

[Cite as *Occhionero v. Cox*, 2009-Ohio-3891.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92334

RONALD L. OCCHIONERO, D.D.S.

PLAINTIFF-APPELLEE

vs.

PAUL COX

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Shaker Heights Municipal Court
Case No. 07 CVF 01646

BEFORE: Cooney, A.J., Rocco, J., and Dyke, J.

RELEASED: August 6, 2009

JOURNALIZED:
FOR APPELLANT

Paul Cox, pro se
16311 Fernway Rd.
Shaker Heights, Ohio 44120

ATTORNEYS FOR APPELLEE

Richard J. Kaplow
808 Rockefeller Building
614 Superior Avenue N.W.
Cleveland, Ohio 44113

John F. Gannon
55 Public Square, Suite 930
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Paul Cox (“Cox”), appeals the municipal court’s grant of summary judgment to plaintiff-appellee, Ronald L. Occhionero, D.D.S. (“Occhionero”) and its dismissal of Cox’s counterclaim. Finding no merit to the appeal, we affirm.

{¶ 2} This case arose in October 2007, when Occhionero sued Cox to collect fees for dental services. In November 2007, Cox filed a pleading entitled “Answer,” in which he counterclaimed that Occhionero had committed dental malpractice. Occhionero filed a motion for more definite statement in April 2008, requesting an affidavit of merit pursuant to Civ.R. 10(D)(2). The trial court granted this motion and ordered Cox to comply by May 19, 2008. Cox produced a notarized letter from Dr. Benjamin Hornstein, D.D.S. (“Hornstein”), which Occhionero claimed did not comply with Civ.R. 10(D)(2). Occhionero moved for summary judgment in July 2008. In September 2008, the trial court granted summary judgment, awarding Occhionero \$1,192.55 with interest, and dismissed Cox’s counterclaim.

{¶ 3} Cox now appeals, raising five assignments of error for our review.

{¶ 4} In the first assignment of error, Cox claims that the trial court erred in granting summary judgment because it failed to accept his expert’s affidavit. It appears from the record that the trial court did not grant Occhionero

summary judgment on Cox’s malpractice claim; rather, it dismissed Cox’s malpractice claim. The relevant journal entry reads:

“Plaintiff’s Motion for Summary Judgment is granted. Plaintiff awarded judgment against Defendant in the amount of \$1,192.55 together with interest from the date of judgment and court costs. Defendant’s counterclaim is dismissed.”

{¶ 5} Accordingly, we construe this assignment of error as challenging the trial court’s dismissal of Cox’s malpractice claim.

{¶ 6} Civ.R. 10(D)(2) requires that a complaint asserting a dental malpractice claim must include an “affidavit of merit” from an expert witness who meets the requirements of Evid.R. 601(D) and 702. The affidavit must show that the affiant (1) has reviewed all relevant medical records that are reasonably available to the plaintiff, (2) knows the applicable standard of care, and (3) has determined that the defendant breached the standard of care, causing the plaintiff’s injury. Civ.R. 10(D)(2)(a); *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, ¶5. If a party fails to submit such an affidavit, the trial court may dismiss the complaint without prejudice. *Fletcher* at ¶13.

{¶ 7} Cox’s “expert affidavit” did not comply with Civ.R. 10(D)(2)(a) for several reasons. First, it was not an affidavit. “An affidavit is a written declaration under oath[.]” R.C. 2319.02; *Moss v. Bush*, 104 Ohio St.3d 1443, 2004-Ohio-7119, 819 N.E.2d 1125. Hornstein did not swear to his letter’s

contents under oath but merely signed the document before a notary, who acknowledged that Hornstein was indeed the person who signed the document.

{¶ 8} Next, Hornstein did not state that he was familiar with the applicable standard of care, nor did he opine that Occhionero had breached the standard of care to cause Cox's injury. In fact, the letter never mentions Occhionero or his treatment of Cox.

{¶ 9} Accordingly, the trial court properly rejected the document and dismissed Cox's malpractice claim as the holding in *Fletcher* allows.

{¶ 10} In the second assignment of error, Cox claims that the trial court erred in granting summary judgment when it accepted that the statute of limitations had expired on his dental malpractice claim. Because we have concluded that the trial court did not grant summary judgment on Cox's counterclaim, we overrule this assignment of error.

{¶ 11} In the third assignment of error, Cox argues that the trial court erred in allowing Occhionero to answer his counterclaim after the statutory 30-day deadline had elapsed.

{¶ 12} Cox filed his answer and counterclaim on November 30, 2007, and on January 30, 2008, over 60 days later, Occhionero filed a motion to extend the time to answer. The trial court granted this extension on February 1, and Occhionero filed the answer on February 6.

{¶ 13} The trial court acted within its discretion in granting the extension. Loc.R. 17 of the Shaker Heights Municipal Court governs the grant of extensions to filing deadlines, and the trial court may exercise discretion in applying its local rules. See *Roth v. Roth*, Cuyahoga App. No. 89141, 2008-Ohio-927, ¶21, citing *Boieru v. State Emp. Relations Bd.* (1988), 54 Ohio App.3d 23, 560 N.E.2d 801. We cannot conclude that the trial court abused its discretion in granting the extension, particularly because Cox has not shown that he was prejudiced. Accordingly, we overrule the third assignment of error.

{¶ 14} In the fourth assignment of error, Cox claims that the trial court erred in requiring the parties to file dispositive motions before Occhionero had responded to Cox's discovery requests. Cox, however, has not cited any legal authority to support this assignment of error, violating App.R. 16(A)(7), which requires that appellate briefs cite legal authority to support each assignment of error. Because he has not met his burden to prove the fourth assignment of error, we overrule it.

{¶ 15} In the fifth assignment of error, Cox alleges that the trial court erred in granting summary judgment to Occhionero, awarding \$1,192.55 plus costs. Cox has not separately argued this claim in his brief. App.R. 12(A)(2) provides that we may disregard an assignment of error if the party raising it does not argue it separately. Therefore, we disregard this assignment of error.

Judgment is affirmed.

It is ordered that appellee recover of appellant 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 municipal court 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.

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

KENNETH A. ROCCO, J., and
ANN DYKE, J., CONCUR