

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Heath Wallace, D.D.S., LLC, et al.

Court of Appeals No. WD-12-048

Appellants

Trial Court No. 10 CV 934

v.

Kalniz, Choksey Dental—Ralston,
Inc., et al.

DECISION AND JUDGMENT

Appellees

Decided: July 5, 2013

* * * * *

Martin J. Holmes, Sr. and Martin J. Holmes, Jr., for appellants.

Roy Hulme and Michelle J. Sheehan, for appellees.

* * * * *

JENSEN, J.

{¶ 1} Appellants Heath Wallace, D.D.S. and Health Wallace, D.D.S., LLC (collectively referred to as “Wallace”) timely appeal the December 7, 2011 and August 13, 2012 judgments of the Wood County Court of Common Pleas granting summary judgment to appellees Kalniz Choksey Dental—Ralston, LLC, Kalniz Choksey

Dental Services, Inc., Dental Logic, LLC, Kalniz Choksey Dental—Bowling Green, LLC, Scott Kalniz, D.D.S., Alap Choksey, D.D.S., and Kalniz Choksey, LLC, and striking the report and affidavit of his expert witness, Dr. Malcolm Cohen. We find that the trial court properly granted summary judgment to appellees on Wallace’s breach of contract claims and in striking Wallace’s expert’s report and affidavit, but erred in granting summary judgment on Wallace’s fraud claim. Accordingly, we affirm in part and reverse in part.

A. Factual Background

{¶ 2} Heath Wallace, D.D.S. is a dentist who has been practicing since 2005. Upon his graduation from the Ohio State University’s dental program, he purchased a practice in Weston, Ohio, near Bowling Green, Ohio from a retiring dentist. In late 2007, Dr. Wallace was introduced by Dr. George Namay to Dr. Scott Kalniz, a dentist affiliated with a larger group called Corner Dental. Kalniz planned to expand the group and expressed interest in buying Wallace’s practice as part of that expansion plan. Having realized that he did not enjoy the business aspect of running a dental office, Wallace was interested in this prospect. On December 13, 2007, the parties executed a confidentiality and nondisclosure agreement so that they could further explore the potential of Corner Dental acquiring Wallace’s practice.

{¶ 3} On May 5, 2008, appellees filed articles of organization to create a new LLC called Kalniz Choksey Wallace Dental, LLC—Bowling Green. Following the creation of this LLC, on May 30, 2008, appellees presented Wallace with a written offer prepared by

their attorney, Mark Abramson, contained within an asset purchase agreement, employment agreement, operating agreement, and subscription agreement. Under these agreements, Wallace would be an owner-operator of the office, which would be managed by Dental Logic, a separate company co-owned by Kalniz. Wallace's attorney, Andrew Spitler, reviewed those agreements.

{¶ 4} On June 2, 2008, Kalniz signed a lease on behalf of Kalniz Choksey Wallace Dental—Bowling Green to begin construction of the Bowling Green dental practice. In the meantime, the agreements were still in Spitler's hands. On June 23, 2008, Abramson e-mailed Spitler urging him to complete his review of the agreements because “we really need to bring this to closure.” Spitler offered revisions and on July 9, 2008, Abramson e-mailed Spitler attaching revised agreements. Abramson told Spitler: “if these changes meet with your approval, please advise and we can finalize the documents for execution.” The next day, Spitler told Abrahamson to prepare the final versions.

{¶ 5} There were certain terms contained within the agreements that were important to Wallace. For example, Wallace negotiated a four-day work week and would work no weekends or holidays. His salary was to be \$156,000 with a 30 percent commission after collecting fees in excess of twice his salary. He would be permitted to treat specified family members at no charge. And the agreement contained a very narrow termination clause, essentially limiting the grounds for termination to illegal conduct, licensure problems, or failure to abide by the terms of the parties' contract. Wallace would be an owner-operator of the new office.

{¶ 6} There were also several items that were missing in the agreements, and there were a number of inconsistencies among the various agreements: (1) the asset purchase agreement, employment agreement, and operating agreement did not specify an effective date; (2) the asset purchase agreement stated that a closing would occur at Abramson's office, but did not specify a closing date; (3) the operating agreement stated that Wallace would have a 49 percent interest but did not specify the amount of his initial capital contribution; (4) the subscription agreement allocated 25 percent interest to Dr. Wallace while the operating agreement allocated 49 percent; and (5) the subscription agreement required Wallace to make a contribution to the company of "three hundred thousand dollars (\$100,000) [sic]" while the operating agreement did not state an initial contribution but said "to come."

{¶ 7} Despite these inconsistencies and missing terms, on July 23, 2008, Wallace signed the agreements and Spitler sent them to Abramson, along with many of the documents that appellees required Wallace to deliver, including lists of excluded office furniture, fixtures, and personal items; tax returns; copies of licenses; copies of insurance policy declarations; copy of an X-ray equipment lease agreement; Wallace's patient demographics and numbers with a promise that a CD of 350 pages containing Wallace's patient list would be delivered; bill of sale and assignment of Wallace's equipment to the new LLC; list of family members to whom Wallace was permitted to provide free dental services; seller's consent to use Wallace's persona for marketing; management and services agreement; IRS form 8594; and notice of transfer of X-ray equipment.

{¶ 8} After receiving the executed agreements from Wallace, Abramson brought them to Kalniz' house to be executed. Kalniz was going to be out of town for several days. He executed the agreements so Abramson could supply the missing terms and finalize the documents while Kalniz was away. He instructed Abramson to retain the agreements until the additional terms were finalized. Wallace requested copies of the executed agreements and was assured that they were forthcoming.¹

{¶ 9} Sometime around July, appellees hired a new business manager, Stuart Michael Schwartz. Schwartz became a point of contact on the Wallace acquisition. On August 4, 2008, Abrahamson emailed Schwartz, telling him "the only real issue open is the allocation. [Wallace] is being acquired for \$350,000, and the remaining issues deal with how much he will need to contribute back. * * * [O]nce he has the numbers (or meets with Stu) it seems likely the only thing left is to close."

{¶ 10} On September 24, 2008, appellees held a congratulatory party at Wallace's office, at which time they brought a celebratory cookie cake and informed Wallace's staff about the upcoming acquisition for the first time. That day, Wallace gave Kalniz his list of clients and demographics. Approximately three weeks later, Wallace paid his staff to attend training at one of appellees' offices. Appellees had Wallace photographed in Corner Dental attire for publicity purposes and they placed a phone book advertisement indicating that Wallace was with Corner Dental.

¹ The parties apparently executed an amended asset purchase agreement dated September 18, 2008, but that version of the agreement is not contained in the record. It appears that Wallace was never provided the executed copy of that agreement either.

{¶ 11} Despite Wallace’s belief that the parties’ plans were moving forward, on December 1, 2008, without Wallace’s knowledge, Kalniz and Choksey signed a document entitled “Operating Agreement of Kalniz Choksey Wallace Dental—Bowling Green, LLC to be known as Kalniz Choksey Dental—Bowling Green, LLC.” On December 11, 2008, appellees filed a certificate of amendment with the secretary of state, changing the name of the new LLC to Kalniz Choksey Dental—Bowling Green, LLC, thus removing Wallace’s name.

{¶ 12} Around this time, Wallace was informed that appellees now had different ideas about the terms of the agreements. On December 8, 2008, Schwartz communicated to Wallace that appellees had concerns with a number of key terms contained in the original agreements and intended to amend those terms. Revised agreements were provided to Wallace in mid-December. Under the revised terms, he would no longer have any ownership interest. He would be required to work five days a week and some weekends and holidays. His salary would be \$180,000 per year, but the threshold for commission payments increased to collected fees exceeding \$500,000, and the commission rate decreased. In addition, Wallace could be terminated if his fee receipts did not exceed \$500,000, “for convenience,” or for other unspecified reasons constituting “cause.” He would have to re-pay the \$350,000 purchase price if he did not meet his \$500,000 goal. If he terminated the employment agreement in years 1 through 5, he would be required to pay back incremental portions of the purchase price. He would be liable for liquidated damages if the employment agreement was terminated before its

five-year expiration. His non-compete agreement was extended from one year to two years. And he lost a number of other benefits granted under the original agreement, such as the ability to treat family members for free.

{¶ 13} On Christmas Eve, appellees contacted Wallace, insisting that he make a decision about whether to accept the new terms they proposed. Wallace declined to accept those terms. Negotiations ceased and on January 20, 2009, Abramson formally advised Spitler that his clients were no longer interested in acquiring Wallace's practice. Corner Dental opened its Bowling Green office without Wallace.

B. Procedural History

{¶ 14} Wallace filed his complaint on September 30, 2010, against Kalniz Choksey Dental—Ralston, LLC, Kalniz Choksey Dental Services, Inc., Dental Logic, LLC, and Kalniz Choksey Dental—Bowling Green, LLC alleging breach of contract, deceptive trade practices, and business interference. Wallace later amended his complaint to add claims for conversion and fraudulent misrepresentation and added Scott Kalniz, D.D.S., Alap Choksey, D.D.S., and Kalniz Choksey, LLC as defendants.

{¶ 15} On September 23, 2011, Wallace filed a motion for summary judgment on his breach of contract claims. Appellees filed a cross-motion on all counts. In an order dated December 7, 2011, the trial court denied Wallace's motion and granted appellees' motion as to the breach of contract claims, but denied the motion as to Wallace's tort claims. The court found that no contract had been formed because the agreements were missing essential terms, the exhibits to the asset purchase agreement were not attached,

no closing took place, Heath Wallace, D.D.S., LLC continued to do business and to employ Wallace, Wallace did not receive paychecks from Kalniz Choksey Dental—Ralston, Inc., and the capital contribution schedule and subscription agreements were incomplete or contradictory. The court concluded that the agreements were merely drafts.

{¶ 16} Appellees filed a second motion for summary judgment on March 2, 2012, on Wallace’s tort claims. On July 13, 2012, they moved to strike Wallace’s affidavit filed with his opposition brief, as well as the report and affidavit of Dr. Malcolm Cohen, Wallace’s expert economist, also attached to Wallace’s opposition brief. The court granted the motion to strike Wallace’s affidavit as to paragraphs 11 through 15. In its August 13, 2012 order, it granted the motion to strike Dr. Cohen’s report and affidavit, reasoning that Dr. Cohen was not qualified under Evid.R. 702(B) and the assumptions on which his loss calculations were based were speculative and unreliable. The court also granted appellees’ motion for summary judgment on Wallace’s remaining claims, concluding, among other things, that Wallace had not created a genuine issue of material fact as to the damages element of his fraudulent misrepresentation claim.

{¶ 17} Wallace now appeals the trial court’s orders and assigns the following errors for our review:

- I. The trial court erred in granting summary judgment on the first cause of action when it concluded that no contract had been formed.

II. The trial court abused its discretion in disqualifying the expert testimony of Malcolm Cohen.

III. The trial court erred in granting summary judgment on the second cause of action when it concluded that there was no genuine issue of material fact as to appellant's damages for its fraud claim.

C. Standard of Review

{¶ 18} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 19} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate

the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A “material” fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

D. Analysis

I. Wallace’s First Assignment of Error:

The trial court erred in granting summary judgment on the first cause of action when it concluded that no contract had been formed.

{¶ 20} There are five agreements relating to the acquisition of Wallace’s practice and Wallace’s employment by the new entity: (1) confidentiality and nondisclosure agreement, (2) asset purchase agreement, (3) employment agreement, (4) operating agreement, and (5) subscription agreement. There is no dispute that a contract was formed with respect to the confidentiality and nondisclosure agreement. The remaining agreements were signed by both Wallace and Kalniz, however, appellees maintain—and the trial court agreed—that the signed agreements were only draft documents, essential

terms were missing from the draft agreements and were still being negotiated, and the contracts were never finalized.

{¶ 21} “A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.” *Kostelink v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 16, quoting *Perlmutter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D. Ohio 1976). An enforceable contract requires a meeting of the minds as to the essential terms of the contract. *Id.*, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991). The essential terms of a contract include identity of the parties, the subject matter of the contract, and consideration. *Huntington v. R.R. Wellington, Inc.*, 11th Dist. No. 2012-P-0035, 2012-Ohio-5935, 983 N.E.2d 941, ¶ 25. “Terms of a contract are adequate if they provide a foundation for determining whether a breach occurred and for establishing an appropriate remedy.” *Id.*

{¶ 22} “The construction of written contracts is a matter of law, and courts will give common words in a written instrument their plain and ordinary meaning, unless an absurd result would follow or there is clear evidence of another meaning from the face or overall contents of the instrument.” *Indus. Heat Treating Co., Inc. v. Indus. Heat Treating Co.*, 104 Ohio App.3d 499, 508, 662 N.E.2d 837 (6th Dist.1995), citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978),

paragraphs one and two of the syllabus. A court will supply a missing term by making a factual determination of intent only if the meaning of a term cannot be determined from the four corners of the contract. *Id.*, citing *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984).

{¶ 23} Generally, when multiple documents concern the same transaction, Ohio courts construe those documents together. *Prudential Ins. Co. of America v. Corp. Circle, Ltd.*, 103 Ohio App.3d 93, 98, 658 N.E.2d 1066 (8th Dist.1995), citing *Center Ridge Ganley, Inc. v. Stinn*, 31 Ohio St.3d 310, 511 N.E.2d 106 (1987). The documents should be interpreted together, and effect should be given to every provision. *Id.*, citing *Abram & Tracy, Inc. v. Smith*, 88 Ohio App.3d 253, 623 N.E.2d 704 (10th Dist.1993). This is true regardless of whether the agreements expressly refer to each other. *Starr v. Columbia Broadcasting System, Inc.*, 68 Ohio App. 352, 357, 36 N.E.2d 861 (1st Dist.1941).

{¶ 24} It is apparent in this case that the various agreements were part of the same transaction, thus we will interpret them together. The trial court determined that the agreements were missing essential terms and contained inconsistencies establishing that they must have been only drafts, despite the fact that there is no notation on the agreements to that effect. Kalniz' testimony was that he was going to be leaving town, so he signed the agreements with instructions to his counsel to retain them until the missing terms were inserted. The agreements were signed but, despite Wallace's requests, were never delivered to Wallace.

{¶ 25} In the absence of an agreement to the contrary, there is no general rule in Ohio that requires a contract to be physically delivered before it is binding. *Indus. Heat Treating Co., Inc. v. Indus. Heat Treating Co.*, 104 Ohio App.3d at 509, 662 N.E.2d 837. Here, however, sections 5(b) and 6(b), the asset purchase agreement provided that “all instruments of transfer and other documents to be delivered in connection with this Agreement, when executed *and delivered*, will constitute, legal, valid, and binding obligations * * *.” (Emphasis added.) Similarly, the confidentiality and nondisclosure agreement provided at section 5 that “unless and until a Definitive Agreement between [appellees] and [appellants] with respect to the Transaction has been executed *and delivered*, neither [appellants] or [appellees] has any legal obligation of any kind whatsoever with respect to such Transaction * * *.” (Emphasis added.)

{¶ 26} Although Kalniz executed the agreements, the fact that he specifically instructed counsel not to deliver them leads us to conclude that no enforceable agreement was formed. Because the unambiguous terms of the agreement conditioned the enforceability of the agreement on execution *and* delivery, the failure to deliver the executed documents to Wallace is fatal to its validity. Like the trial court, we find it curious that Kalniz signed what appellees claim were merely “drafts.” Nevertheless, the absence of delivery evidences that no binding agreement was formed. As such, we need not progress to the issue of whether the missing or inconsistent terms were essential. We find Wallace’s first assignment of error not well-taken.

II. Wallace's Second Assignment of Error:

The trial court abused its discretion in disqualifying the expert testimony of Malcolm Cohen.

{¶ 27} In opposition to appellees' motion for summary judgment, Wallace submitted the affidavit and report of his expert, Malcolm Cohen, Ph.D., who provided opinions about Wallace's economic loss. Dr. Cohen holds a Ph.D. in Economics from MIT and is the president of Employment Research Corporation in Ann Arbor, Michigan. He performs research on labor market issues, new hires, and labor shortages. In calculating Wallace's economic losses in this case, he prepared discounted cash flow analyses using three different time periods (the end of 2011, 2027, and 2042) and three different scenarios (Wallace continuing with his current practice, Wallace upgrading his office in 2008 as originally planned, and Wallace updating his office as originally planned *and* adding 10 percent additional collected income in 2009, assumed to have been lost because of Corner Dental entering the market). Dr. Cohen predicted growth of Wallace's practice at 12 percent starting in 2011 for three years and flat at 5 percent thereafter. He used a rate of 4.4 percent to discount cash flow to present value. He estimated Wallace's economic loss at between \$251,319 to \$2,652,947.²

² In opposing appellees' summary judgment motion, Wallace submitted Dr. Cohen's November 14, 2011 report. This November 2011 report updated a previous report that he had authored in 2009 and about which he was deposed in October of 2011. The original report contained Dr. Cohen's calculations based on what he projected Wallace's revenues would be in 2009 and 2010. When those actual revenues became known during the

{¶ 28} Upon appellees' motion, the trial court struck Dr. Cohen's affidavit and report, finding that his opinions did not meet the requirements of Evid.R. 702(B) and (C). The court found (1) that Dr. Cohen lacked expertise in business valuations; and (2) that the assumptions underlying his damages calculations were speculative and unreliable and were, therefore, inadmissible.

{¶ 29} Under Evid.R. 702, a witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *

Absent an abuse of discretion, the trial court's decision in determining the admissibility of expert testimony will generally be upheld. *Valentine v. Conrad*, 110 Ohio St.3d 42, 43, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 9.

pendency of the case, they exceeded Dr. Cohen's projections by about 20 to 25 percent. Dr. Cohen updated his report to reflect the actual numbers for 2009 and 2010.

{¶ 30} The trial court determined that Dr. Cohen attempted to show Wallace’s losses by valuing Wallace’s business. The trial court acknowledged that Dr. Cohen is “a highly qualified economics and econometrics expert,” however, it struck Dr. Cohen’s report under Evid.R. 702(B) because “he is not qualified to act as a business valuation expert.” At his deposition, Dr. Cohen testified as follows:

Q: I just want to -- again, I did not read your report as you writing a business valuation report. And what I read your report primarily as is [sic] given these assumptions, projecting those assumptions over the work life expectancy of this gentleman and reducing it to practice present value, here is the present value of that stream of income under certain different scenarios and assumptions.

A: That’s basically what I did, yes.

Q: Okay. And the business valuation part of it that shows up at the tail end of his work life expectancy, all you did for that was to say, so I have a number, I’m going to use the same formula that Wallace used when he purchased [Dr.] Rowe’s [practice], but I’m not going to necessarily vouch and say that it is within a reasonable degree of scientific certainty the value of the business; is that fair?

A: I’m not sure that that is fair. I mean I’m going to say that’s the best—that’s the best estimate that I was able to make, and I would say that it’s accurate to a reasonable degree of economic certainty.

Q: The calculation is accurate?

A: The calculation.

Q: Okay. Not the methodology?

A: Well I can't vouch for what the business—I didn't have all the information that the business evaluator had when he initially evaluated the practice, so that I—given the information I had, I believe it is—it is accurate to a reasonable degree of economic certainty. If I had—

Q: What is accurate?

A: The estimate. If I had different information, then it's possible that I would have come up with a different valuation. But given the information that I had, that's the best estimate that I can make.

Q: Okay. Did you do any independent investigation to test the validity of your conclusion of what the business value was at work life expectancy? Did you do any independent analysis –

A: No.

Q: -- or investigation?

A: No.

Q: You simply relied upon the formula that was applicable to the purchase by Dr. Wallace of Dr. Rowe's practice?

A: Yes. And so in fact—if that was a valid way of evaluating the practice at that point, by discounting it to present value would give a valid estimate at the time that he would retire.

In other words, Dr. Cohen testified that he performed calculations applying the formula used in the business valuation performed at the time Wallace purchased the practice, but did not himself perform a business valuation. To the extent that the trial court determined that Dr. Cohen had performed a business valuation that he was not qualified to perform, this ground for striking Dr. Cohen's report was incorrect.

{¶ 31} However, the trial court also cited Evid.R. 702(C) in excluding Dr. Cohen's testimony. The court reasoned that "although the methods used to calculate the amounts Dr. Wallace allegedly lost appear accurate and appropriate," the assumptions on which those calculations were made were speculative and unreliable. More specifically, the trial court indicated that Dr. Cohen failed to provide support for the rate of growth of Wallace's practice that he used in his calculations. The court acknowledged that in forming his opinions, Dr. Cohen had reviewed Wallace's financial information, select financial information from appellees, documents admitted into evidence in the case, an American Dental Association practice survey, an analysis of Wallace's dental practice, information obtained through an interview with a dental consultant, federal bond rates, and an article on the increment-decrement model of labor force activity. However, the court found that Dr. Cohen had not explained how these sources impacted the figures he

used. The court reasoned that the calculations were only as good as the assumptions on which they were based. We agree with the trial court.

{¶ 32} Dr. Cohen was deposed about the bases for his opinions. At his deposition, there were numerous instances in which Dr. Cohen could not even recall the basis for his calculations. But his testimony also revealed that he had made purely speculative assumptions in arriving at his projections. For instance, Dr. Cohen predicted no growth of Wallace's practice in 2009 and 2010. When asked at deposition about this prediction, Dr. Cohen did little more than to attribute his predicted flat growth in 2009 and 2010 to the 2008 recession and to insist that his methodology should be accepted because he had been permitted to offer opinions in hundreds of other cases. He testified that with employees losing their jobs, many would have lost dental insurance, which would, therefore, "maybe" lead them to postpone dental treatment and teeth cleaning. But he conceded that he had performed no research and reviewed no peer-reviewed articles to support his "theory" and he acknowledged that he "didn't do any specific research on how dental practices are likely to fare in a recession." He had no information about the percentage of the population that has dental insurance or the extent to which the existence or nonexistence of dental insurance influences people's decision to get dental care.

{¶ 33} When asked about his projected rate and reasons for growth after 2010, Dr. Cohen agreed that growth could result from charging more per patient or by obtaining new patients. But he admitted that he had not looked at whether Wallace had gained or lost patients. Overall, Dr. Cohen said he would want to look at much additional

information before testifying in court: trends in Wallace's business, his fees, whether the nature of his practice had changed, his advertising expenses, whether Wallace was now advertising differently than he had been, where his patients were coming from, and the impact of the proximity of the university on both Wallace's and appellees' practices.

{¶ 34} It was pointed out to Dr. Cohen that his initial predictions about Dr. Wallace's 2009 and 2010 collections had been off by approximately 20-25 percent. He was asked how, in applying economic science, his projections could have been so wrong. He explained that economic science does not allow him to provide exact estimates and given the nature of the economy at that time, he did not believe that there would be any growth. However, he also conceded that he was not familiar with Wallace's labor market or advertising practices or "what factors can account for this [disparity in his projections]." He went on to say that "it's possible that whatever he grew by, there may be other factors in the labor market that would allow him to -- that had the recession not occurred he would have -- he could have -- it would have grown even more."

{¶ 35} Dr. Cohen was also asked about the basis for his projection that Wallace's collections would have been 10 percent higher if appellees had not entered the Bowling Green market. His explanation was simply that "I'm assuming if you have a new competitor that that will take away some business from Wallace." But he admitted that he had done no research or investigation to verify the validity of his assumption that a competitor in an office ten miles from Wallace's would decrease Wallace's existing business. In fact, he said it was also possible that there was overall growth of business in

the area, benefitting both Wallace and appellees. Ultimately, he said he would have “a lot more questions” and would want to talk with Wallace about why his practice increased, where his patients came from, and the effect of appellees’ office on Wallace’s practice.

{¶ 36} In determining whether an expert’s opinions are reliable under Evid.R. 702(C), the trial court must determine whether the expert used reliable principles and methods, rather than whether the conclusions are correct. *Marcus v. Rusk Heating & Cooling, Inc.*, 12th Dist. No. CA2012-03026, 2013-Ohio-528, ¶ 15. (Internal citations omitted.) As gatekeeper, the trial court must assess whether the expert’s testimony is both relevant and reliable before admitting it into evidence. *Id.* at ¶ 16. “Expert testimony may not be based on mere speculation.” *Rose v. Truck Centers, Inc.*, 611 F.Supp.2d 745, 750 (N.D. Ohio 2009), citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 112 S.Ct. 2786. Assumptions upon which the expert bases his or her opinions must be supported by evidence in the factual record. *Id.* at 751.

{¶ 37} From our review of Dr. Cohen’s report and his deposition testimony, his calculations were merely speculative. He reviewed no data to inform his opinions and listed a number of items that he wanted to—but did not—review in calculating Wallace’s economic loss. Had he done any of the things he said he wanted to do, perhaps he could have articulated a basis for his assumptions. Instead, it appears that the overall state of the economy and his unsupported assumptions about people’s practices in seeking dental care in times of a depressed economy provided the only foundation for his projections.

See, e.g., Proctor v. CNL Income Fund IX, Ltd., 6th Dist. WD-04-027, 2005-Ohio-1223, ¶ 23 (affirming trial court’s exclusion of expert testimony which was based only on “hyperbole, doubtful sources, and vague generalizations”). The trial court did not abuse its discretion in striking Dr. Cohen’s affidavit and report.

III. Wallace’s Third Assignment of Error:

The trial court erred in granting summary judgment on the second cause of action when it concluded that there was no genuine issue of material fact as to appellant’s damages for its fraud claim.

{¶ 38} To overcome a summary judgment motion in an action for fraudulent misrepresentation or concealment, a plaintiff must demonstrate that genuine issues of material fact remain as to each of the following elements: (1) a representation or, when a duty to disclose exists, concealment of a fact, (2) material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent to mislead another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *E.g., Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 491 N.E.2d 1101(1986), paragraph two of the syllabus.

{¶ 39} The trial court found that questions of fact existed as to the first five elements of Wallace’s fraudulent misrepresentation claim, but held that Wallace failed to present admissible evidence of damages, thus defeating his claim. The trial court reached

this conclusion primarily based on its exclusion of Dr. Cohen's damages calculations. The court reasoned that the only measure of Wallace's damages came from Dr. Cohen's report and because Dr. Cohen's report had been stricken, there was no information before it that would allow a fact-finder to compute Wallace's damages. We disagree.

{¶ 40} “A person injured by fraud is entitled to such damages as will fairly compensate him for the wrong suffered; that is, the damages sustained by reason of the fraud or deceit, and which have naturally and proximately resulted therefrom.” *Reinbolt v. Kern*, 6th Dist. No. WD-12-041, 2013-Ohio-1359, ¶ 61, citing *Foust v. Valleybrook Realty Co.*, 4 Ohio App.3d 164, 166, 446 N.E.2d 1122 (6th Dist.1981). Generally, once a plaintiff establishes a right to damages, those damages will not be denied because they cannot be calculated with mathematical certainty. *D.A.N. Joint Venture III, L.P. v. Med-XS Solutions, Inc.*, 11th Dist. No. 2011-L-056-980, 2012-Ohio-980, ¶ 36. (Citations omitted.) Nevertheless, damages must be ascertainable with reasonable certainty and will not be awarded based on mere speculation and conjecture. *Id.*

{¶ 41} To survive appellees' summary judgment motion, Wallace was required to present evidence of the existence of damages—not the specific method of calculation or amount of damages. *See, e.g., Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 75 L.Ed. 544 (1931) (“There is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount.”) Wallace did that. In addition to Dr. Cohen's opinions, which we held were properly

stricken, Wallace testified at deposition and argued in his summary judgment opposition that he paid his staff to participate in training on Corner Dental's computer system. He also indicated that he devoted numerous hours to reviewing floor plans for the new Corner Dental office, providing insight as to dental practices in Bowling Green, participating in the production of marketing materials, and generally preparing to be a Corner Dental dentist. He postponed upgrades to his existing practice and also turned over patient lists to appellees.

{¶ 42} The court in *McGinnis v. Lawrence Economic Dev. Corp.*, 4th Dist. No. 02CA33, 2003-Ohio-6552, ¶ 35, considered a similar issue. In *McGinnis*, the defendant, a community improvement corporation, was developing riverfront property in an industrial park known as "The Point" and was negotiating with plaintiff concerning its possible involvement in the project. Unbeknownst to plaintiff, defendant had signed an agreement with one of plaintiff's competitors in which that business would relocate to The Point. After plaintiff spent time negotiating with defendant and submitted sketches, defendant informed plaintiff of its agreement with plaintiff's competitor. Plaintiff brought an action for fraud, negligent misrepresentation, defamation, and intentional interference with business relationships. In its complaint, plaintiff alleged that if it had known that defendant had already signed an agreement with its competitor, it would have devoted its resources to other endeavors. On defendant's motion for summary judgment, it was not disputed that a genuine issue of material fact existed as to all the elements of plaintiff's claims except damages. Plaintiff argued that it had been damaged because if it

had known that defendant was negotiating with its competitor, it would have submitted a competing offer; it was damaged by the use of public funds to locate a competitor right next door to plaintiff's property; and the competing business would affect plaintiff's business and its ability to bid on large contracts. Plaintiff asserted that it would later establish the specific amount of damages. The court held that in outlining the type of damages it suffered, including loss of business and loss of time and resources, it had successfully created a genuine issue of material fact sufficient to survive summary judgment.

{¶ 43} As in *McGinnis*, even without Dr. Cohen's damages calculations, Wallace presented evidence concerning his assistance to appellees and his diversion of resources. He should have been permitted to proceed to a jury on his fraudulent misrepresentation claim.

{¶ 44} Because we agree with Wallace that the trial court erred in finding that he presented no evidence of damages, we find Wallace's third assignment of error well-taken.

E. Conclusion

{¶ 45} The trial court properly held that no contract had been formed and it properly struck Wallace's expert's report and affidavit. However, the trial court erred in finding that no genuine issue of material fact existed as to the damages element of Wallace's fraud claim. We, therefore, find Wallace's third assignment of error well-taken, and we find his first and second assignments of error not well-taken. The

judgment of the trial court is affirmed in part and reversed in part, and this case is remanded to the trial court for proceedings consistent with this decision. The costs of this appeal are assessed to appellees pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.