[Cite as *Babcock v. Albrecht,* 2012-Ohio-1129.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

WILLIAM C. BABCOCK, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2010-L-150**
- vs -	:	
RUSTY M. ALBRECHT, D.D.S, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 004099.

Judgment: Affirmed.

David H. Davies, Law Firm of David H. Davies, 38108 Third Street, P.O. Box 1264, Willoughby, OH 44096 (For Plaintiffs-Appellants).

Brian D. Sullivan and *Richard J. Rymond,* Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115-1093 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, William C. Babcock and Shirley L. Babcock, appeal the judgment of the Lake County Court of Common Pleas granting the motion to dismiss and/or for summary judgment filed by appellees, Rusty M. Albrecht, D.D.S., and Rusty M. Albrecht, D.D.S., Inc. ("Dr. Albrecht") with respect to Mr. Babcock's claim for dental malpractice and Mrs. Babcock's claim for loss of consortium. At issue is whether

appellants' failure to comply with the trial court's order to produce an expert report authorized the court to dismiss the complaint. For the reasons that follow, we affirm.

{¶2} On December 21, 2009, appellants filed a complaint for dental malpractice and loss of consortium against Dr. Albrecht, alleging that he provided dental services to Mr. Babcock that were not within the acceptable standard of care, as a result of which, Mr. Babcock sustained personal injury and Mrs. Babcock sustained loss of consortium.

{¶3} Appellants did not, however, file with their complaint an "affidavit of merit," as required by Civ.R. 10(D)(2)(d). Instead, they filed a motion to extend the time to file an affidavit of merit to January 21, 2010. That motion was granted; however, appellants did not file an affidavit of merit by January 21, 2010.

{¶4} More than two months later, on March 31, 2010, Dr. Albrecht filed a motion to dismiss the complaint due to appellants' failure to file an affidavit of merit after the deadline had passed. Thereafter, appellants filed an affidavit of merit signed by Alan Kelman, D.D.S. By its April 7, 2010 judgment, the trial court granted leave to appellants to file their late affidavit of merit and denied Dr. Albrecht's motion to dismiss.

{¶5} The matter came on for a case management conference on April 9, 2010. The parties agreed to a case management schedule. Appellants agreed to provide their expert report to Dr. Albrecht by July 9, 2010. Dr. Albrecht agreed to provide his expert report to appellants by October 8, 2010. On April 14, 2010, the trial court entered an order confirming the foregoing agreed-upon dates.

{¶6} Four months after the July 9, 2010 deadline for appellants to submit their expert report had expired, on October 29, 2010, Dr. Albrecht filed a motion to dismiss the complaint and/or for summary judgment, arguing that, while appellants were ordered

to produce their expert report by July 9, 2010, they never produced it. The record supports this contention. Dr. Albrecht argued that, as a result, appellants were precluded from calling any expert witness to testify at trial and that, without expert testimony, appellants could not establish a prima facie case. Although served with Dr. Albrecht's motion, appellants never responded to it.

{¶7} On November 24, 2010, the trial court entered judgment granting Dr. Albrecht's motion to dismiss and/or for summary judgment. The court noted that appellants failed to respond to Dr. Albrecht's motion. Thus, appellants failed to explain why the case should not be dismissed or to identify any issues of fact. The court found that, although appellants were ordered to produce their expert report more than four months prior to the court's ruling, they failed to produce it. As a result, the court stated appellants would not be permitted to have an expert testify at trial, and, without such testimony, they could not establish dental malpractice.

{¶8} One month later, on December 22, 2010, appellants filed a motion to vacate the court's judgment granting Dr. Albrecht's motion to dismiss. As grounds, appellants argued that, pursuant to Civ.R. 60(B)(3), Dr. Albrecht had committed fraud by alleging in his motion to dismiss that appellants had failed to submit an expert report, because, they claimed, their affidavit of merit constituted an expert report. Appellants also argued that Dr. Albrecht failed to perform an oral cancer screen and that, if he had, he would have found Mr. Babcock's cancer earlier, and less aggressive treatment would have been required. However, appellants never supported this argument by an expert report or any evidence. Dr. Albrecht filed a brief in opposition to appellants' motion to

vacate, in which he argued that he did not commit fraud as alleged by appellants because an affidavit of merit does not qualify as an expert report.

{¶9} While appellants' motion to vacate was pending in the trial court, on December 27, 2010, appellants filed the instant appeal. On March 24, 2011, we remanded this case for the trial court to rule on appellants' motion to vacate.

{¶10} The trial court entered judgment on April 8, 2011, denying appellants' motion to vacate. The trial court found that appellants failed to demonstrate grounds for relief under Civ.R. 60(B)(3) based on fraud because appellants' affidavit of merit could not be used as an expert report. As a result, the trial court found that Dr. Albrecht's argument in his motion to dismiss and/or for summary judgment that appellants had failed to submit an expert report was accurate and not fraudulent. The court cited two reasons for its finding. First, the trial court noted that at the case management conference, appellants agreed to the July 9, 2010 deadline for them to submit their expert report, and never advised court or counsel that they intended their affidavit of merit to serve as their expert report. Second, the court found that appellants' affidavit of merit did not set forth the facts of this case or any opinions based on those facts and so could not serve as an expert report. With respect to appellants' argument that if Dr. Albrecht had followed the applicable standard of care, he would have conducted a cancer screen, the court noted that such "opinion" was *not* rendered by Dr. Kelman in his affidavit of merit or otherwise supported by the record. Thus, the court found this "opinion" could not be considered in ruling on Dr. Albrecht's motion, and, pursuant to the court's local rules, could not be offered at trial.

{¶11} Appellants filed their appellate brief on May 24, 2011. On June 2, 2011, this court entered a magistrate's order in which it notified appellants that their brief was not in compliance with various Appellate and Local Rules as noted in the order. This court instructed the clerk of courts to strike appellants' brief from the record, and granted leave to appellants to file a corrected brief within 15 days from the date of the order, i.e., by June 17, 2011. However, appellants failed to file a corrected brief, and this court dismissed this appeal for failure to prosecute. Thereafter, appellants filed a motion to reinstate and a corrected brief. Over Dr. Albrecht's objection, on August 12, 2011, this court granted appellants' motion and reinstated the appeal.

{¶12} Appellants assert three assignments of error. Because they are related, they shall be considered together. They allege:

{¶13} "[1.] The Trial Court committed prejudicial error in granting defendants appellees' motion for summary judgment when the motion was unsupported and the affidavit of merit filed by the plaintiffs provided expert opinion that the defendants [sic] care of the plaintiff was not within the standard of care and that the deviation from the standard was a cause of injury to the plaintiff.

{¶14} "[2.] The Court erred in not considering the Affidavit of Merit filed by the plaintiff as support for the plaintiffs [sic] opposition to the Motion for Summary Judgment.

{¶15} "[3.] The trial erred [sic] to the prejudice of the plaintiffs in granting defendant's motion for summary judgment on the basis of plaintiffs' failure to provide an expert report within the time originally allowed by the Court."

{¶16} As noted above, appellants failed to file a brief in opposition to Dr. Albrecht's motion to dismiss and/or for summary judgment or to otherwise raise any of the issues asserted in their assignments of error prior to the court's entry of final judgment. "'[A]n appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" *Warren v. Warner Realty*, 11th Dist. No. 98-T-0117, 1999 Ohio App. LEXIS 4976, *5, (Oct. 22, 1999), quoting *State v. Childs*, 14 Ohio St.2d 56 (1968), paragraph three of the syllabus. Such failure constitutes a waiver of the right to raise the error on appeal. *Warren*, *supra.* Because appellants failed to raise the issues asserted in their assigned errors in the trial court, these issues are waived. For this reason alone, appellants' assignments of error lack merit.

{¶17} Further, we note that, despite our order requiring appellants to correct their appellate brief by making references to the record, appellants' factual allegations in their "corrected brief" that [1.] Dr. Albrecht's negligence is based on his alleged failure to screen Mr. Babcock for oral cancer and that [2.] Mr. Babcock was therefore not earlier diagnosed with oral cancer, are still not supported by reference to the record, in violation of App.R. 16(A)(6). Moreover, our review of the record demonstrates that appellants failed to include in the trial court record any evidentiary materials supporting these factual allegations. Appellants' failure to support their statement of facts with references to the record, or any evidence in the record, prevents us from considering these factual allegations on appeal. For this additional reason, appellants' assignments of error lack merit.

{¶18} Even if appellants had not waived their assigned errors and if their statement of facts was supported by reference to the record or evidence of record, their first assignment of error would still lack merit. Appellants' first assignment of error states that the trial court erred in granting summary judgment because the motion was not supported by Civ.R. 56(C) evidentiary materials and that, in any event, the affidavit of merit they filed constituted an expert opinion. However, appellants failed to present any argument or reasons in support of their first assigned error, in violation of App.R. 16(A)(7). The only information provided under this assignment of error is a discussion of the general rules regarding summary judgment procedure. For this reason alone, appellants' first assignment of error lacks merit.

{¶19} In any event, even if appellants had not waived their first assigned error and if it was properly supported, it would still lack merit. Although Dr. Albrecht did not support his motion for summary judgment with Civ.R. 56(C) evidentiary materials, we note that Dr. Albrecht's motion alternatively requested that the trial court dismiss the action based on appellants' failure to produce an expert report pursuant to the court's case management order. Further, the trial court did not specify in its judgment entry whether its ruling was based on Civ.R. 41(B)(1) (dismissal for failure to prosecute) or Civ.R. 56 (summary judgment). For the reasons that follow, we hold the trial court was authorized to dismiss this action for failure to prosecute.

{¶20} Civ.R. 41(B)(1) provides: "Where the plaintiff fails to prosecute, or comply with * * * *any court order*, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." (Emphasis added.)

{¶21} The decision to dismiss a case pursuant to Civ.R. 41(B)(1) is within the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion. *Quonset Hut, Inc. v. Ford Motor Co*., 80 Ohio St.3d 46, 47 (1997). This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, ¶24, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District has also recently adopted this definition of the abuse-of-discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶65, citing Black's Law Dictionary (4 Ed.Rev.1968) 25 ("A discretion exercised to an end or purpose not justified by and clearly against reason and evidence").

{¶22} The Supreme Court of Ohio has stated that dismissal with prejudice is appropriate as a sanction where a party's conduct "'falls substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party.'" *Sazima v. Chalko*, 86 Ohio St.3d 151, 158 (1999), quoting *Moore v. Emmanuel Family Training Ctr., Inc*., 18 Ohio St.3d 64, 70 (1985). A court may dismiss a case where """the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order."" *Sazima*, *supra*, quoting *Quonset*, *supra*, at 48, quoting *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 632 (1992). "*In considering dismissal under Civ.R. 41(B)(1), a trial court may properly take into account the entire history of the litigation* * * *." (Emphasis added.) *Sazima*, *supra*.

{¶23} In *Quonset*, *supra*, the Ohio Supreme Court held that dismissal with prejudice for failure to comply with an order of the trial court is proper under Civ.R. 41(B)(1) when plaintiff's "counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal." *Id*. at syllabus. In *Quonset*, after Ford Motor Co. obtained an order compelling discovery against Quonset, it failed to comply with the court's discovery order. Ford filed a motion to dismiss, which the trial court granted. In affirming the trial court's dismissal, the Supreme Court held that Quonset was on notice that the action could be dismissed because Ford had filed a motion asking the court to dismiss Quonset's claim. *Id*. at 48. The court in *Quonset* pointed out that at the time the trial court granted defendant's motion to dismiss, the plaintiff had not taken any action to comply with the outstanding discovery order for over four months, and there was no reason for the court to expect that one more warning would have prompted them to do so. *Id*. at 49.

{¶24} Further, in *Hillabrand v. Drypers Corporation*, 87 Ohio St.3d 517, 2000-Ohio-468, the Supreme Court of Ohio stated:

> **{¶25}** Civ.R. 41(B)(1) permits a trial court to dismiss an action for failure to comply with a court order, but only after notice to plaintiff's counsel. * * * "The notice requirement of Civ.R. 41(B)(1) applies to *all* dismissals with prejudice * * *." (Emphasis sic.) *Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99, 101; *Sazima* [, *supra*]. "The purpose of notice is to 'provide the party in default an opportunity to explain the default or to correct it, or to explain why the case should not be dismissed with prejudice.'" *Logsdon v.*

Nichols (1995), 72 Ohio St.3d 124, 128, quoting McCormac, 31 Ohio Civil Rules Practice (2 Ed.1992) 357, Section 13.07.

{¶26} * * *

{¶27} A "reasonable opportunity to defend against dismissal" under *Quonset* contemplates that a trial court allow the party opposing dismissal the opportunity to respond at least within the time frame allowed by the procedural rules of the court. (Footnote omitted.) *Hillabrand*, *supra*, at 518-520.

{¶28} In the instant case, appellants did not file an affidavit of merit with their complaint filed in December 2009. Instead, they filed a motion to enlarge the time to file their affidavit of merit to January 21, 2010. The court granted the motion, but appellants still failed to file an affidavit of merit by January 21, 2010. More than two months later, on March 31, 2010, Dr. Albrecht filed a motion to dismiss the complaint due to appellants' failure to file the affidavit of merit. The court denied Dr. Albrecht's motion, and on April 7, 2010, granted leave to appellants to file their belated affidavit of merit. At the April 9, 2010 case management conference, appellants agreed to provide their expert report to Dr. Albrecht by July 9, 2010, and the court confirmed this deadline in its case management order. However, appellants failed to file an expert report by July 9, 2010, and never requested an extension of the deadline. Then, four months after this deadline expired, on October 29, 2010, Dr. Albrecht filed his motion to dismiss and/or for summary judgment based on appellants' failure to comply with the court's order requiring them to produce an expert report. As a result of Dr. Albrecht's motion, appellants: (1) were informed that dismissal was a possibility and they (2) were given an opportunity to defend against dismissal by responding to Dr. Albrecht's motion.

However, appellants did not respond to the motion and never filed an expert report. The trial court granted Dr. Albrecht's motion on November 24, 2010, well beyond the dates fixed by local rule for responding to a motion to dismiss or motion for summary judgment. We find appellants' repeated failure to comply with the court's orders and their failure to produce an expert report during the entire year that this case was pending in the trial court demonstrate a complete disregard for the judicial system and Dr. Albrecht's rights. Such dilatory conduct constitutes grounds for dismissal for failure to prosecute.

{¶29} Next, even if appellants' additional arguments were not waived and were properly supported, they would still lack merit. In their first and second assignments of error, appellants argue that their affidavit of merit constituted an expert report. We disagree.

{¶30} In a dental malpractice claim, proof of the recognized standard of care must be provided through expert testimony. *Bruni v. Tatsumi,* 46 Ohio St.2d 127, 131-132 (1976). This expert must be qualified to express an opinion concerning the specific standard of care that prevails in the dental community in which the alleged malpractice took place. *Id.* The plaintiff must also prove that the dentist negligently departed from this standard of care in his treatment of the plaintiff. *Id*.

{¶31} Further, pursuant to the trial court's Local Rule V.A.3.(b), "[a]n expert witness shall not testify unless a written report has been procured from the witness and provided to opposing counsel."

{¶32} Appellants fail to cite any authority in support of their argument that an affidavit of merit constitutes an expert report, in violation of App.R. 16(A)(7). For this reason alone, this argument lacks merit. In fact, appellants concede that Ohio Appellate

Courts hold that an affidavit of merit cannot be used as an expert report to oppose summary judgment.

{¶33} Civ.R. 10(D)(2) provides:

{¶34} (a) [A] complaint that contains a * * * dental claim * * * shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness * * *. Affidavits of merit shall include all of the following:

{¶35} (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations * * * in the complaint;

{¶36} (ii) A statement that the affiant is familiar with the * * * standard of care;

{¶37} (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants * * * and that the breach caused injury to the plaintiff.

{¶38} * * *

{¶39} (d) An affidavit of merit is required to establish the adequacy of the complaint and *shall not otherwise be admissible as evidence* * * *." (Emphasis added.)

{¶40} In *Schura v. Marymount Hosp*., 8th Dist. No. 94359, 2010-Ohio-5246, the Eighth District stated:

{¶41} Appellant's reliance on the affidavits of merit is unfounded. Civ.R. 10(D)(2)(d) expressly provides that "[a]n affidavit of merit is

required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence * * *." (Emphasis deleted.) An affidavit of merit that merely sets forth the bare assertions required by Civ.R. 10(D)(2)(a) does not constitute evidence of the type enunciated in Civ.R. 56(C) to oppose a motion for summary judgment. *Braden v. Sinar*, 9th Dist. No. 24056, 2008-Ohio-4330, ¶20. An affidavit used for purposes of avoiding summary judgment is required to list the facts and not merely state final conclusory opinions on liability. *Ramos v. Khawli*, 181 Ohio App.3d 176, 2009-Ohio-798, at ¶87. The affidavits of merit in this case contain only the bare assertions required by Civ.R. 10(D)(2). As such, they are insufficient to oppose summary judgment. *Schura*, *supra*, at ¶28.

{¶42} Likewise, the Ninth District in *White v. Summa Health Sys*., 9th Dist. No. 24283, 2008-Ohio-6790, stated:

{¶43} The affidavit of merit merely establishes the adequacy of the complaint. It does not constitute evidence in support of a plaintiff's claim, nor would the assertions therein ever be adequate to prove the merits of a medical liability claim. An affidavit of merit need not set out the recognized prevailing standard of care in the relevant medical community, how the defendant failed to meet the standard of care, or how that breach caused the plaintiff's injury. Accordingly, an affidavit of merit which includes only the bare assertions required by Civ.R. 10(D)(2)(a) can never constitute evidence of the type enunciated in Civ.R. 56(C) to support or oppose a motion for

summary judgment. *White*, *supra*, at ¶22. *Accord*, *Nye v. Ellis*, 5th Dist. No. 09-CA-0080, 2010-Ohio-1462, ¶36, discretionary appeal not allowed at 2010-Ohio-3855, 2010 Ohio LEXIS 2081.

{¶44} Appellants' proffered affidavit of merit included only the bare conclusory statements referenced in Civ.R. 10(D). It stated that the reviewing dentist, Dr. Kelman, had reviewed appellees' records and that it was his opinion that reasonable grounds existed to support a claim of dental negligence against Dr. Albrecht; that Dr. Albrecht breached the standard of care applicable to a general dentist; and that as a result of that breach, Mr. Babcock had suffered physical injury. However, the affidavit of merit did not set forth facts that would allow it to be used as an expert report. Specifically, it did not state the recognized prevailing standard of care in the dental community; how Dr. Albrecht failed to meet the standard of care; or how the alleged breach caused Mr. Babcock's injury. *Bruni*, *supra*. Thus, while the affidavit of merit complied with the minimal requirements of Civ.R. 10, it was not sufficient to constitute an expert report.

{¶45} Next, under their third assigned error, appellants argue their failure to submit an expert report within the time set by the trial court did not warrant dismissal on the merits. Instead, they argue that the court should have dismissed the case without prejudice so they could have re-filed their action. However, the facts in this case demonstrate that appellants did not merely fail to provide an expert report within the time allotted by the court. Appellants repeatedly violated the court's orders by: (1) failing to timely produce their affidavit of merit; (2) failing to produce their expert report by the deadline to which they had agreed; (3) failing to move for an extension of time to produce their expert report; and (4) never producing an expert report during the entire year the case was pending in the trial court. Moreover, after Dr. Albrecht filed his

motion to dismiss and/or for summary judgment, appellants failed to respond and thus failed to take advantage of this opportunity to explain why the case should not be dismissed. In the circumstances of this case, we cannot say the trial court abused its discretion by dismissing this case with prejudice.

{¶46} For the reasons stated in this opinion, appellants' assignments of error are overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

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

DIANE V. GRENDELL, J., concurs in judgment only.