

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS FOR THE STATE OF OHIO

2015 JAN 23 PM 4:45

MATTHEW RIES, Admr., et al.,

Plaintiff,

Case No. 2010-10335

vs.

Judge Joseph T. Clark

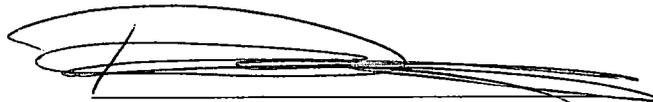
**THE OHIO STATE UNIVERSITY
MEDICAL CENTER,**

Defendant.

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

Plaintiff, by and through counsel, hereby submits the following response to Defendant's Memorandum Contra to Plaintiff's Motion to Deem Requests for Admission Admitted and Motion for Leave to Amend and Serve Late Responses To Requests for Admission.

Respectfully submitted,



Daniel N. Abraham (0023457)
David I. Shroyer (0024099)
Colley Shroyer & Abraham Co., L.P.A.
536 South High Street
Columbus OH 43215
(614) 228-6453
(614) 228-7122 (fax)
Email: dabraham@csajustice.com
Counsel for Plaintiffs

ON COMPUTER

MEMORANDUM IN SUPPORT

I. Introduction

Upon learning that Plaintiff had filed a motion asking the Court to deem his unanswered requests for admission admitted, Defendant served responses to the requests for admission, responded to Plaintiff's motion and filed its own motion for leave to amend and serve late responses to the requests for admission. Defendant's explanation for failing to timely respond is his holiday schedule and his work load upon returning to the office which caused him to miss the deadline. Defendant's explanation is not a sufficiently compelling reason to excuse his non-compliance with Civ. R. 36 and Defendant should not be permitted to now amend the default admissions or serve a late response.

II. Law and Argument

The purpose of Civ. R. 36, as well as the Civil Rules in general, is "to simplify trial procedure and facilitate a speedy resolution of lawsuits." *St. Paul Fire & Marine Ins. Co. v. Battle*, 44 Ohio App.2d 261, 269, 337 N.E.2d 806 (8th Dist. 1975). "Specifically, Civil Rule 36 provides a mechanism by which potentially disputed issues may be expeditiously resolved before trial, thereby expediting proof of these issues at trial." *Id.*

A. Plaintiff's Requests For Admission Were Intended To Establish Facts Already Developed Through Discovery.

When Plaintiff received Defendant's untimely Responses to the Requests for Admission, Plaintiff did not anticipate that Defendant would deny all but one of the requests given the discovery that had taken place. Plaintiff served the requests in an effort to narrow the issues for trial, based upon what was learned in discovery. The requests for admissions served on Defendant in this case seek the admission of basic facts which should be undisputed. For example, Plaintiff provided a copy of the telephone records of Michael and Cyrelle McNew as

Exhibit A and asked the Defendant to admit that Exhibit A was a true and accurate copy of those records and that the records are admissible under Evid. R. 803(6) as a business record. (Request for Admission, #5) Defendant was then asked to admit that certain calls reflected in the telephone records were made or received. (Requests for Admission. # 7-9) Of the eleven requests for admission, Defendant admitted only #6 – “that the telephone number 614-257-2264 was assigned to OSUMC Surgery Department as of September, 2009.” None of the requests for admission are case determinative. Rather, they are facts that should be admitted to facilitate the trial and Defendant’s unwillingness to admit these facts in the face of the evidence serves to obstruct the process.

B. Civ. R. 36 Does Not Mandate Allowing Defendant To Amend Or Serve Late Responses To Plaintiff’s Requests For Admissions.

“A request for admissions automatically establishes facts, ‘which the court must recognize,’ upon the mere passage of a stipulated time without response.” *Colopy v. Nationwide Ins. Co.*, 9th Dist. Summit No. 17019, 1995 Ohio App. LEXIS 3462, *5, quoting, *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d 66, 67, 485 N.E.2d 1052 (1985), certiorari denied, 478 U.S. 1005, 92 L.Ed.2d 710, 106 S. Ct. 3295 (1986). In *Colopy*, even assuming that the proponent of the requests for admissions would not have been prejudiced by the withdrawal of the admissions, the court still found that the trial court did not err in refusing to allow the withdrawal of the default admissions. The court reasoned that “[t]he rule does not mandate withdrawal of admissions whenever the merits are subserved and prejudice is not demonstrated; the rule states that the court ‘may’ permit withdrawal or amendment.” *Id.* at *6. The Ohio Supreme Court has stated that “under *compelling circumstances*, the court may allow untimely replies to avoid the

admissions.” *Id.* Even then, the court still has discretion to determine whether to permit withdrawal or amendment of the admissions. *Id.*

In *Colopy*, the trial court was not given a reason for the failure to timely respond to the request for admissions. Although counsel stated that the claims file was not received until after the answers were due, he did not explain his failure to request an extension of time to respond. The court held that there were no compelling circumstances to justify relief from a lack of diligence and the trial court had not abused its discretion in denying the motion to withdraw the default admissions. *Id.* at **6-7.

In this case, Defendant argues that his holiday schedule and the assignments he had to complete upon his return which caused him to lose track of the date upon which his responses were due somehow rise to the level of excusable neglect. Defendant cites no authority for applying an excusable neglect standard to excuse his failure to respond to the requests for admissions and he would be unlikely to satisfy such a standard if it were applied. Instead, courts consider whether there are “compelling circumstances” excusing the failure to respond. In both *Willis* and *JPMorgan Chase & Co. v. Indus. Power Generation, Ltd.*, 11th Dist. Trumbull No. 2007-T-0026, 2007-Ohio-6008, the court found that illness was not a compelling circumstance excusing the failure to respond. *Willis*, 20 Ohio St.3d at 67; *JPMorgan Chase* at ¶ 31. Defendant’s counsel’s holiday schedule is even less compelling.

Defendant cites *Balson v. Dodds*, 62 Ohio St.2d 287 (1980), to support allowing the amendment of the admissions in this case. While *Balson* may be instructive, it applied an abuse of discretion standard to a trial court decision to permit an amendment. *Balson* does not require this Court to permit the amendment sought here.

C. Civil Rule 60(B)(1) Does Not Provide For An Extension Of Time To Allow Defendant To Respond To Requests For Admissions.

Finally, Defendant argues that Civ. R. 60(B)(1) allows this Court to grant an extension of time upon a showing of excusable neglect. Civ. R. 60(B)(1) permits relief from a final judgment, order or proceeding for mistake, inadvertence, surprise or excusable neglect. Here, there is no final judgment, order or proceeding from which Defendant can seek relief. There is also nothing in the rule to suggest that the Court may grant an extension of time to permit Defendant to respond to the requests for admission, or any other discovery request. Civ. R. 60(B)(1) has no application whatsoever to the matter before this Court.

III. Conclusion

For the foregoing reasons, as well as those reasons stated in Plaintiff's Motion to Deem Requests for Admission Admitted, Plaintiff respectfully requests that the Court Order that Plaintiff's amended requests for admission served on December 11, 2014 be deemed admitted for the purpose of this action and that Defendant's Motion for Leave to Amend and Serve Late Responses to Requests for Admission be overruled.

Respectfully submitted,



Daniel N. Abraham (0023457)

David I. Shroyer (0024099)

COLLEY SHROYER & ABRAHAM CO. LPA

536 South High Street

Columbus, Ohio 43215

(614) 228-6453

(614) 228-7122 (fax)

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was served upon the following counsel of record via email only, this 23rd day of January, 2015:

Daniel R. Forsythe, Esq.
Jeffrey L. Maloon, Esq.
Office of the Ohio Attorney General
Court of Claims Defense Section
150 East Gay Street, Suite 1800
Columbus, OH 43215
Attorneys for Defendant



Daniel N. Abraham (0023457)
Attorney for Plaintiff