

**ORIGINAL**

FILED  
COURT OF CLAIMS  
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2013 MAR 19 PM 3: 22

LYNDSEY HOWELL

Plaintiffs

v.

OHIO UNIVERSITY POLICE  
DEPARTMENT

Defendants

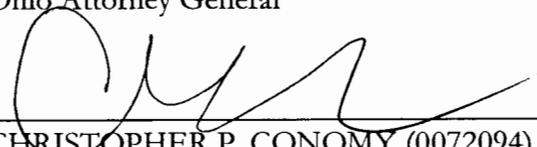
CASE NO. 2013-00001

MAGISTRATE HOLLY T. SHAVER

**DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR DEFAULT JUDGMENT AND  
MOTION FOR LEAVE TO FILE ANSWER INSTANTER**

Defendant Ohio University respectfully asks this Court to grant it leave to file its Answer to the Complaint instanter and to deny Plaintiff's Motion for Default Judgment. Defendant's counsel prepared to file the Answer in a timely manner and simply failed to present the Answer to the Court just before being out of the office for a week with medical issues, which constitutes excusable neglect under Civ.R. 6(B). Therefore leave to file an Answer instanter should be granted. Furthermore, Plaintiff will not be prejudiced as a default may not be entered against the State without evidence. Civ.R. 55(D). A Memorandum in Support is attached.

Respectfully submitted,  
MICHAEL DEWINE  
Ohio Attorney General

  
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COUNSEL FOR DEFENDANT

**ON COMPUTER**

## MEMORANDUM IN SUPPORT

Defendant Ohio University failed to timely file an Answer the Complaint through the fault of counsel, who was prepared with an Answer but simply failed to present it to this Court through an administrative oversight. However, Plaintiff cannot be granted a default judgment in this case without presenting evidence under Civ.R. 55(D). Under these circumstances, Defendant should be granted leave to file an Answer instanter.

Under Civ.R. 55(D), “No judgment by default shall be entered against this state, a political subdivision, or officer in his representative capacity or agency of either unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” Plaintiff’s Motion for Default Judgment presents no evidence, and therefore cannot support a default judgment as to liability as she requests. Because she is required to present evidence in any event, she will not be prejudiced by the University’s request to file an Answer at this time, as very little time has passed since the date on which undersigned counsel should have presented the Answer to this Court.

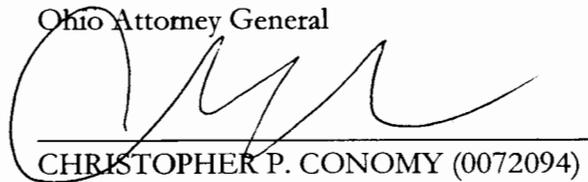
Under Civ.R. 6, this Court has discretion to extend a defendant’s answer date. *State ex rel. Lindenschmidt v. Board of Comm'rs*, 72 Ohio St. 3d 464, 650 N.E.2d 1343 (1995). Though counsel could have handled his schedule better, undersigned counsel was out of the office for a CAT scan on Tuesday Feb. 5 and for abdominal surgery on Feb. 6, which surgery prevented him from driving for a week and left him with restrictions for several weeks. The Answer should have been filed that Monday, Feb.4, but counsel was simply distracted in managing his affairs at that time. Counsel was kept out of work for longer than anticipated as the result of the surgery and failed to realize that the date to file an answer had slipped by, although preparations to file the Answer had been made. Thus, excusable neglect applies in this case and the University should be granted leave to file an Answer instanter under Civ.R. 6(B). “The determination of

whether neglect is excusable or inexcusable must take into consideration all the surrounding facts and circumstances, and courts must be mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds.” *Id.* at 466. Furthermore, the standard for “excusable neglect” under Civ.R. 6(B) is less stringent than that for “excusable neglect” necessary to seek relief after judgment has been entered pursuant to civ.R. 60(B). *Id.*

Given the circumstances in this case, where excusable neglect should allow the untimely filing of an Answer and where Plaintiff is not prejudiced because she is required to present evidence in any event, the University respectfully asks this Court for leave instanter to file the proposed Answer that is presented to the Clerk for filing along with this Memorandum and Motion, and to deny Plaintiff’s Motion for Default Judgment.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



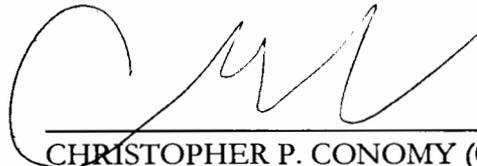
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**CERTIFICATE OF SERVICE**

On March 19, 2013, a copy of this document was served via regular mail on the following:

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