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COURT OF CLAIMS  
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al.,	:	
	:	
Plaintiffs	:	
	:	
v.	:	Case No. 2010-10335
	:	
THE OHIO STATE UNIVERSITY	:	Judge Patrick M. McGrath
MEDICAL CENTER,	:	
	:	
Defendant	:	

**DEFENDANT'S MEMORANDUM CONTRA**  
**PLAINTIFF'S MOTION TO DEEM REQUESTS FOR ADMISSION ADMITTED**  
**AND**  
**DEFENDANT'S MOTION FOR LEAVE TO AMEND AND**  
**SERVE LATE RESPONSES TO REQUESTS FOR ADMISSIONS**

Now comes defendant, The Ohio State University Medical Center, and respectfully requests that this Court deny plaintiffs' motion to deem requests for admission admitted. Instead, defendant moves this Court for leave to amend its response by filing late responses to plaintiffs' requests for admissions, pursuant to Civil Rules 36 and 60. Defendant has now served plaintiffs' counsel with its responses to the requests for admissions (a copy is attached as Exhibit A) a mere six days after the twenty-eight day deadline due to the excusable neglect of its counsel. See *Affidavit of Daniel R. Forsythe*, copy attached. Most of the requests for admissions involve factual allegations, which are currently disputed between the parties. Because the courts have generally preferred to have issues determined on the merits rather than procedural constraints, this Court should deny plaintiffs' motion and instead give defendant leave to amend its response.

ON COMPUTER

**I. The Civil Rules provide defendant an opportunity to amend its response to plaintiffs' request for admissions due to the excusable neglect of its counsel.**

Pursuant to Ohio Civ. R. 36(B), Defendant respectfully requests that this Court permit defendant to withdraw and/or amend the "admissions" to reflect the responses contained in the Medical Center's response attached as Exhibit A. This is necessary because defendant has denied, at least partially, nine out of the ten requests for admissions.

Ohio Civ. R. 60(B)(1) allows this Court to grant an extension of time upon a showing of excusable neglect. As explained in the attached affidavit, defendant agrees with plaintiffs that defendant's response was due January 8, 2015. (Forsythe Aff., ¶ 4). However, Mr. Forsythe – who was assigned the task of completing the response – was out of the office for the end of year holidays from December 24, 2014 until January 5, 2015, during which time he did not conduct any work on this case, and it had been his intention to complete defendant's response when he returned to the office in the new year. (Forsythe Aff., ¶ 3). Unfortunately, upon returning to the office, he had a number of assignments to complete, and lost track of the due date for the response. (Forsythe Aff., ¶ 4). Any delay was the result of excusable neglect and not an attempt to prevent discovery or delay the proceedings. In fact, when counsel for defendant learned about plaintiffs' motion to have the requests for admissions admitted, he served the response that very same day – January 14, 2015 – six days after the due date. (Forsythe Aff., ¶ 5). Thus, defendant would request that this Court grant it leave to amend its response by serving the late responses.

Should this Court choose not to grant defendant's request for leave, and to instead deem the "admissions" admitted pursuant to Ohio Civ. R. 36(A), then defendant seeks amendment or withdrawal. Ohio Civ. R. 36(B) provides that, upon motion, the Court may permit withdrawal or amendment of the admissions. Thus, pursuant to this rule, defendant would respectfully request

that it be permitted to withdraw responses to the admissions and amend them to reflect the responses contained in its responses served on January 14, 2015 (Exhibit A).

Ohio Civ. R. 36(B) provides that "...the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits." There can be no question that allowing the defendant to amend the admissions will promote the purpose of having the case presented on the merits. Defendant disputes that the facts contained in the admissions can be proven, and unless amended, the case will be determined on false facts. Moreover, plaintiffs are not prejudiced by the amendment. The matter is not set for trial until May 26, 2015; thus, there is ample time to prepare plaintiffs' case on the merits. Moreover, based on the discovery thus far conducted, none of the denials should come as a surprise to plaintiffs.

**II. Case law supports the position that defendant should be given an opportunity to amend its response to plaintiffs' request for admissions.**

"It has always been the desire of the courts and the General Assembly to have issues determined upon their merits rather than extinguished because of procedural constraints." *Motorists Mutual Insurance Co. v. Huron Road Hospital* (1995), 73 Ohio St. 3d 391, 396. Allowing defendant the opportunity to amend the admissions to reflect the correct responses promotes this policy. The response was served just six days late. To prevent defendant from presenting its version of the facts to defend this action because of a six-day delay would not be in the interest of justice. Justice would not be served by requiring this Court to decide this case based upon facts which plaintiffs cannot otherwise prove.

In *Balson v. Dodds* (1980), 62 Ohio St. 2d 287, the Ohio Supreme Court considered a

case similar to the case at bar. In *Balson*, admissions responses were served 17 days late without any motion for leave to file the responses late. *Id.*, at 288. In addition, prior to the time the responses were filed, the opposing party filed a Motion for Summary Judgment based upon the admissions having been deemed admitted. *Id.* The Ohio Supreme Court upheld the trial Court's decision to allow amendment of the admissions. *Id.*, at 290. Essentially, the Supreme Court found that the admissions were admitted, but the late filing of responses and contesting the admissions in the summary judgment could be construed as a motion to amend pursuant to Ohio Civ. R. 36(B). *Id.* It was held to be within the trial court's discretion to allow the amendment. *Id.*, at 291.

In reaching its decision in *Balson*, the Supreme Court found that the "...presentation of the merits herein would be enhanced by permitting appellee to file untimely answers...." *Id.* The same can be said in the present case. Similarly, as in *Balson*, plaintiff in the present action has not demonstrated that the untimely answers prejudice plaintiff's ability to maintain its action on the merits. In *Balson*, the trial court found that no pecuniary loss or undue hardship resulted from the untimely answers. *Id.*, at 288. Similarly, in the present case, no such hardship has occurred. When plaintiffs filed their action, they should have anticipated having to establish their case upon the merits, and they are not prejudiced by this Court's requiring them to do so.

The present case is easily distinguished from cases where courts have allowed admissions to be deemed admitted when responses were late. For example, in *Johnstown Mfg., Inc. v. Haynes*, (1988), 53 Ohio App. 3d 42, admissions were purposely ignored for three months because the space between the admissions was only 7/8 of an inch as opposed to the one inch requirement. The court in *Haynes* deemed the admissions admitted, but noted that a motion to

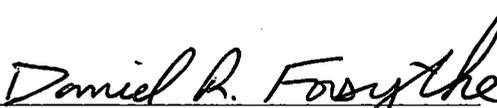
amend could have been filed, but was not. Similarly, in *Sandler v. Gossick* (1993), 87 Ohio App. 3d 372, admissions responses were served 59 days late, were unsigned, and no reason for the delay was ever offered; thus, the admissions were deemed admitted. These facts are completely different from those in the present case involving a six-day delay and where the defendant has requested permission to amend.

It is a basic doctrine of Ohio law that cases should be decided on their merits and not based upon mere procedural technicalities. See, e.g., *Barksdale v. Vanss Auto Sales, Inc.* (1988), 38 Ohio St. 3d 127; *State v. Herzing* (1985), 18 Ohio St. 3d 337; *DeHart v. Aetna Life Insurance Co.* (1982), 69 Ohio St. 2d 189. This doctrine is served by allowing defendant in this action to amend its responses to admissions. Plaintiffs need not be permitted to establish facts through procedural technicalities which cannot be proven otherwise.

Therefore, defendant respectfully requests that this Court overrule plaintiffs' motion and instead allow defendant leave to amend its response to plaintiffs' requests for admissions, which has already been served on plaintiffs' counsel on January 14, 2015.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



DANIEL R. FORSYTHE (0081391)

JEFFREY L. MALOON (0007003)

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COUNSEL FOR DEFENDANT

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing *Memorandum Contra* was served upon the following party of record by ordinary U.S. mail, postage prepaid, this 16th day of January, 2015:

David I. Shroyer  
Daniel N. Abraham  
536 South High Street  
Columbus, Ohio 43215  
*Counsel for Plaintiff*

  
DANIEL R. FORSYTHE  
Assistant Attorney General

IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al., :  
 :  
 Plaintiffs :  
 :  
 v. : Case No. 2010-10335  
 :  
 THE OHIO STATE UNIVERSITY : Judge Patrick M. McGrath  
 MEDICAL CENTER, :  
 :  
 Defendant :

**AFFIDAVIT OF DANIEL R. FORSYTHE**

STATE OF OHIO )  
 ) SS:  
 COUNTY OF FRANKLIN )

Now comes Daniel R. Forsythe, first being duly cautioned and sworn, says and deposes:

1. My name is Daniel R. Forsythe. I am an Assistant Attorney General assigned to the case of *Matthew Ries, Admr., et al. v. The Ohio State University Medical Center*, and have personal knowledge of the events set forth here;

2. As part of my duties in defending this lawsuit, I was responsible for responding to Plaintiff's (Amended) Combined First Request for Production of Documents, Requests for Admission and Interrogatories to Defendant, which was served on me on December 11, 2014;

3. Due to the end of the year holidays, I was out of the office from December 24, 2014 until January, 5, 2015, during which time I did not conduct any work on this case. It was my intention to complete the discovery responses upon returning to the office after the holidays;

4. Unfortunately, upon returning to my office, I had a number of assignments to complete and lost track of the due date for our responses, which was January 8, 2015;

5. I first learned about Plaintiffs' Motion to Deem Requests For Admission Admitted (filed on January 13, 2015) while reviewing the Court's online case docket on January 14, 2015. That same day, I served on plaintiffs' counsel, via email and U.S. Mail, Defendant's Response to Plaintiff's (Amended) Combined First Request for Production of Documents, Requests for Admission and Interrogatories to Defendant. Defendant has denied, at least partially, nine out of the ten requests for admissions, due in part to a dispute over these factual allegations.

6. Further, Affiant sayeth naught.

*Daniel R. Forsythe*  
DANIEL R. FORSYTHE

Sworn to before me and subscribed in my presence this 16<sup>th</sup> day of January, 2015.

*Lindsey M. Grant*  
NOTARY PUBLIC



Lindsey M. Grant, Attorney At Law  
NOTARY PUBLIC - STATE OF OHIO  
My commission has no expiration date  
Sec. 147.03 R.C.

IN THE COURT OF CLAIMS OF OHIO

MATTHEW RIES, Admr., et al.,

Plaintiffs

V.:

Case No. 2010-10335

THE OHIO STATE UNIVERSITY  
MEDICAL CENTER,

Judge Patrick M. McGrath

Defendant

**DEFENDANT'S RESPONSE TO  
PLAINTIFF'S (AMENDED) COMBINED FIRST REQUEST FOR PRODUCTION  
OF DOCUMENTS, REQUESTS FOR ADMISSION AND INTERROGATORIES**

**DOCUMENTS REQUESTED**

1. Complete copy of all records pertaining to documentation from nurses/medical assistants/staff or other categories of personnel for phone calls from Michael or Cyrelle McNew to an employee or agent of this Defendant (including but not limited to the offices of Dr. Husain and/or Dr. Rothbaum) from August 1 to September 30, 2009, including but not limited to the following:

1. Phone call(s) that lead up to the August 27, 2009 nurse's visit via Dr. Rothbaum's office
2. Phone call(s) that led up to the September 14, 2009 visit with Dr. Rothbaum.
3. Phone call(s) that led up to the September 15, 2009 visit with Dr. Husain.
4. Any and all calls received from, or placed to, Michael or Cyrelle McNew on September 15, 2009
5. Any and all calls received from or placed to, Michael or Cyrelle McNew on September 16, 2009.
6. Any and all calls received from, or placed to, Michael or Cyrelle McNew on September 17, 2009.
7. Any and all calls received from, or placed to, Michael or Cyrelle McNew on September 18, 2009.



**Response: Objection: overly broad and vague as the request refers to “other categories of personnel” and not relevant and the information sought is not reasonably calculated to lead to the discovery of admissible evidence as the request relates to a time period following September 18, 2009. Without waiving these objections: defendant is not in possession of any such documents.**

2. A complete copy of any and all office records, phone records, phone logs, metadata, emails, computer generated records, text messages, pager messages or other recorded or written data associated with any of the above-referenced calls.

**Response: Objection: overly broad and vague, not relevant and the information sought is not reasonably calculated to lead to the discovery of admissible evidence as the request relates to a time period following September 18, 2009. Without waiving these objections: defendant is not in possession of any such documents.**

3. A complete copy of any and all office records, phone records, phone logs, metadata, emails, computer generated records, text messages, pager messages or other recorded or written data from August 1 to September 30, 2009 associated with:

1. Dr. Husain’s pager identified in his deposition as ending with 1372.
2. Dr. Husain’s personal cell phone ending in 8813 as identified in his deposition.
3. Any other pager numbers or personal phone numbers associated with Dr. Husain

**Response: Objection: overly broad and vague, not relevant, and the information sought is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections: defendant is not in possession of any such documents.**

4. Logs, whether handwritten or maintained by computer or other recorded instrument, associated with any and all calls received from, or placed to, Michael or Cyrelle McNew, from August 1 to September 30, 2009.

**Response: Objection: overly broad and vague, not relevant, and the information sought is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections: defendant is not in possession of any such documents.**

5. Produce all itemized billing, insurance billing, patient statements, metadata and/or coding information/documentation for all contacts between OSUMC employees and/or agents and Mr. and Mrs. McNew in August/September, 2009, including but not limited to actual office visits or phone contacts, including but not limited to the August 27, 2009 "Nurse Visit".

**Response:** Please see attached document(s).

6. Copies of any and all policies, procedures, protocols or guidelines in place at OSUMC from 2009 to the present regarding the receiving of or returning of patient related phone calls applicable to the internal medicine department and/or Dr. Rothbaum's office, the surgery department and/or Dr. Husain's office, including but not limited to the documentation/recording of such phone calls, the type of information that should be obtained when receiving or responding to a patient related phone call and what subsequent steps an OSUMC employee should take upon receipt of a patient related phone call, including but not limited to policies, procedures, protocols or guidelines governing medical assistants, receptionists or other medical office staff personnel.

**Response: Objection: overly broad and vague, not relevant, and the information sought is not reasonably calculated to lead to the discovery of admissible evidence; subsequent remedial measures. Without waiving these objections: defendant is not in possession of any such documents.**

7. Copies of any and all exhibits Defendant intends to introduce into evidence at the trial of the within matter.

**Response: Unknown at this time, but will most likely include the medical records, documents which have been exchanged during discovery, and documents which have been used as exhibits during depositions. Defendant will comply with the Court's pretrial orders, regarding identifying exhibits.**

8. Copies of any and all medical literature which Defendant plans on establishing as "reliable authority" pursuant to Ohio Rules of Evidence 803(18) for use at trial.

**Response: Unknown at this time, but may include the two following articles which have already been provided to plaintiffs' counsel: (1) Shah, A., Anderson TM, Racht B., et al, Survival and cure of acute myeloid leukemia in England, 1971-2006: a population based study, British Journal of Hematology (2013); (2) Wolf, D.J., Fialk, M.A., Mouradian, J.A. et al., Unusual Intracytoplasmic Inclusions in Acute Myeloblastic Leukemia, American Journal of Hematology (1980)**

**COMBINED REQUESTS FOR ADMISSIONS AND INTERROGATORIES**

1. Admit that documentation not otherwise produced herein, pertaining to phone calls placed by Michael or Cyrelle McNew to an employee or agent of this Defendant (including but not limited to the offices of Dr. Husain and/or Dr. Rothbaum) from August 12 to September 19, 2009 was destroyed.

**Response: Objection to the form of the question and the use of the work "destroy."  
Without waiving objection: Deny.**

2. Fully describe by date, author and the content/type/purpose of any and all documentation not otherwise produced herein, pertaining to phone calls placed by Michael or Cyrelle McNew to an employee or agent of this Defendant (including but not limited to the offices of Dr. Husain and/or Dr. Rothbaum) from August 12 to September 19, 2009, and the date such documentation was destroyed.

**Response: Objection to the form of the question and the use of the work "destroy."  
Without waiving objection, defendant is unable to provide a response, but would refer plaintiff to its records management retention schedule, located online at <http://library.osu.edu/documents/records-management/general-schedule.pdf>.**

3. Admit that Michael McNew placed a phone call to an employee and/or agent of this Defendant on the morning of September 17, 2009 at approximately 8:08 a.m.

**Response: Deny.**

4. Admit that an employee and/or agents of this Defendant provided instructions by phone to Michael McNew to stop taking Tramadol due, in part to reporting bruising on September 17, 2009.

**Response: Deny.**

5. Admit that Exhibit A is a fair and accurate copy of the telephone records of Michael and Cyrelle McNew and that such records are admissible under Rules of Evidence 803(6) as business records.

**Response: Deny.**

6. Admit that telephone number 614-257-2264 was assigned to OSUMC Surgery Department as of September, 2009.

**Response: Admit.**

7. Admit that OSUMC received a phone call from the McNews on September 18, 2009 at approximately 8:04 a.m.

**Response: Deny.**

8. Admit that OSUMC received a phone call from the McNews on September 18, 2009 at approximately 2:08 p.m.

**Response: Deny.**

9. Admit that Dr. Husain called the McNews back on the afternoon of September 18, 2009 at approximately 2:32 p.m.

**Response: Admit to the extent that Dr. Husain recalls speaking with the McNews at some point during that week. However, because Dr. Husain does not recall specifically a conversation taking place at approximately 2:32 p.m. on September 18, 2009, defendant must deny.**

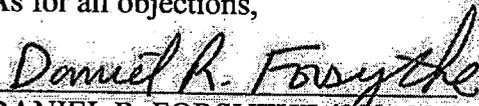
10. Admit that on September 18, 2009, Dr. Husain was told by Cyrelle McNew that Michael McNew was experiencing shortness of breath.

**Response: Deny.**

11. Admit that on September 18, 2009, Dr. Husain was told by Cyrelle McNew that Michael McNew had bruising on his arm.

**Response: Deny.**

As for all objections,

  
DANIEL R. FORSYTHE (0081391)  
Assistant Attorney General

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



DANIEL R. FORSYTHE (0081391)

JEFFREY L. MALOON (0007003)

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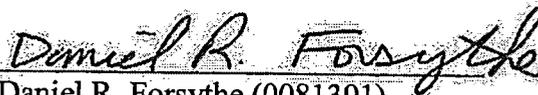
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Defendant's Response* was sent by regular U.S. mail, postage prepaid, and via email [dshroyer@csajustice.com;

dabraham@csajustice.com; cbotkin@csajustice.com; kfrazier@csajustice.com] this

14<sup>TH</sup> day of January, 2015, to:

David I. Shroyer  
Daniel N. Abraham  
536 South High Street  
Columbus, Ohio 43215  
*Counsel for Plaintiff*



Daniel R. Forsythe (0081391)

Assistant Attorney General