

**IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO**

<b>DANIEL McCARTY</b>	:	<b>CASE NO. 14-CV-00559</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	<b>JONATHAN P. HEIN, JUDGE</b>
	:	
<b>BRIAN MIHOK, D.O., et. al.</b>	:	
	:	
<b>Defendants.</b>	:	<b><u>JUDGMENT ENTRY</u></b>
	:	<b><u>OF DISMISSAL</u></b>

This matter came before the Court on the Defendants motion filed November 14, 2014 to dismiss pursuant to Civil Rule 10(D)(2). The Plaintiff filed various documents in response to the Court's Notice dated November 19, 2014 and the matter is ready for determination.

This matter involves allegations of negligence by the Defendants when providing medical care to the Plaintiff. As such, the provisions of Civil Rule 10(C)(2) set forth the minimum requirements of the complaint:

***Rule 10. Form of Pleadings***

***(D) Attachments to pleadings.***

*(1) Account or written instrument. When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.*

*(2) Affidavit of merit; medical liability claim.*

*(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic*

claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown and in accordance with division © of this rule, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed ninety days, except the time may be extended beyond ninety days if the court determines that a defendant or non-party has failed to cooperate with discovery or that other circumstances warrant extension.

\* \* \*

(d) An 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. Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.

In this matter, the Plaintiff has failed to comply with the mandates

of Civil Rule 10(D)(2). The failure to attach an expert

*report with the complaint is a jurisdictional defect which prevents the Court from proceeding with the case. Accordingly, the Court finds that the Defendants' motion should be granted.*

Regarding the nature of the dismissal, Civil Rule 10(D) clearly states that the dismissal shall be “otherwise than on the merits.” This determination goes to the question of whether the action could later be refiled, which implicates provisions of Civil Rule 41. The Court will not recite the entirety of Civil Rule 41, but merely state that Civil Rule 41 permits the Court to determine whether the dismissal permits a subsequent refiling (if within the savings statute of R.C. 2305.19). See also *Schulte v. Wilkey*, 2010-Ohio-5668 (12<sup>th</sup> Dist.)

**IT IS, THEREFORE, ORDERED AND DECREED** that the Complaint filed herein is dismissed, without prejudice, pursuant to Civil Rule 41(B)(1). FINAL APPEALABLE ORDER.  
Costs to Plaintiff, per Local Rule 1(F).

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**Jonathan P. Hein, Judge**

cc: Daniel McCarty, Plaintiff, 3072 Washington Road, Rossburg, 45362  
Patrick K. Adkinson, Attorney for Defendants (via fax)

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