[Cite as *Kinasz v. Diplomat Healthcare*, 2016-Ohio-2949.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103758

MARY KINASZ, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JUSTYNA KINASZ (DECEASED)

PLAINTIFF-APPELLANT

vs.

DIPLOMAT HEALTHCARE, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-831276

BEFORE: Keough, P.J., S. Gallagher, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: May 12, 2016

ATTORNEY FOR APPELLANT

Richard O. Mazanec
Richard O. Mazanec Co., L.P.A.
1422 Euclid Avenue, Suite 500
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEES

For Diplomat Health Care, et al.

Leslie Moore Jenny
Kenneth W. McCain
Marshall, Dennehey, Warner & Coleman
127 Public Square, Suite 3510
Cleveland, Ohio 44114

For Cleveland Clinic Foundation, et al.

Erin Siebenhar Hess
Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115

KATHLEEN ANN KEOUGH, P.J.:

{¶1} Plaintiff-appellant, Mary Kinasz, as personal representative of the estate of Justyna Kinasz ("appellant"), appeals from the trial court's decision granting summary judgment in favor of defendants-appellees, Diplomat Healthcare, Diplomat Healthcare, L.L.C., Saber Healthcare Group, Saber Healthcare Group, L.L.C., Saber Healthcare Holdings, L.L.C., Saber Healthcare Foundation, George S. Repchick, William I. Weisberg, Cleveland Clinic Foundation, Cleveland Clinic Health System, and Fairview Hospital (collectively "appellees"). For the reasons that follow, we affirm.

{¶2} On August 14, 2012, appellant filed a complaint alleging medical malpractice against appellees. The complaint was filed without the necessary affidavit of merit as required pursuant to Civ.R. 10. The case was subsequently voluntarily dismissed under Civ.R. 41 on August 12, 2013.

{¶3} The complaint was refiled on August 15, 2014, again without the necessary affidavit of merit, but with a request for an extension to file the affidavit pursuant to Civ.R. 10(D)(2)(b), which was granted. The court subsequently conducted a case management conference and ordered that appellant submit her expert report by May 20, 2015.

{¶4} On November 11, 2014, appellant filed two affidavits of merit. However, appellees moved to dismiss the case pursuant to Civ.R. 12(B)(6) alleging that the affidavits were deficient and failed to comply with Civ.R. 10(D).

{¶5} While the motion to dismiss was pending, the deadline for appellant to submit an expert report passed. On May 21, 2015, the day after the deadline, appellees moved for summary judgment on the basis that appellant failed to produce an expert report in accordance with Loc.R. 21.1 of the Court of Common Pleas of Cuyahoga County, General Division; thus, appellant could not establish a prima facie claim for medical negligence.

{¶6} The trial court conducted a settlement conference on August 21, 2015 and sua sponte granted appellant twenty-one days to file an opposition to appellees' motion for summary judgment. In that same order, the trial court denied appellees' motion to dismiss.

{¶7} Appellant failed to respond to appellees' motion for summary judgment, and failed to file an expert report pursuant to Loc.R. 21.1 and the trial court's October 31, 2014 case management order. Accordingly, on October 31, 2015, the trial court granted appellees' motion for summary judgment finding that "reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that [appellees] are entitled to judgment as a matter of law."

{¶8} Appellant appeals this judgment, raising as her sole assignment of error that the trial court improperly granted summary judgment in favor of appellees because her affidavits of merit in support of her complaint create a genuine issue of material fact.

{¶9} Before addressing this issue and as noted above, appellant failed to file a brief in opposition to appellees' motion for summary 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. Trumbull No. 98-T-0117, 1999 Ohio App. LEXIS 4976, *5 (Oct. 22, 1999), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. Such failure constitutes a waiver of the right to raise the error on appeal. *Warren* at *id*., citing *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986). Because appellant failed to raise the issue asserted in her assignment of error with the trial court, the issue is waived. For this reason alone, appellant's assignment of error lacks merit.

{¶10} Nevertheless, and addressing the assignment of error raised, this court has previously rejected the argument that an affidavit of merit in support of a medical malpractice complaint creates a genuine issue of material fact to defeat summary judgment. *Schura v. Marymount Hosp*., 8th Dist. Cuyahoga No. 94359, 2010-Ohio-5246.

> 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* or used for purposes of impeachment." (Emphasis added.) 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. [Summit] 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, 908 N.E.2d 495, ¶ 87 (7th Dist). 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.

Id. at ¶ 28; *see also White v. Summa Health Sys*., 9th Dist. Summit No. 4283, 2008-Ohio-6790; *Babcock v. Albrecht*, 11th Dist. Lake No. 2010-L-150, 2012-Ohio-1129.

{¶11} Appellant's affidavits of merit include only the bare conclusory statements referenced in Civ.R. 10(D). The affidavits from Dr. Tim Klein, M.D., and Jewell Morgan, R.N., C.L.N.C., stated that they each reviewed Justyna Kinasz's medical and vital statistic records, and that they were individually familiar with the applicable standard of care. The affidavit of Dr. Klein stated that it was his "opinion that to a reasonable degree of medical certainty that the applicable standard of care was breached by Diplomat Health nursing home * * * and by Fairview Hospital * * * and that each breach caused injury to Justyna Kinasz." The affidavit of Ms. Morgan stated that it was her "opinion to a reasonable degree of certainty, that the applicable standard of care was breached by one or more of the employees of Fairview Hospital and by one or more employees of the Diplomat Healthcare [n]ursing [h]ome with respect to the care they provided to Justyna Kinasz."

{¶12} However, the affidavits do not set forth facts that would allow them to be used as an expert report. Specifically, the affidavits do not state the recognized prevailing standard of care; how the employees or agents of Diplomat Health nursing home, Fairview Hospital, or any of the other defendants failed to meet the standard of care; or how the alleged breach caused Justyna Kinasz injury. Thus, while the affidavits

of merit complied with the minimal requirements of Civ.R. 10, they were insufficient to constitute an expert report. *See Babcock*. Therefore, appellant's argument on appeal has no merit. This court must still decide, however, whether summary judgment was properly granted.

{¶13} An appellate court reviews the trial court's judgment regarding a summary judgment motion de novo, using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Civ.R. 56(C) provides that summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc*., 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998); *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). A party seeking summary judgment bears the initial burden of demonstrating an absence of genuine issues of material fact concerning an essential element of an opponent's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A moving party may satisfy this burden by showing an absence of evidence to support the nonmoving party's case. Once the moving party has satisfied this burden, the nonmoving party then has the burden to set forth specific facts showing there is an issue for trial. *Id*.

{¶14} In this case, appellees moved for summary judgment contending that appellant failed to comply with the court's October 31, 2014 case management order requiring her expert report to be filed by May 20, 2015. Appellees maintained that because appellant failed to submit an expert report as required by Loc.R. 21.1 in support of her allegations, she should be precluded from presenting any expert testimony at trial. Without any expert testimony, appellees argued, appellant would be unable to establish a prima facie case of medical negligence. Accordingly, appellees maintained that no genuine issues of material fact remained as to appellees' liability.

{¶15} Appellant did not respond to appellees' motion for summary judgment and she failed to submit an expert report in the interim to defeat the allegations in appellees' motion for summary judgment. Civ.R. 56(E) specifically states that where a litigant opposing a motion for summary judgement fails to respond to the motion, "summary judgment, if appropriate, shall be entered against him." *See Toledo's Great E. Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc*., 24 Ohio St.3d 198, 494 N.E.2d 1101 (1986).

{¶16} Loc.R. 21.1, Part I: Expert Witness, states in relevant part:

> (A) * * * each counsel shall exchange with all other counsel written reports of medical and expert witnesses expected to testify in advance of the trial. The parties shall submit expert reports in accord with the time schedule established at the Case Management Conference. * * * Upon good cause shown, the court may grant the parties additional time within which to submit expert reports.
>
> (B) A party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. * * *

> An expert will not be permitted to testify or provide opinions on issues not raised in his report.

Furthermore, subsection (C) provides that all "non-party experts must submit reports." The subsection further discusses the procedure and process upon which a party is unable to obtain a written report from a non-party expert.

{¶17} Pursuant to Loc.R. 21.1, the decision as to whether a party has complied with the rule and the appropriate sanctions for noncompliance is within the sound discretion of the trial court. *See Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged*, 15 Ohio St.3d 44, 472 N.E.2d 704 (1984) (exclusion of expert report from evidence at trial upheld where proponent failed to timely exchange expert's report in accordance with Loc.R. 21.1).

{¶18} In this case, the trial court did not issue an order specifically excluding any or all of appellant's expert testimony and opinion. However, by granting appellees' motion for summary judgment, the court implicitly excluded any expert appellant wished to use at trial pursuant to Loc.R. 21.1. Appellant does not challenge on appeal that the trial court's implicit exclusion of expert testimony was an abuse of discretion thereby waiving the issue on appeal. *See* App.R. 12(A)(2) and 16(A).

{¶19} Nevertheless, we find that the trial court's decision to exclude expert testimony as a sanction for failing to comply with Loc.R. 21.1 was not an abuse of discretion. During the course of the proceedings, the trial court gave appellant ample time and opportunity to comply with its October 31, 2014 case management order and to file a brief in opposition to summary judgment. Despite this leniency, appellant failed to

submit an expert report, offer an explanation why she was unable to do so, or seek any additional time to submit her report. Furthermore, appellant failed to respond to summary judgment. Accordingly, the trial court acted within its discretion when it implicitly excluded any expert testimony potentially offered by appellant.

{¶20} It is settled law in Ohio that in order to prevail in a medical malpractice claim, a plaintiff must demonstrate through expert testimony that, among other things, the treatment provided did not meet the prevailing standard of care. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131-132, 346, N.E.2d 673 (1976). A recognized exception to the rule requiring expert testimony exists where the nature of the case is such that the lack of skill or care of the medical professional is so apparent as to be within the comprehension of a layperson and requires only common knowledge and experience to understand and judge it. *Id.* at 130.

{¶21} In this case, appellees argued in their motion for summary judgment that without any expert testimony, appellant would be unable to establish a prima facie case of medical negligence, i.e., unable to produce any evidence to demonstrate the applicable standard of care, a breach of that standard of care, and how that breach proximately caused Justyna Kinasz's injury. Therefore, appellees satisfied their initial burden of establishing that no genuine issue of material facts exists concerning essential elements of appellant's medical negligence case.

{¶22} Without an expert report, which was properly excluded by the trial court, and no argument that the medical malpractice claims fall under the exception to the

medical expert requirement, appellant failed to satisfy her reciprocal burden of presenting evidence to demonstrate that a genuine issue of material fact exists, or that an exception to the general rule requiring expert testimony exists in this case. Accordingly, no genuine issue of material fact exists and, on this record, appellees were entitled to judgment as a matter of law. The trial court did not err in granting summary judgment in favor of appellees.

{¶23} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR