ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

LYNDSEY HOWELL	:	
	:	
Plaintiff	:	Case Number: 2013-00001
	:	
-V-	:	
	:	Judge: McGrath
THE OHIO UNIVERSITY	:	
POLICE DEPARTMENT	:	Magistrate: Shaver
	:	
Defendant	:	

2013 MAR 26 AM 11:08
FILED
COURT OF CLAIMS
OF OHIO

PLAINTIFF'S MOTION TO STRIKE FRIVOLOUS PLEADINGS

PLAINTIFF'S REPLY MEMORANDUM

MEMORANDUM CONTRA DEFENDANT'S MOTION
FOR
LEAVE TO PLEAD INSTANTER

Now comes the Plaintiff by and through her Trial Attorney of Record and hereby Moves the Court for such Orders as may be just and necessary to strike those portions of the Defendant's Answer as are frivolous and without merit.

Further Moving Plaintiff requests such other and further relief as may be reasonable just, and proper.

RESPECTFULLY SUBMITTED,

VINCENT DePASCALE, Trial Attorney
786 NORTHWEST BOULEVARD
GRANDVIEW HEIGHTS, OH 43212
(614) 298-8200 S.C. # 0013227
ATTORNEY FOR LINDSEY HOWELL

ON COMPUTER

SUPPORTING MEMORANDA

No question exists that the Court has the power to extend an answer date. No question exists that the exercise of such power is within the sound discretion of the Court. No question exists that the Court must exercise its discretion and not rubber stamp whatever the Attorney General wants.

Plaintiff's Counsel did not attempt to secure a Default Judgment immediately upon the running of the Answer date, nor did he do so within a week or two of such time. In fact, Plaintiff's Counsel waited 40 days past the Answer date before requesting Judgment by Default.

In the 28 days during which the Answer was due, Defendant's Counsel had knowledge of the identity, address, and telephone number of Plaintiffs's Counsel and the opportunity to call or write Counsel herein and request an extension of the Answer date or leave to plead at some other time; this did not occur. There is no evidence that Defendants's Counsel is a sole practitioner, as is Plaintiff's Counsel, and in fact Defendant's Counsel appears to be a chief of section for the Attorney General so there are others who could have performed the above actions if he were unable to do so on any given day. Also, there is no evidence that Defendant's Counsel's medical condition was an emergency so he had notice that he would have been out of the office and had the opportunity for himself or one of his subordinates to perform one of the above actions. Plaintiff's Counsel has been practicing law for some 46 years and comes from

an era where professionalism and accommodation to another attorney were the norm rather than the exception and counsel for the Defendant would have freely been given such time to plead as was necessary had a timely and proper request been made. Defendant's Counsel and/or his staff did nothing required of an Attorney.

A simple telephone call or letter a week after the Answer date had run would have generated the same response. Defendant's Counsel and/or his staff did nothing required of an Attorney.

What we have here, however, is a totally different set of facts:

1. The Answer is not tendered until approximately 50 days after it was due under the law;
2. The Answer is not tendered until after Plaintiff has waited more than a reasonable time and asked for Default Judgment on the issue of liability only, and a date for a damages hearing;
3. The Answer is not tendered until the Court has failed to either grant the Motion for Default, or deny same for a stated reason which Plaintiff could cure, within a 10 day period;
4. The Motion for leave to plead, and the Answer is not tendered, until somehow the Defendant learns that the Motion was filed.

Further, while Defendant's Counsel was reading O CIR R 6, O CIR R 55, and O CIR R 60 he should have read O CIR R 11.

Paragraph 6 of the Complaint which Defendant's Counsel has denied states :

> "So far as Plaintiff knows, Eric Hoskinson was at all relevant times acting within the scope of his authority as an Officer of the Ohio University Police Department, and the Ohio University, despite the fact that he was doing so in a grossly negligent manner."

Counsel herein will be astounded if the evidence in this case would show that:

1. Eric Hoskinson was not at all relevant times a sworn officer with the Ohio University Police;
2. That he did not sign a Criminal Complaint against the Plaintiff alleging that he was a sworn officer with the Ohio University Police;
3. That the Ohio University Police did not provide him with a uniform, a badge, a firearm, and a marked cruiser;
4. That officer Hoskinson did not represent to a Court in Athens County that he was at all relevant times acting as an Ohio Peace Officer in the performance of his duty.

Paragraph 16 of the of the Complaint which Defendant's Counsel has denied states that Ms Howell had her thumb broken, incurred medical expenses, underwent medical treatment, and suffered pain. Hoskinson took Ms Howell to the hospital after he injured her.

Paragraph 17 of the of the Complaint which Defendant's Counsel has denied states:

> Police are taught a procedure for handcuffing an arrestee specifically designed to prevent the type of injury suffered by Ms Howell and obviously Officer Eric Hoskinson failed to use such procedure.

Counsel herein will be astounded if the evidence in this case would show that Eric Hoskinson did not go through a Basic Training School as required by the *Attorney General* and that he was not taught basic handcuffing procedures which are specifically designed to avoid and prevent such injuries as were suffered by Ms Howell.

Even more egregious are the "Additional Defenses" termed Affirmative Defenses in O CIV R 8:

1. "The Complaint fails to state a claim for relief." The Complaint states that Officer Hoskinson, acting as an Ohio University Police Officer, broke a bone in the hand of the Plaintiff while handcuffing her in an improper manner, and that such injury caused pain and medical costs. That is a claim for relief and to deny such is frivolous.
2. The Complaint is barred by the Statute of Limitations. The applicable statute or limitations in this case is two (2) years; Plaintiff filed in less than one (1). Such denial is frivolous.

3. The Complaint is barred by the doctrine of laches. The doctrine of laches only applies when a Party waites so long as to prejudice the ability of the opposing Parties to defend themselves before the Courts. On these facts such a denial is frivolous.

4. Plaintiff's alleged damages are not the direct result of the incident alleged in the Complaint. Plaintiff's hand was not broken prior to her arrest, her thumb was broken after she was handcuffed, nothing else occurred. On these facts such a denial is frivolous.

5. The damages of Plaintiff were the result of intervening or superseding acts outside the control or the duty of the Defendant. No one was present but Ms Howell and Officer Hoskinson, no one handcuffed Ms Howell but Hoskinson, and there were no other parties. On these facts such a denial is frivolous.

6. Plaintiff was solely negligent. Plaintiff did not handcuff herself. On these facts such a denial is frivolous.

7. Assumption of Risk. No-one assumes the risk of having bones broken from being improperly handcuffed. On these facts such a denial is frivolous.

From the forgoing the only conclusion is that the Defendant is grasping at straws that have no basis in law or fact. Allowing the Defendant to file an Answer

approximately 50 days out of Rule so that it can allege defenses that are clearly improper is not a proper exercise of the sound discretion of the Court but is a gift to the Defendants at the expense of a Plaintiff who gave the Defendants more than a 30 day extension before asking for justly deserved relief.

Further, Defendants are still entitled to a damages hearing at which they are entitled to appear and present whatever evidence they may have to show that the injuries suffered by Ms Howell:

1. Could not have been caused by being handcuffed.
2. That she did not suffer pain.
3. That she did not incur medical expenses.
4. That her ability to perform the hands-on portions of her training was not hampered or impinged.
5. Should not generate any monetary recovery in any amount for any reason.

In reality, the damages hearing will cure virtually all of the deficiencies that Defendant's Counsel claims.

What denying Defendant's Motion for leave to plead will not prevent is the filing of an O CIV R 56 Motion for Summary Judgment that will be as equally frivolous as the Additional Defenses presently claimed by Defendant.

Counsel for Defendant is probably correct in his assertion that an O CIV R 6 Motion grants him more latitude than an O CIV R 60 Motion but again he wants all of

the benefits of the law and none of the detriments that he has caused and he is not entitled to such benefits simply because he demands them.

I seriously doubt that Plaintiff would be granted such leniency if she missed her response date to an O CIV R 56 Motion for Summary Judgment by 50 days, failed to ask anyone for an extension, and then claimed excuse for problems that only took a week and were known in advance; or failed to respond to a request for admissions by such almost 2 mkonths and then filed pro-forma denials that were as unrealistic as Defendant's Answers.

Plaintiff is entitled to fairness and equity every bit as much as the Defendant.

Certainly the situation would be different if Defendant had tendered an Answer that merely denied that the injuries suffered by the Plaintiff were not as severe as she claims and that her damages, if any, were minimal. Perhaps under such circumstances the attitude of Plaintiff's Counsel would be different and the duty of the Court as to the exercise of its discretion would not be as onerous as it is under these facts.

Not only does the Court not have a duty to allow a Party to raise irrelevant, frivolous, and improper issues, the Court has an affirmative duty to deter such conduct.

On these facts, in this case, under these circumstances, the Court must deny Defendant's Motion for leave to plead, strike Defendant's Answer, and set a date for a damages hearing sufficiently far out to allow Defendants to properly prepare for such hearing.

Failing in such conduct, the Court must strike the obviously improper and frivolous portions of the Answer, and put Defendant's Counsel on notice that further frivolous conduct such as baseless motions for summary judgement will not be tolerated.

Counsel herein raises the motion for summary judgement issue up front as such a motion requires that there be no genuine issue of material fact and that movant be entitled to judgment as a matter of law, and in a case where Plaintiff claims Defendant broke a bone in her hand during an improper performance of a routine handcuffing and Defendant categorically denies the existence of such fact; where Plaintiff claims her injuries are the direct and proximate result of Defendant's conduct and Defendant denies such proximate cause; where no one else was present; there cannot be a lack of a genuine issue of material fact and the existence of a right to judgment as a matter of law.

Defendant should not be permitted to jerk Plaintiff or her attorney around simply because it can. Outside this forum there exist sanctions for frivolous pleadings and other Motions but such will not be granted against the Attorney General so Plaintiff has no remedy therefor.

VINCENT DEPASCALE
ATTORNEY FOR LYNDSEY HOWELL

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the forgoing upon Christopher Conomy, Assistant Attorney General as attorney for Defendant, this 23d day of March, 2013, by regular U.S. Mail.

VINCENT DEPASCALE
ATTORNEY FOR LYNDSEY HOWEL