[Cite as *Taylor v. Burkhart*, 2020-Ohio-3632.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

SHARON TAYLOR

Plaintiff-Appellant,

v.

CYRIL A. BURKHART

Defendant-Appellee.

DONNA STEED

Plaintiff-Appellant,

v.

CYRIL A. BURKHART

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 19 MO 0013

Civil Appeals from the
Court of Common Pleas of Monroe County, Ohio
Case Nos. 2019-008; 2019-010

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Theodore L. Tsoras, Tsoras Law Office, P.O. Box 150, 54491 Lysien Road, Powhatan Point, Ohio 43942, for Plaintiffs-Appellants.

Atty. Bruce A. Curry, *Atty. Trent M. Thacker*, Curry, Roby & Mulvey Co., LLC, 30 Northwoods Blvd., Suite 300, Columbus, Ohio 43235, for Defendant-Appellee.

Dated: June 29, 2020

WAITE, P.J.

{¶1} In these consolidated cases, Appellants Sharon Taylor and Donna Steed appeal the May 9, 2019 Monroe County Common Pleas Court judgment entry denying their motion for leave to file an amended complaint and granting summary judgment to Appellee Cyril A. Burkhart ("Cyril A."). For the reasons that follow, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This matter arises from an automobile accident that occurred in Monroe County on October 4, 2014. Both Appellants have continually resided in the State of Alabama. On the day of the accident, Cyril T. Burkhart ("Cyril T.") was driving a 2008 Kia Optima owned by his father, Appellee, "Cyril A." Cyril A. was not in the automobile at the time of the accident. Cyril T. struck the rear of Appellant Steed's 2014 Mazda. Appellant Taylor was a passenger in Steed's vehicle. Subsequently, on December 9, 2014, Cyril A.'s insurance company paid $22,900.00 to Appellant Steed for damage to her vehicle.

{¶3} On September 26, 2016, Appellants filed suit as *pro se* litigants naming Cyril A. as the sole defendant. Cyril A. filed an answer on October 31, 2016, denying all allegations and raising a number of affirmative defenses, including that the complaints

failed to name the correct defendant. On September 26, 2016 Appellants sent their first discovery request, including interrogatories, to Cyril A. Cyril A. sent discovery requests to both Steed and Taylor on October 26, 2016, but received no response. Cyril A. filed his responses to Appellants' interrogatories on January 19, 2017. A copy of those was made part of the record. In five of the interrogatories, he specifically responded that he was not the person involved in the accident. Appellants filed a notice of counsel on March 9, 2017. Because he received no response to his discovery requests, Cyril A. filed two motions to compel, and on June 27, 2017, the trial court issued an entry ordering Steed and Taylor to comply with discovery.

{¶4} On July 17, 2017, Cyril A. filed a motion to dismiss for failure to comply with discovery and for failure to prosecute. He also filed a notice of deposition for Appellants, which was set for January 25, 2018. On February 12, 2018, Cyril A. served his responses to Appellants' second set of interrogatories and request for production of documents. Once again, he responded to several interrogatories that he was not the person involved in the automobile accident at issue. Despite this information, Appellants did not seek to amend their complaints. On April 17, 2018, counsel for Appellants voluntarily dismissed the complaints without prejudice pursuant to Civ.R. 41(A)(1)(a).

{¶5} On January 11, 2019, Appellants, each represented by the same counsel, again filed separate complaints pursuant to R.C. 2305.19. Once again, they named only Cyril A. as the party defendant. Cyril A. filed a motion to consolidate the cases and a motion seeking to transfer all previous filings, discovery, and other documents into the refiled cases. The trial court did not rule on the motion to consolidate but granted the motion to transfer the record.

{¶6} On March 8, 2019, Cyril A. filed a motion for summary judgment in both cases, asserting that: (1) there exists no evidence that Cyril A. was involved in any way in the October 4, 2014 automobile accident; (2) his son, Cyril T. was the driver of the automobile at the time of the accident; (3) Steed and Taylor never commenced or attempted to commence an action against Cyril T.; and (4) any attempt to amend the complaints against Cyril A. to include a theory of negligent entrustment would be fruitless.

{¶7} Neither Appellant opposed the motion for summary judgment. Instead, they each filed motions for leave to file amended complaints and motions seeking an order amending the complaints filed in the 2016 case. They also sought to stay the motion for summary judgment, contending that summary judgment would be moot if their motions to amend were granted. Appellants also requested an oral hearing on their motions. They filed no affidavits or other evidentiary materials and no memorandums in opposition to summary judgment were filed.

{¶8} Cyril A. filed to oppose all of Appellants' motions. On May 9, 2019, the court denied Appellants' motions to stay and their motions to amend. The court granted the motion for summary judgment filed by Cyril A.

{¶9} Appellants filed these timely appeals which have been consolidated.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ABUSED ITS' [SIC] DISCRETION BY DENYING PLAINTIFFS' REQUEST FOR AN EVIDENTIARY HEARING.

{¶10} In their first assignment of error, Appellants contend the trial court abused its discretion when it denied their motions for an evidentiary hearing. They claim the court

prevented them from presenting evidence that: (1) Appellants' local counsel was contacted by an Alabama firm to aid as local counsel and local counsel agreed, but the Alabama firm failed to file a *pro hac vice* application; (2) Appellants' local counsel suffered a serious medical condition requiring him to reduce his work load and causing him to voluntarily dismiss Appellants' initial complaint; and (3) Appellants' counsel intended to cross-examine both Cyril A. and Cyril T. regarding their affidavits filed in summary judgment and whether Cyril T. had notice the 2016 lawsuits had been filed. This record reveals that none of these factual matters were presented to the trial court and are presented for the first time on appeal.

{¶11} Appellee asserts that an evidentiary hearing was not required. None of Appellant's issues were appropriately raised by Appellants at the trial level because Appellants failed to oppose his motion for summary judgment. Hence, these claims are waived for purposes of appellate review.

{¶12} We review a denial of a request for an oral hearing on summary judgment for an abuse of discretion. *Moellendick v. United Dairy, Inc.,* 7th Dist. Belmont No. 90-B-32, 1991 WL 161341, *2 citing *Gates Mills Inv. Co. v. Village of Pepper Pike,* 59 Ohio App.2d 155, 392 N.E.2d 1316 (8th Dist.2000), paragraph one of the syllabus. In order to determine whether the trial court abused its discretion, we may consider only the evidence presented to the trial court prior to its ruling on a motion for summary judgment. *Gates Mills* at 165.

{¶13} Attached to Cyril A.'s motion for summary judgment were two affidavits, one from Cyril A. and one from Cyril T. In his affidavit, Cyril A. stated he was the owner of the vehicle that was driven by Cyril T. but that he was not occupying the vehicle on the day

of the accident. Cyril A. also stated that in his discovery responses, completed in January of 2017, he informed Appellants that he was never involved in the accident. Cyril A. averred that Cyril T. was not named as a party in either the 2016 or 2018 complaints in this matter and Cyril A. never discussed these lawsuits with Cyril T. In fact, he never told Cyril T. they were filed.

{¶14} In his affidavit, Cyril T. stated that he was driving the automobile involved in the accident in 2014, the automobile was his father's car, and that the police report from the accident named him as the driver. Cyril T. also averred that he had not concealed himself, absconded or been imprisoned since the accident and he never received any notice of any lawsuit prior to September 26, 2017, when his father first mentioned the matter. Cyril T. also stated that he resides in Ohio and has never left the state except to travel to South Carolina for one week in 2015 and one week in 2018.

{¶15} Appellants' March 19, 2019 request for oral hearing stated only:

> Now comes the Plaintiffs, by and through counsel, Theodore L. Tsoras, and respectfully requests this Honorable Court Order that an oral hearing be set on Plaintiffs' *Motion for Leave to File Amended Complaints and Motion for an Order Amending the Complaint Filed in Case No. 2016-302.* (Emphasis in original.)

(3/19/19 Request for Oral Hearing.)

{¶16} No supporting memorandum, affidavits, or other evidentiary materials were filed by Appellants to inform the court why an evidentiary hearing was necessary. While the trial court did not explicitly deny the motion, it is settled in Ohio that when a trial court

fails to rule on a pending motion prior to final judgment, that motion is deemed overruled. *Clay v. Shriver Allison Courtley Co.,* 2018-Ohio-3371, 118 N.E.3d 1027, ¶ 112 (7th Dist.). Appellants now contend an evidentiary hearing was required to provide them with the opportunity to present a number of evidentiary issues to the trial court, including the Alabama law firm's *pro hac vice* status and Appellants' counsel's medical issues. They also urge that they intended to cross-examine Cyril A. and Cyril T. regarding their affidavits. It is apparent from this record that Appellants did not raise these issues to the trial court. They cannot raise them for the first time on appeal. *Schade v. Carnegie Body Co.,* 79 Ohio St.2d 207, 436 N.E.2d 101 (1982). Hence, this matter is left for only a "plain error" review. Utilizing this review is left to the discretion of the reviewing court. *Paulus v. Beck Energy Corp.,* 7th Dist. Monroe No. 16 MO 0008, 2017-Ohio-5716, 94 N.E.3d 73, ¶ 30. In civil cases, the plain error doctrine "is sharply limited to the extremely rare case involving exceptional circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself." (Emphasis deleted.) *Goldfuss v. Davidson,* 79 Ohio St.3d 116, 122, 679 N.E.2d 1099 (1997). This case presents no such circumstance. Appellants did not inform the court as to the necessity of their request for a hearing, nor did they ever attempt to oppose the summary judgment motion. Without more, the trial court had no reason to hold an evidentiary hearing. The trial court did not abuse its discretion in denying the motion seeking an evidentiary hearing in this matter.

{¶17} Appellants' first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ABUSED ITS' [SIC] DISCRETION BY DENYING PLAINTIFFS' REQUEST TO AMEND THEIR COMPLAINTS TO CORRECT AN INADVERTENT MISNOMER.

{¶18} Appellants contend they commenced or attempted to commence their action against Cyril T. in 2016 pursuant to Civ.R. 3(A) and 15(C). Hence, they should have been allowed to amend their refiled complaints to correct what they claim was the inadvertent misnomer of naming Cyril T. as the party defendant rather than Cyril A. Appellee responds that Appellants never commenced or attempted to commence a lawsuit against the appropriate party defendant and are now barred from amending their complaints.

{¶19} A trial court's decision regarding whether to amend a complaint to add or substitute new parties is reviewed under an abuse of discretion standard. *Adlaka v. Quaranta,* 7th Dist. Mahoning No. 09 MA 134, 2010-Ohio-6509, ¶ 25, citing *Darby v. A-Best Products Co.,* 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117, paragraph one of the syllabus. Similarly, a review of the trial court's decision regarding the motion to stay judgment on Appellants' motion for summary judgment (construed as a Civ.R. 56(F) motion) is for abuse of discretion. *State ex rel. Denton v. Bedinghaus,* 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99, ¶ 31. An abuse of discretion reflects more than an error of judgment, but that the trial court acted unreasonably, arbitrarily or unconscionably in making its determination. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶20} Appellants refiled their 2016 actions in 2019 pursuant to R.C. 2305.19(A), Ohio's savings statute, which provides:

> In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

(R.C. 2305.19.)

{¶21} The Ohio Supreme Court has explained how the savings statute is applied:

> This statute, the savings statute, is not a statute of limitations. Neither is R.C. 2305.19 a tolling statute extending the period of a statute of limitations. R.C. 2305.19 can have no application unless an action was timely commenced, was dismissed without prejudice, and the applicable statute of limitations had expired by the time of such dismissal.

Reese v. Ohio State Univ. Hosp., 6 Ohio St.3d 162, 163, 451 N.E.2d 1196 (1983).

{¶22} A "voluntary dismissal pursuant to Civ.R. 41(A)(1) constitutes a failure otherwise than upon the merits within the meaning of the savings statute, R.C. 2305.19." *Frysinger v. Leech,* 32 Ohio St.3d 38, 512 N.E.2d 337 (1987), paragraph two of the syllabus.

{¶23} Appellants seek to amend their 2019 complaints to change the party defendant from Cyril A. Burkhart to Cyril T. Burkhart. This amendment must relate back

to their 2016 complaints, because the statute of limitations for their negligence claim against the driver expired prior to 2019. The only way the amendment may properly relate back to the earlier complaints is if the record shows that Appellants timely commenced or attempted to commence an action against the appropriate party, Cyril T.

{¶24} Civ.R. 3(A) defines "commencement" of an action:

> A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).

{¶25} Civ.R. 3(A) must be read *in pari materia* with Civ.R. 15(C). *Cecil v. Cottrill,* 67 Ohio St.3d 367, 618 N.E.2d 133 (1993). Civ.R. 15(C) reads, in pertinent part:

> **Relation back of amendments**. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2)

> knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

{¶26} In this case the automobile accident at issue occurred on October 4, 2014. The statute of limitations on any claim against any party defendant expired on October 4, 2016. R.C. 2305.10. Appellants filed their separate *pro se* complaints on September 26, 2016. The complaints named Cyril A. Burkhart as the party driving the automobile. There was no mention, however, of any claims regarding negligent entrustment or the like. The record shows that while Cyril A. admits he owned the automobile, Cyril T. was driving at the time of the accident. This information was obtained by Appellants fairly early in the 2016 proceeding. The record also shows that shortly after these lawsuits were filed Appellants obtained counsel and were represented. Appellants voluntarily dismissed their 2016 complaints without prejudice pursuant to Civ.R. 41(A)(1) on April 16, 2018 without any attempt by them to amend the 2016 complaints to add or substitute Cyril T. as a party defendant. On January 11, 2019, Appellants refiled their complaints pursuant to R.C. 2305.19(A), but again named only Cyril A. as the party defendant and raising the identical claim of driver negligence as their sole basis for suit.

{¶27} On March 19, 2019 Appellants filed one combined motion, captioned "Motion for Leave to File Amended Complaints and Motion for an Order Amending the Complaint Filed in Case No. 2016-302." The motion read, in pertinent part:

> [Plaintiffs request] this Honorable Court to grant Plaintiffs' Motion for Leave to File Amended Complaints in cases 2019-008 and 2019-010, respectively and further requests this Honorable Court order Complaint filed in case

> 2016-302 be deemed amended to correct a misnomer and/or inadvertent mistake, correcting/substituting Cyril T. Burkhart for Cyril A. Burkhart as the Defendant pursuant to Ohio Civ. P. R. 15(C).

(3/19/19 Motion to File Amended Complaints, pp. 1-2.)

{¶28} We note at the outset that Appellants argue both here and to the trial court that they seek to amend both the 2016 and 2019 complaints. The 2016 complaints were voluntarily dismissed. Appellants cannot amend complaints in a closed case that did not result in a final judgment. By law, the 2016 complaints cannot now be amended. The only significance of the 2016 complaints to this matter is whether the requested amendments to the 2019 complaints relate back to the original 2016 complaints in order to survive the expiration of the statute of limitations which occurred in October of 2016.

{¶29} Appellants do not invoke the saving statute in order to amend their complaints. Instead, they argue that they seek to correct an "inadvertent" "misnomer" regarding the name of the party, pursuant to Civ.R. 15(C). Appellants contend they are not seeking to add new claims or a new party, but merely correcting an inadvertent mistake made as to the middle initial of the named party. However, Appellants' assertion is disingenuous. If this matter presented a mere clerical error where an incorrect initial was used by mistake and Appellants sought to correct the clerical error to the actual party's name, Appellants' contention may be correct. However, in this case, changing the middle initial is not a mere clerical matter. While Cyril T. Burkhart was, by all accounts, the driver of the automobile and the person Appellants should have named in their suit alleging driver negligence, it also may have been possible to raise a claim against Cyril A. Burkhart, as the owner. Hence, the change Appellants now seek is not a mere clerical

correction, but a complete change of party. Appellants could have, but did not, assert claims against both father and son; Cyril T. for negligent driving and Cyril A. for negligent entrustment. Appellants raised only claims asserting driver negligence. This is not a scenario where Appellants seek merely to correct the middle initial of a named party. In this instance, the change in the middle initial actually acts to substitute a different person, altogether, as the party defendant. A similar issue has been addressed by this Court in *Reighard v. Cleveland Elec. Illuminating,* 7th Dist. Mahoning No. 05 MA 120, 2006-Ohio-1283. In *Reighard,* the appellant named as defendant the Ohio Edison Company fka Cleveland Electric Illuminating Company. Appellant subsequently discovered that both companies were actually subsidiaries of First Energy Corporation. They sought to amend their complaint to change the name of the defendant to Cleveland Electric Illuminating Company. We concluded that since the amendment would result in a change in party defendants, from an entity that had been served to one that had not been served, a Civ.R. 15(C) analysis must be applied. *Id.*

{¶30} Cyril A., although the owner of the vehicle, was not directly involved in the incident in question. Cyril T. does not dispute that he was driving one of the vehicles involved in the accident. Looking at the allegations in the underlying complaints, Appellants' change in middle initial would, in fact, substitute one defendant for another—one who was not the driver of the vehicle involved in the accident for the person who was, in fact, driving. Therefore, Appellants seek to bring a new party into the action.

{¶31} The trial court in its May 9, 2019 judgment entry concluded:

> This Court finds that Plaintiffs' failure to file suit against the correct driver of the automobile within two years after the accident has extinguished their

> claims and they cannot utilize the savings statute to name a new or substitute party to refiled complaints because they never commenced or attempted to commence an action against Cyril T. Burkhart prior to dismissal.

(5/9/19 J.E., p. 2.)

{¶32} In *Cecil v. Cottrill, supra*, the Supreme Court held that Civ.R. 15(C) and Civ.R. 3(A) must be read *in pari material,* meaning that notice to the new defendant sought to be named must occur within one year of the filing of the complaint if the statute of limitations has run, and that such notice does not require service. *Id.* at 370. Civ.R. 3(A) provides two conditions for commencement of an action; that a complaint must be filed and service must be obtained within one year of filing. Reading Civ.R. 3(A) together with Civ.R. 15(C), there are three requirements which must be met before an amendment relates back to the original pleading. First, the amended complaint must arise out of the same conduct, transaction or occurrence set forth in the original pleading. Second, the party brought in by the amendment must receive "within the period provided by law for commencing the action," sufficient notice of the action so that the new party can maintain a defense. Third, within this same period the new party knew or should have known that but for a mistake concerning the correct party's identity, the action would have been brought against the new party.

{¶33} There is no dispute in this matter that both the 2016 and 2019 complaints relate to the same conduct, transaction or occurrence: the automobile accident that occurred on October 4, 2016. The question at issue in this case is whether the second

and third requirements of Civ.R. 15(C) were met "within the period provided by law for commencing the action." Civ.R. 15(C).

{¶34} In *Cecil*, the Supreme Court concluded:

> It is apparent to us that Civ.R. 3(A) read in *pari materia* with Civ.R. 15(C) does not require that service be made on a *misnamed* defendant *before* the expiration of the applicable statute of limitations. Rather, we find that the language, "within the period provided by law for commencing the action," as used in Civ.R. 15(C), includes the time for service allowed by Civ.R. 3(A).

(*Id*. at p. 371.)

{¶35} The *Cecil* record showed that the misnamed defendant, James L. (the father) and the new party, James C. (the son) lived in the same family residence and that the lawsuit was served by certified mail two days after being filed. On the same day he was served, James L. informed James C. that a lawsuit that had been filed as a result of an automobile accident involving James C. *Id.*

{¶36} In the instant matter, Cyril T. was clearly aware of the October 4, 2014, automobile accident, as he was directly involved in driving one of the vehicles. However, the relevant inquiry is whether Cyril T. had notice of the "institution of the action" so that he would not suffer prejudice in maintaining a defense should he be substituted as a defendant. Civ.R. 15(C).

{¶37} Contrary to Appellants' assertion, and as this Court noted in *Reighard,* the fact that both Cyril A. and Cyril T. resided at the same address is not enough to infer notice of the lawsuit to Cyril T., particularly in light of his sworn affidavit stating otherwise.

Reighard, ¶ 52. Both Cyril A. and Cyril T. stated in their sworn affidavits that Cyril T. had no notice the lawsuits had been filed. Cyril T.'s sworn statement is that he had no notice of the lawsuits prior to September 26, 2017, which is outside both the two-year statute of limitations and the Civ.R. 3(A) one year additional time after filing the original complaint. Appellants did not dispute this sworn statement in any manner in the trial court. They argue the notice issue to Cyril T. for the first time to this Court. However, the uncontested facts in the record show that Cyril T. had no notice of the lawsuits prior to September 26, 2017.

{¶38} Appellants' motion to amend was filed on March 19, 2019. This was two and one-half years after they filed their original lawsuits. Cyril T. was never added as a party prior to the expiration of the statute of limitations. Appellants clearly had notice that the wrong party had been named in their suits. Appellants have provided no explanation for their delay in seeking to amend their 2016 or 2019 complaints, nor did they oppose Appellee's summary judgment in any fashion.

{¶39} Pursuant to Civ.R. 15(A), courts have taken a fairly broad approach in permitting parties to amend complaints where the amendment is not sought in bad faith and where it would not cause undue delay or prejudice to the opposing party. See *Barrette v. Lopez,* 132 Ohio App.3d 406, 410, 725 N.E.2d 314, (7th Dist.1999.) However, under the foregoing analysis of the saving statute and Civ.R. 3(A), 15(A) and 15(C), the refiled complaints in this case do not properly relate back to the 2016 complaints. This failure is particularly egregious when the record clearly shows that prior to their dismissal of the earlier complaints 2018, Appellants possessed responses to two sets of interrogatories in which Appellee specifically informed them more than once that they had

named and served the wrong party. Appellants never timely commenced or attempted to commence an action against Cyril T. prior to their voluntary dismissal, precluding the possibility that any amendment to the 2019 complaints might relate back to their original complaints. Appellants have unwisely failed to properly consider the multiple responses to their own discovery requests for over a year, and voluntarily dismissed their complaints after the statute of limitations had expired without adequate inquiry into whether they named the proper party. To further exacerbate their problem, they failed to oppose summary judgment in any way and failed to give the trial court any basis on which to conclude that Cyril T. did, in fact, have appropriate notice that suit had been filed, or even that an oral hearing would be necessary. We cannot conclude the trial court abused its discretion based on the record before us.

{¶40} Appellants' second assignment of error is without merit and should be overruled.

ASSIGNMENT OF ERROR NO. 3

> THE TRIAL ERRED AS A MATTER OF LAW BY GRANTING DEFENDANT CYRIL A. BURKHART'S MOTION FOR SUMMARY JUDGMENT AS GENUINE ISSUES OF FACT EXIST TO BE DISCOVERED/TRIED ON WHEN CYRIL T. BURKHART RECEIVED NOTICE OF THE INSTITUTION OF CASE NO. 2016-302

{¶41} In their third assignment of error Appellants contend the trial court improperly granted Appellee's summary judgment motion because a genuine issue of fact existed regarding whether Cyril T. had notice of the institution of the 2016 complaints.

{¶42} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶43} Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc., v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶44} "[T]he moving party bears the initial responsibility of informing the trial court of the basis of the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt,* 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶45} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267.

{¶46} Appellants allege the trial court granted summary judgment in favor of Appellee based on a flawed analysis of Appellants' motion to amend their complaint. We have largely addressed the reasons why Appellants' assertion is incorrect in the earlier assignments of error. Specifically, Appellee produced affidavits of both himself and his son, Cyril T., demonstrating no genuine issues of material fact exist regarding the claims asserted in Appellants' complaints. Appellee presented evidence in the record, including discovery responses, showing Appellants were informed that they had sued the wrong party, and provided a copy of the initial police report which listed Cyril T. as the driver of the vehicle. Appellee also produced uncontested evidence that Cyril T. had no knowledge that Appellants had filed lawsuits in this matter.

{¶47} At that point Appellants had the reciprocal burden to produce material facts for the record demonstrating a genuine issue for trial. As noted, Appellants never opposed Appellee's motion for summary judgment. Instead, Appellants filed an unsupported motion to stay a ruling on summary judgment. Appellants did not dispute the statements in the affidavits or direct the court to other facts in the record which would render summary judgment improper.

{¶48} Even if the Appellants' motion to stay were construed as a Civ.R. 56(F) request for an extension of time to properly respond to the motion for summary judgment, Appellants did not meet their burden under that rule. Civ.R. 56(F) reads:

> **When affidavits unavailable**. 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.

{¶49} The motion to stay simply sought to defer a ruling on summary judgment. Appellants did not attach any affidavits to justify an inability to support their opposition to summary judgment. In the absence of such an affidavit, the trial court may proceed directly to the merits of the summary judgment motion. *Ramsey v. Edgepark, Inc.,* 66 Ohio App.3d 99, 104, 583 N.E.2d 443 (10th Dist.1990). Moreover, an appellate court cannot grant relief under Civ.R. 56(F) in the absence of an affidavit. *State ex rel. Coulverson v. Ohio Adult Parole Auth.,* 62 Ohio St.3d 12, 577 N.E.2d 352 (1991). Importantly, "an appellant who failed to seek relief under Civ.R. 56(F) in the trial court has not preserved his rights thereto for purposes of appeal." *Stegawski v. Cleveland Anesthesia Group, Inc.,* 37 Ohio App.3d 78, 523 N.E.2d 902 (8th Dist.1987), paragraph four of the syllabus.

{¶50} The trial court found "no genuine issue of material fact exists and Defendant is entitled to judgment as a matter of law because Plaintiffs did not name the correct party

to the originally-filed lawsuits, named the wrong party to the refiled lawsuits, and never attempted to commence a lawsuit against the proper party within the Statute of Limitations." (5/9/19 J.E.)

{¶51} Appellants alleged in their complaints that Cyril A. Burkhart was negligent as the driver of the automobile. They had the burden of proving that Cyril A. had a legal duty to Appellants; that Cyril A. breached that duty; and that Appellants' injuries were the proximate cause of that breach. Appellants did not establish the requisite elements of negligence. They alleged their claims for driver negligence against the wrong party and have acknowledged that Cyril A. was not the alleged tortfeasor in the record. Moreover, Appellants failed to commence or attempt to commence an action against Cyril T., the proper party, within the statute of limitations. They have failed to produce evidence that Cyril T. knew suit had been filed. They are precluded from proceeding with their claims as any amendment does not properly relate back to the 2016 complaints under the saving statute and civil rules as earlier discussed.

{¶52} Therefore, a review of the record reveals the trial court properly granted summary judgment to Appellee. Appellants' third assignment of error is without merit and should be overruled.

Conclusion

{¶53} Based on the foregoing, Appellants' assignments of errors are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Monroe County, Ohio, is affirmed. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.