial court granted leave, the answer became effective and did not need to be filed again. The first assignment of error is overruled.

{¶ 19} In their second assignment of error, the appellants claim the trial court erred in sustaining the motion for summary judgment filed by Harris and Valley Auto Parts on the basis of res judicata.

{¶ 20} In support of its ruling, the trial court reasoned that Stumpff could have moved to amend his complaint in Mont. C.P. Case No. 2003-CV-5624 to add a new claim against Harris for misusing Mahaffey's funds for the benefit of Valley Auto Parts. Although judicial dissolution already had been ordered, the trial court noted that no determination had been made as to "the financial rights and obligations of the parties" when Stumpff discovered Harris' alleged wrongdoing in January 2008. In any event, the trial court noted that Stumpff *did* raise the issue in Mont. C.P. Case No. 2003-CV-5624, albeit not through a formal amendment of the complaint. The trial court reasoned that

after it declined to provide Stumpff with the relief he requested, the proper remedy was to appeal. The trial court also rejected an argument by Stumpff that no final judgment exists in Mont. C.P. Case No. 2003-CV-5624 because judicial dissolution has not occurred.

{¶ 21} On appeal, Stumpff and Mahaffey's raise four arguments against the trial court's ruling. First, they contend res judicata does not apply because their claim for Harris' misuse of Mahaffey's money, which allegedly began in 2005, did not arise out of the same nucleus of operative facts as the prior action, which was filed in 2003 and involved the dissolution of Mahaffey's. Second, the appellants argue that the law-of-the case doctrine precluded them from amending their complaint in Mont. C.P. Case No. 2003-CV-5624 to add a new claim against Harris for misusing Mahaffey's money. As set forth above, in our 2006 ruling affirming a finding of judicial dissolution, we also upheld the trial court's denial of a motion for leave to amend to add a different claim. In light of this ruling, the appellants claim the law of the case barred yet another attempt to amend. Third, the appellants claim that a separate lawsuit to recover money from Harris, rather than seeking recovery within the dissolution proceeding, is the proper vehicle for pursuing their claim. Fourth, the appellants argue that res judicata does not apply because no final judgment has been entered in Mont. C.P. Case No. 2003-CV-5624.

{¶ 22} The doctrine of res judicata requires a party to present every ground for relief in the first action or be forever barred from asserting it. *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62. "It has long been the law of Ohio that an existing final judgment or decree between the parties to litigation is conclusive as to all

claims which were *or might have been* litigated in a first lawsuit." Id., citing *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69. (Emphasis in original).

{¶ 23} The appellants' first two arguments rest on the premise that the present claims against Harris were not litigated in the prior action and could not have been litigated there. The first argument presumes that the claims were not litigated and suggests that they could not have been because they do not even share a common nucleus of operative facts with the claims at issue in the prior case. The second argument asserts that the present claims could not have been litigated in the prior case because the law-of-the-case doctrine precluded amending the pleadings to add them. Both of these arguments fail, however, because the present claims actually were litigated in the prior action.

{¶ 24} As indicated above, Mahaffey's filed a formal "notice of claims" against Harris on July 2, 2008, seeking recovery of the funds he allegedly misappropriated for his operation of Valley Auto Parts. The record reflects that these are the same funds at issue in the present lawsuit. The receiver's July 9, 2008, report in Mont. C.P. Case No. 2003-CV-5624 noted the existence of Mahaffey's claims along with numerous others. The receiver's report did not include Mahaffey's claims against Harris among those the receiver found to be valid. Stumpff and Mahaffey's twice objected. The trial court overruled the objections and ultimately approved the receiver's proposed distribution of the liquidation proceeds. In so doing, the trial court necessarily rejected the same argument that the appellants are advancing in the present lawsuit.

{¶ 25} The appellants contend in their third argument, however, that the prior

dissolution proceeding was not the proper place to raise their arguments. The appellants make this argument despite the fact that they did pursue their arguments in the dissolution proceeding. In support, they merely block quote the following language from *Rundell v. Batch* (1931), 42 Ohio App. 204, 206:

{¶ 26} "This section (now R.C. 1701.91), however, does not require that actions brought by the receiver to recover monies due the corporation, or property or assets belonging to it, should be brought in the action for dissolution. If the receiver had sought to recover money or property for the dissolved corporation, it would have been necessary for him to have brought an independent action. In our judgment, the plaintiffs in error, desiring to pursue their remedies against third parties named and the plaintiffs, should file an independent suit for that purpose."

{¶ 27} Upon review, we find *Rundell* to be distinguishable. As the Tenth District Court of Appeals recognized in *Dehoff v. Veterinary Hosp. Operations of Cent. Ohio, Inc*., Franklin App. No. 02AP-454, 2003-Ohio-3334, *Rundell* involved claims in a dissolution proceeding being asserted against non-parties to the action. Id. at ¶101. Claims against a party to a dissolution proceeding properly are brought as part of that action. Id. at ¶100-101. Indeed, the Revised Code expressly authorizes a trial court to require parties to a dissolution proceeding to present and prove their claims and to make all demands regarding the dissolved corporation's property. *Dehoff*, at ¶93-99, quoting R.C.1701.91(C) and R.C. 1701.89(A).[2] Therefore, the appellants' claims

[2]Although R.C. 1701.89(A) pertains to voluntarily dissolved corporations, R.C. 1701.91(D) also makes it applicable to judicially dissolved corporations.

against Harris to recover funds allegedly belonging to Mahaffey's logically and properly were asserted in the prior dissolution proceeding. Moreover, there was no need for Stumpff of Mahaffey's to amend the complaint in Mont. C.P. Case No. 2003-CV-5624 to raise those claims. They adequately were raised through the July 2, 2008 "notice of claims" mentioned above. After the receiver and the trial court rejected those claims, the proper remedy was—and in fact still is—an appeal,[3] not the filing of a new action raising the same claims again.

{¶ 28} Finally, we turn to the appellants' argument that no final judgment exists in Mont. C.P. Case No. 2003-CV-5624. In support, the appellants cite R.C. 1701.91(D), which provides: "After a hearing had upon such notice as the court may direct to be given to all parties to the proceeding and to any other parties in interest designated by the court, a final order based either upon the evidence, or upon the report of the special master commissioner if one has been appointed, shall be made dissolving the corporation or dismissing the complaint. An order or judgment for the judicial dissolution of a corporation shall contain a concise statement of the proceedings leading up to the order or judgment; the name of the corporation; the place in this state where its principal office is located; the names and addresses of its directors and officers; the name and address of a statutory agent; and, if desired, such other provisions with respect to the judicial dissolution and winding up as are considered necessary or desirable. A certified copy of such order forthwith shall be filed in the office of the secretary of state, whereupon the corporation shall be dissolved."

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[3]The non-finality of the trial court's rulings in Mont. C.P. Case No. 2003-CV-5624 is addressed more fully infra.

{¶ 29} The appellants claim no final judgment exists in Mont. C.P. Case No. 2003-CV-5624. because there is no entry that includes all of the information required by R.C. 1701.91(D). They also contend no certified copy of a dissolution order was filed with the Ohio Secretary of State as required by the statute. Absent such a filing, the appellants contend res judicata cannot apply.

{¶ 30} As set forth above, the trial court ordered Mahaffey's judicially dissolved on December 6, 2005. In its ruling, the trial court stated that the dissolution would be effective upon the filing of a final judgment entry with the Secretary of State as required by R.C. 1701.91(D). The trial court's December 6, 2005, ruling also directed Harris' counsel "to prepare a final judgment entry in compliance with the specific provisions of O.R.C. 1701.91(D)." The trial court's ruling then set forth further procedures for the liquidation of Mahaffey's assets. Finally, it included Civ.R. 54(B) certification. Stumpff appealed the dissolution order, and we affirmed in *Stumpff v. Harris*, Montgomery App. No. 21407, 2006-Ohio-4796. As explained in more detail above, the trial court subsequently appointed a receiver, liquidated Mahaffey's assets, and distributed the funds. All proceedings in Mont. C.P. Case No. 2003-CV-5624 now have terminated, and the case is identified on the trial court's docket as being closed. We take judicial notice, however, that Mahaffey's remains listed as an active corporation on the Ohio Secretary of State's web site. It appears that no entry in compliance with R.C. 1701.91(D) has been filed with that office or even exists.[4]

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[4]In its summary judgment ruling in this case, the trial court identified its February 8, 2008, order in Mont. C.P. Case No. 2003-CV-5624 as an entry meeting the requirements of R.C. 1701.91(D). The trial court reasoned that the mere failure of either party to file that document with the Secretary of State did not preclude application of res judicata. The February 8, 2008, order cited by the trial court was not a dissolution order.

{¶ 31} Upon review, we agree with the appellants that the absence of an entry meeting the requirements of R.C. 1701.91(D) in Mont. C.P. Case No. 2003-CV-5624 means no final judgment exists in that case. In its December 6, 2005, ruling, the trial court stated that judicial dissolution would be effective upon such a filing. We note, however, that the December 6, 2005, dissolution order itself was immediately appealable (and was appealed), apparently because it affected a substantial right, was made in a special proceeding, and contained Civ.R. 54(B) certification. Unlike that order, the trial court's subsequent October 7, 2008, order approving disbursement of all funds obtained through the liquidation of Mahaffey's assets lacked Civ.R. 54(B) certification. Presumably, this was because the trial court believed the case was over. As noted above, however, an order in compliance with R.C. 1701.91(D) still must be prepared and filed with the Secretary of State. Therefore, we conclude that no ruling exists from which Stumpff and Mahaffey's could have appealed the trial court's rejection of their claims against Harris in Mont. C.P. Case No. 2003-CV-5624. Absent finality in that case, res judicata cannot bar the present lawsuit. In reaching this conclusion, we reject the appellees' argument that the finality of proceedings in Mont. C.P. Case No. 2003-CV-5624 is immaterial because collateral estoppel applies regardless. The appellees appear to believe that collateral estoppel or "issue preclusion" may arise even when there is no final order in a prior proceeding. The Ohio Supreme Court has held otherwise. See, e.g., *Glidden Co. v. Lumbermen's Mut. Cas. Co.*, 112 Ohio St.3d 470,

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Rather, it directed the receiver to secure Mahaffey's assets and to prepare a proposed liquidation plan for the court's review. In any event, the order does not include the addresses of Mahaffey's directors and officers or the name and address of a statutory agent.

478, 2006-Ohio-6553, ¶46 ("The doctrine of collateral estoppel cannot be invoked when there is no final order."). Accordingly, we sustain the appellants' second assignment of error, which asserts that the trial court improperly entered summary judgment against them on the basis of res judicata.

{¶ 32} Given that finality has not attached in Mont. C.P. Case No. 2003-CV-5624, the appellants' claims against Harris in that case may be pursued further on appeal whenever final judgment is entered. But the appellants cannot simultaneously pursue their claims in the present lawsuit while the same claims remain part of a pending dissolution action in the same court. Cf. *Castrataro v. Urban*, 155 Ohio App.3d 597, 608, 2003-Ohio-6953, ¶58 ("Moreover, plaintiff's pursuit of her claim before this court while simultaneously pursuing the same claim before the court that first acquired jurisdiction to consider the claim served to harass the defendant and cause him considerable expense."). We are aware of no authority that would allow a plaintiff separately to litigate the same claims in the same court at the same time. In any event, this is an issue for the trial court and the parties to address on remand.

{¶ 33} Based on the reasoning set forth above, we find no abuse of discretion in the trial court's decision to allow Harris and Valley Auto Parts to file an answer out of time. We conclude, however, that the trial court erred in entering summary judgment against the appellants on the basis of res judicata. Accordingly, we reverse the trial court's entry of summary judgment and remand the cause for further proceedings.

{¶ 34} Judgment reversed and cause remanded.

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DONOVAN, P.J., and FROELICH, J., concur.

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