



malpractice action against Dr. Rostami and Digestive Care, alleging that they failed to properly diagnose Thomas Engle's rectal cancer. Engle attached the affidavit of Dr. David A. Mororwitz, a gastroenterologist, who opined in conclusory terms that Dr. Rostami's negligence caused injury to Thomas Engle. This affidavit of merit was required by Civ.R. 10(D)(2).

{¶ 3} In August, the defendants moved the court to exclude Engle's experts upon the ground that Engle had failed to produce a single expert for a deposition, despite numerous requests dating back two years. (Defendants apparently were referring to matters that occurred in a previous action, which was voluntarily dismissed by Engle pursuant to Civ.R. 41.) Defendants also sought summary judgment. The docket and journal entries related to the previous action are not part of this appellate record. Defendants' counsel represented to the court that he had made six previous written requests to depose the Engles' experts, and had received no response. Dr. Rostami submitted her own conclusory affidavit that she committed no malpractice in her treatment of Thomas Engle.

{¶ 4} In response, Engle's attorney stated in a memorandum that discovery depositions were delayed because Thomas Engle was still receiving treatment for his rectal cancer. Also, Engle's counsel argued that Civ.R. 56 was not the proper vehicle to enforce alleged discovery violations. Counsel noted that defense counsel had not certified to the court in writing the existence of a discovery impasse, as provided for in Civ. R. 37(E). He also argued that the affidavit of merit attached to the complaint demonstrated that summary judgment for the defendants was not appropriate.

{¶ 5} In granting summary judgment for defendants, the trial court noted that the

plaintiffs filed no evidentiary material disputing Dr. Rostami's opinion that she was not negligent in the care of Thomas Engle.

{¶ 6} The Engles moved for relief from that judgment pursuant, to Civ.R. 60(B)(1) and (5). Counsel for the Engles contended that he had believed in good faith that the defendants' motion for summary judgment was premature, because genuine issues of material facts would be demonstrated during the depositions of the plaintiffs' experts. Secondly, counsel stated that he had believed in good faith that Dr. Morowitz's affidavit of merit would suffice to defeat the defendants' motion for summary judgment. Lastly, counsel argued the court should grant the Engles' relief from the summary judgment, because meritorious claims should be resolved on their merits, particularly where the plaintiffs had already incurred considerable litigation expenses. The Engles supplied the affidavit of Dr. Morowitz, who opined that Dr. Rostami deviated from the proper standard of care by failing to discover Thomas Engle's tumor during a March 17, 2004 colonoscopy, or by digital examination at that time. Counsel ignored case law submitted to the trial court demonstrating that Dr. Morowitz's affidavit of merit was inadmissible as evidentiary material under Civ.R. 56(C).

{¶ 7} In granting the Engles' motion for relief, the trial court noted that they had presented evidence of a meritorious claim, that the motion had been made in a reasonable time and that their counsel's conduct was not so egregious as to exhibit disregard for the judicial system. The court noted that although counsel should have sought a continuance to complete discovery, pursuant to Civ.R. 56(F), he did not ignore the defendants' motion for summary judgment. The court noted that counsel argued before the trial court that summary judgment should not be granted because discovery depositions had not been completed. Lastly, the

court noted that counsel's reliance on Dr. Morowitz's affidavit of merit was not so egregious as to exhibit a complete disregard for the judicial system. The court noted that although counsel's reliance on Dr. Morowitz's affidavit was misplaced, the Supreme Court of Ohio and this court had yet to rule on the competency of an affidavit of merit to combat a summary judgment motion in a malpractice action.

## II

{¶ 8} In the defendants' sole assignment of error, they contend the trial court erred in vacating the judgment in their favor by finding that the Engles' counsel's knowing exercise of professional judgment constituted excusable neglect, pursuant to Civ.R. 60(B)(1).

{¶ 9} Defendants note that the neglect of a party's attorney will, as a general rule, be imputed to the party for the purposes of Civ.R. 60(B)(1). Defendants argue that the Engles' attorney made a professional judgment to rely, incorrectly, on Dr. Morowitz's affidavit of merit, and should be held accountable for that decision. Defendants cite the case of *Argo Plastic Prod. Co. v. Cleveland* (1984), 15 Ohio St.3d 389. In that case the Supreme Court of Ohio held that a trial court had not abused its discretion by refusing to grant relief, pursuant to Civ.R. 60(B)(1), to the City of Cleveland when an assistant city law director settled a lawsuit for an amount beyond his authority.

{¶ 10} Attorney negligence, although imputable to the client, is nevertheless a basis for relief if it is excusable. *Moore v. Emanuel Family Training Ctr.* (1985), 18 Ohio St.3d 64. Attorney negligence is excusable if it does not fall substantially below what is reasonable under the circumstances, *Moore*, supra, at 68, or does not exhibit a complete disregard for the judicial system. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146.

{¶ 11} The decision whether to grant relief pursuant to Civ.R. 60(B) is commended to the sound discretion of the trial court. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, at 77. We conclude that the trial court was within its discretion in deciding that the Engles’ counsel’s conduct was not so egregious as to exhibit a disregard for the judicial system. The Engles’ counsel did not completely ignore the defendants’ summary judgment motion. Counsel did note that discovery had not been completed. Counsel’s reliance on the Civ.R. 10(D) affidavit was not wholly unreasonable, in view of the fact the trial court had previously ruled that the affidavit was admissible to combat a summary judgment motion. In addition, despite the apparently clear language of Civ. R. 10(D), neither this court nor the Supreme Court of Ohio had ruled to the contrary. The Engles’ motion for relief was timely, and included the affidavit of the expert physician who had established the meritorious claim. The defendants’ sole assignment of error is overruled.

III

{¶ 12} The defendants’ sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY, P.J., FAIN and FROELICH, JJ., concur.

Copies mailed to:

- Thomas J. Intili
- Danielle A. Groves
- Patrick K. Adkinson
- Hon. Timothy N. O’Connell