

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
ROSS COUNTY

Cynthia A. Oldacre,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA3073
	:	
vs.	:	
	:	
Kip C. Oldacre,	:	<b><u>DECISION AND JUDGMENT</u></b>
	:	<b><u>ENTRY</u></b>
Defendant-Appellant.	:	File-stamped date: 4-9-10

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**APPEARANCES:**

Clifford N. Bugg, Newman and Bugg, Chillicothe, Ohio, for Appellant.

J. Jeffrey Benson and Jonathan D. Schmidt, Chillicothe, Ohio, for Appellee.

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Kline J.:

{¶1} Kip C. Oldacre (hereinafter “Kip”) appeals the judgment of the Ross County Court of Common Pleas. The trial court divided marital property and debts between Kip and Cynthia A. Oldacre (hereinafter “Cynthia”) after granting Cynthia’s complaint for divorce. On appeal, Kip contends that the trial court erred in determining the appreciation of his dental practice. Kip further contends that that the trial court erred by assigning a value of \$0.00 to a 2002 Toyota Sequoia. The trial court awarded that motor vehicle to Cynthia and assigned the remaining debt on the Toyota Sequoia to Kip. However, we choose to disregard Kip’s two assignments of error because his appellate brief does not comply with App.R. 16(A)(7). Specifically, Kip does not cite to any legal authority in his appellate brief. Accordingly, we affirm the judgment of the trial court.

{¶2} The record reveals the following facts pertinent to our decision. Kip and Cynthia were married on April 12, 1996, and Cynthia filed her complaint for divorce on March 25, 2004.

{¶3} Kip is a licensed dentist with his own practice in Washington Courthouse, Ohio. As part of her case, Cynthia hired Practice Impact, Inc. (hereinafter "Practice Impact") to determine the fair market value of Kip's dental practice. In a report dated September 15, 2006, Practice Impact determined that Kip's dental practice had a fair market value of \$298,629.

{¶4} On September 25, 2006, Kip and Cynthia appeared for a hearing before a magistrate. At that hearing, the president of Practice Impact testified about his evaluation of Kip's dental practice. Kip and Cynthia also testified at the hearing. In relevant part, Cynthia's testimony reveals the following:

{¶5} "Q: You are driving a 2002 Toyota Sequoia?

{¶6} A: Yes.

{¶7} Q: And there's a loan against that with fifth/third?

{¶8} A: Yes.

{¶9} Q: Payments about eight hundred a month?

{¶10} A: Yes.

{¶11} Q: And there's about a year left to pay?

{¶12} A: Yes.

{¶13} Q: [Kip] has been paying that loan. Is that true?

{¶14} A: Yes.

{¶15} Q: And you're asking the court to order him to continue to pay that off for you?

{¶16} A: Yes.

{¶17} \* \* \*

{¶18} Q: The Toyota Sequoia is worth about what you owe on it. Is that a fair statement?

{¶19} A: Yes." Transcript, Final Divorce Hearing, at 30-31.

{¶20} The magistrate subsequently entered a decision that divided the marital property and debts. In relevant part, the magistrate's decision provides the following: "It is therefore recommended:

{¶21} Plaintiff be entitled to a divorce and the marriage be dissolved.

{¶22} The duration of the marriage be from April 12, 1996 to March 25th, 2004.

{¶23} \* \* \*

{¶24} Plaintiff be awarded the 2002 Toyota Sequoia (0) and 2000 Nissan Sentra (\$4,000.00).

{¶25} \* \* \*

{¶26} Defendant's dental practice has a fair market value of \$298,629.00. Defendant started this practice in 1985. The parties married in 1996. Since the marriage, the square footage has increased from 1,000 square feet to 2,500 square feet. The number of operating chairs has increased from three (3) to five (5) during the marriage. Defendant has also purchased new equipment during the marriage. Defendant's dental practice is his separate property. However,

marital property does include all appreciation on separate property due to the labor, monetary or in kind contribution of either or both spouses during the marriage. [R.C.] 3105.171(A)(3)(a)(iii). Justice requires that Defendant's dental practice be further evaluated to determine the appreciation of Plaintiff's [sic] dental practice during the marriage so as to arrive at the amount subject to equitable division. The parties are instructed to submit such evaluation within sixty (60) days. The Court retain [sic] jurisdiction over this issue.

{¶27} \* \* \*

{¶28} Defendant shall pay the debt owed on the Toyota Sequoia until paid in full."

{¶29} On February 8, 2008, Cynthia filed another report from Practice Impact. In this report, Practice Impact determined that Kip's dental practice had a fair market value of \$127,154 as of December 31, 1995. Kip did not submit any evidence as to the value of his dental practice.

{¶30} The trial court entered a decision on June 18, 2008. In that decision, the trial court judge adopted the magistrate's findings regarding the 2002 Toyota Sequoia. That is, the trial court awarded that vehicle to Cynthia and required Kip to make the remaining payments. The trial court judge also found that Kip's dental practice had appreciated by \$171,475 during the marriage. Apparently, the trial court arrived at that figure by subtracting the total of Practice Impact's second report (\$127,154) from the total of Practice Impact's initial report (\$298,629).

{¶31} Finally, the trial court's September 30, 2008 judgment entry states that Cynthia "has retained marital property worth \$4,000.00 and [Kip] has retained marital property worth \$220,602.75, which includes the appreciation of the dental practice of \$171,475.00. Thus, [Kip] owes [Cynthia] the sum of \$108,301.37 to equalize the division of property."

{¶32} Kip appeals, asserting the following two assignments of error: I. "The trial court erred in failing to divide marital property equitably when it incorrectly determined the increase in value of the Appellant/Defendant dental practice [sic] during the duration of the marriage." And, II. "The trial court erred in failing to divide marital property equitably when it granted Appellee/Plaintiff the 2002 Toyota Sequoia, assigning a value of \$0.00 to the vehicle, while assigning the Appellant/Defendant the debt on said vehicle."

II.

{¶33} In his first assignment of error, Kip contends that the trial court erred in determining the appreciation of Kip's dental practice. Essentially, Kip contends that the trial court erred because the relevant dates in Practice Impact's two reports (December 31, 1995 and September 15, 2006) do not correspond to the dates of the marriage (April 12, 1996 to March 15, 2004). And in his second assignment of error, Kip contends that the trial court erred by assigning a value of \$0.00 to the Toyota Sequoia.

{¶34} Initially, we must note a deficiency in Kip's appellate brief. As Cynthia correctly observes, Kip's appellate brief does not comply with App.R. 16(A)(7), which provides: "The appellant shall include in its brief, under the headings and

in the order indicated, all of the following: \* \* \* An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.” However, Kip has cited no authority in support of his two assignments of error – not a single statute, case, or treatise. Because of this defect, Cynthia argues that Kip “should be precluded from having his assignment[s of error] reviewed \* \* \* due to his lack of briefing.” Reply Brief of Defendant-Appellee Cynthia A. Oldacre at 10.

{¶35} “If an argument exists that can support [an] assignment of error, it is not this court’s duty to root it out.” *Thomas v. Harmon*, Lawrence App. No. 08CA17, 2009-Ohio-3299, at ¶14, quoting *State v. Carman*, Cuyahoga App. No. 90512, 2008-Ohio-4368, at ¶31. “It is not the function of this court to construct a foundation for [an appellant’s] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.” *Catanzarite v. Boswell*, Summit App. No. 24184, 2009-Ohio-1211, at ¶16, quoting *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60. Therefore, “[w]e may disregard any assignment of error that fails to present any citations to case law or statutes in support of its assertions.” *Frye v. Holzer Clinic, Inc.*, Gallia App. No. 07CA4, 2008-Ohio-2194, at ¶12. See, also, App.R. 16(A)(7); App.R. 12(A)(2); *Albright v. Albright*, Lawrence App. No. 06CA35, 2007-Ohio-3709, at ¶16; *Tally v. Patrick*, Trumbull App. No. 2008-T-0072, 2009-Ohio-1831, at ¶21-22; *Jarvis v. Stone*, Summit App. No. 23904, 2008-Ohio-3313, at ¶23; *Sigmon v. Southwest Gen.*

*Health Ctr.*, Cuyahoga App. No. 88276, 2007-Ohio-2117, at ¶50-51; *In re T.G.*, Butler App. Nos. CA2005-10-444, CA2005-12-521, 2006-Ohio-5504, at ¶34-36; *Henry v. Gastaldo*, Tuscarawas App. No. 2005 AP 03 0022, 2005-Ohio-4109, at ¶3. Here, we choose to disregard Kip's assignments of error.

{¶36} In the past, this court has often reviewed noncompliant appellate briefs "in the interest of justice." See, e.g., *Frye* at ¶12; *Albright* at ¶16. However, we do not believe that justice requires this court to review Kip's arguments. Kip failed to make any arguments about the appreciation of his dental practice at the trial court level. Generally, a "party cannot assert new arguments for the first time on appeal." *In re Estate of Poling*, Hocking App. No. 04CA18, 2005-Ohio-5147, at ¶28. In the proceedings below, Kip did not object to the magistrate's finding that the dental practice had a fair market value of \$298,629. And despite being instructed to do so by the trial court, Kip did not provide any evidence regarding the appreciation of his dental practice. Moreover, Cynthia submitted the second report from Practice Impact on February 8, 2008, but the trial court did not enter a decision until June 18, 2008. Thus, Kip had over four months to argue against the December 31, 1995 appraisal date in Practice Impact's second report. As the trial court's decision states, "[t]he court has reviewed \* \* \* the evaluation of the value of [Kip's] dental practice filed by [Cynthia]. The court notes that *no objections had been filed to that evaluation.*" (Emphasis added.) And finally, as it regards the 2002 Toyota Sequoia, we see nothing fundamentally unjust in (1) awarding that motor vehicle to Cynthia and (2) requiring Kip to make the remaining payments.

{¶37} Therefore, because Kip's brief fails to present any citations in support of his arguments, we choose to disregard Kip's two assignments of error. As a result, we affirm the judgment of the trial court.

**JUDGMENT AFFIRMED.**



Abele, J., Concurring in Judgment Only with Opinion:

{¶38} Although I agree that appellant's brief did not fully comply with the applicable appellate rules, I wish to emphasize that my review of the merits reveals no basis for a reversal of the trial court's judgment. Accordingly, I agree that the trial court's judgment should be affirmed.

McFarland, P. J., dissenting.

{¶39} I respectfully dissent. The Supreme Court of Ohio has stated, “it is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits.” See *Dehart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644. In Appellant’s brief, he claims the judgment is against the manifest weight of the evidence. Essentially, this is a factual argument and, as such, I would address the merits herein.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED, and appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment Only with Opinion.  
McFarland, P.J.: Dissents with Dissenting Opinion.

For the Court

BY: \_\_\_\_\_  
Roger L. Kline, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**