

**IN THE COURT OF APPEALS OF IOWA**

No. 9-196 / 08-1544  
Filed April 22, 2009

**SHIRLEY MEDICAL CLINIC, INC. and  
the ESTATE OF WILLIAM SHIRLEY,**  
Plaintiffs-Appellants,

**vs.**

**TODD A. SCHWEIZER, MARK MCDONALD,  
JEFFREY BRUCE, NANCY MCDONALD,  
BETTS SCHWEIZER, and JOCELYN K. BRUCE,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Plaintiffs appeal the district court order dismissing their action based on issue preclusion due to an earlier lawsuit. **AFFIRMED.**

Kathryn S. Barnhill of Barnhill & Associates, P.C., West Des Moines, for appellants.

Michael Lewis of Lewis Law Firm, P.C., Cambridge, for appellees.

Considered by Vogel, P.J., and Vaitheswaran, J., and Robinson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**ROBINSON, S.J.****I. Background Facts & Proceedings**

On December 21, 2007, Shirley Medical Clinic and the estate of William Shirley filed suit against Todd and Betts Schweizer, Mark and Nancy McDonald, and Jeffrey and Jocelyn Bruce. The suit alleged William Shirley had been the sole shareholder of Shirley Medical Clinic, and Shirley Medical Clinic had purchased certain assets from BACA Corporation. The petition also stated defendants were the officers, directors, and shareholders of Spectrum Prosthetics & Orthotics, Inc. (Spectrum), and that Spectrum was a tenant of BACA. The suit raised claims of nuisance, negligent interference with the use and enjoyment of the leased premises, and tortious interference with a contract.

Defendants filed a motion to dismiss, asserting these issues had previously been raised as counterclaims in *Spectrum Prosthetics & Orthotics, Inc. v. BACA Corp.*, which resulted in a judgment for Spectrum on February 26, 2008.<sup>1</sup> Defendants asserted plaintiffs' claims in this action were barred under the doctrine of res judicata. Plaintiffs resisted the motion, asserting the parties in the present lawsuit were different than those in the previous lawsuit.

The district court issued an order on July 8, 2008, dismissing the action. The court noted the parties in the first action were Spectrum, BACA, and the officers and shareholders of these companies. The court stated that in the first action BACA raised counterclaims of breach of contract, nuisance, tortious interference with contract, and negligent interference with the use and enjoyment of

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<sup>1</sup> No documents from *Spectrum Prosthetics & Orthotics, Inc. v. BACA Corp.*, were submitted as exhibits in the present case. Our only information about the previous lawsuit comes from references in the documents filed in this case.

leased premises. The district court found the issues raised in this action were the same as those raised in the previous action. The court also found the parties in the second action were in privity to those from the first action. The court concluded:

The privity issue is a close call since the parties in the second suit are actually different from those in the first. However, the Court finds that there is sufficient privity of parties such that Plaintiffs should be precluded from re-litigating the same issues again.

The court additionally determined, “the claims raised by Plaintiffs in the second lawsuit are compulsory claims and should have been raised in the first lawsuit since they arise out of the same transaction—the lease agreement.”

Plaintiffs filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) asserting there was no privity between BACA and Shirley Medical Clinic, and raising several new factual issues. Defendants resisted the motion. The district court overruled the rule 1.904(2) motion. Plaintiffs appeal.

## **II. Standard of Review**

Our review of the district court’s ruling on the motion to dismiss is for the correction of errors at law. Iowa R. App. P. 6.4. The district court’s factual findings have the effect of a jury verdict and are subject to challenge only if they are not supported by substantial evidence in the record. *Bartsch v. Bartsch*, 636 N.W.2d 3, 5 (Iowa 2001). A motion to dismiss admits, and is decided solely upon, all facts well pleaded. *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 831 (Iowa 1983).

### III. Analysis

We first note, “[t]he appellant has the duty to provide a record on appeal affirmatively disclosing the alleged error relied upon.” *In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007). It is the appellant’s responsibility to provide the appellate court with a sufficient record to decide the appeal. *Smith v. Iowa Bd. of Med. Exam’rs*, 729 N.W.2d 822, 827 (Iowa 2007). Under Iowa Rule of Appellate Procedure 6.10(2)(c), “If appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.” The decision of a district court may be affirmed because the appellant failed to present a proper record on appeal. See *In re F.W.S.*, 698 N.W.2d 134, 136 (Iowa 2005).

The district court record in this case does not contain any documents, filings, or exhibits from the previous lawsuit.<sup>2</sup> Furthermore, although there is a certificate in the file stating the hearing on the motion to dismiss was reported, and the ruling indicates testimony was taken, no transcript was submitted with the appeal. We do not consider information outside the record. See Iowa R. App. P. 6.10(1) (stating what constitutes the record on appeal); *Rasmussen v. Yentes*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994) (stating we do not consider evidence outside the record).

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<sup>2</sup> The appendix contains copies of some filings from *Spectrum Prosthetics & Orthotics, Inc. v. BACA Corp.*, but these documents are not in the district court file submitted to us on appeal. Therefore, we are unable to consider these documents. See Iowa R. App. P. 6.10(1).

We are mindful that motions to dismiss are not favored and, since the advent of motion pleading, it is the rare case that will not survive a motion to dismiss. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994); *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991). Nevertheless, the parties jointly participated in a contested hearing resulting in fact finding.

On the limited record available to us, we conclude plaintiffs, as the appellants, failed to support their claims that the district court erred in its factual findings and conclusions.

We affirm the decision of the district court.

**AFFIRMED.**