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**EXPLANATION AS TO WHY THIS CASE IS ONE OF
PUBLIC AND GREAT GENERAL INTEREST**

Ohio R. Civ. Proc. 36(B) – pertaining to requests for admission – is the most problematic and serious means of discovery in the Ohio Rules of Civil Procedure. If a proper request for admissions is made, and an opposing party fails to respond within 28 days, the facts subject to the request for admission are “deemed admitted” and thus “conclusively established.” *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67, 485 N.E.2d 1052. Such “default admissions” can have devastating effects upon a litigant, as this case aptly demonstrates.

The harsh effect of this rule is tempered by the fact that Civ. R. 36(B) recognizes that a court “on motion [may] permit withdrawal or amendment of the admission.”¹ The standard this Court has set for withdrawing or amending such admissions is whether withdrawal or amendment would “aid in presenting the merits of the case” and whether the “party who obtained the admission fails to satisfy the court that withdrawal will prejudice him in maintaining his action.” *Willis, supra* citing *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 405 N.E.2d 293, paragraph two of the syllabus. This standard “emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.” *Willis, supra* at 67.

Regrettably, many courts, including the lower courts in this case, have failed to apply the

¹. A formal motion to withdraw admissions is not required if a trial court can find that the party challenging the admissions is contesting the truth of the admissions. *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 405 N.E.2d 293, paragraph two of the syllabus; *Cheek v. Granger Trucking* (Nov. 1, 2001), Cuyahoga App. No. 78805, 2001 WL 1398454, at fn. 2, unreported; See, too, *Jade Sterling Steel Co. v. Stacey*, Cuyahoga App. No. 88283, 2007 WL 416697, 2007-Ohio-532 (“merely contesting the admissions in a motion for summary judgment meets the requirements of Civ. R. 36(B)”).

Willis standard in the manner in which this Court intended. Rather than assessing whether withdrawal or amendment of admissions would aid the presentation of the case on its merits and whether the party who obtained the admissions has justifiably relied upon those admissions in preparing for trial, a number of courts have seized on the fact that *Willis* contained language about “compelling circumstances” being necessary. As a result, these courts have erroneously focused on the reason(s) advanced for why timely responses were not provided, ignoring whether withdrawal of the admissions would aid a decision on the merits or whether the party who benefits from the admissions has justifiably relied upon those admissions in preparing for trial. The lower courts in this case erroneously focused on whether “compelling circumstances” had been shown for the default admissions and disregarded the twin inquiry that this Court has held is necessary.

As we show below, Appellants sought to withdraw default admissions just 22 days after they were made. They provided the trial court with a cogent and reasonable explanation for why the default had occurred, demonstrated with competent evidence that the facts they admitted by default were inaccurate and why withdrawal of the admissions would aid in allowing the court to make a decision on the merits, and further showed that Appellee, who requested the admissions, had no basis to claim justifiable reliance upon the admissions.

Despite these facts, the trial court focused on whether “compelling circumstances” existed to permit withdrawal of the admissions and the court of appeals below did the same. Having concluded that “compelling circumstances” for withdrawing the admissions did not exist, the trial court granted summary judgment based solely upon the “admitted” facts. The Court of Appeals affirmed.

This case thus presents an exceedingly important and recurring question as to the proper legal standard for determining whether default admissions may be withdrawn or amended. Specifically, the question presented is: Whether compelling circumstances for allowing the admissions to come into effect must be shown, or whether a court must evaluate whether withdrawal or amendment of admissions would aid in the presentation of the merits of the case and whether the party that obtained the admissions has justifiably relied upon those admissions?

As noted above, the “compelling circumstances” inquiry which the lower courts used arose from a misconstruction this Court’s decision in *Willis, supra*. In *Willis*, “compelling circumstances” were required before default admissions could be withdrawn since the request to withdraw them was made on the day of trial and because this Court found that the party who obtained them justifiably relied upon the admissions in preparing for trial.

We submit that requiring a demonstration of “compelling circumstances” for why the default occurred, without focusing on whether the merits of the case would be served by withdrawing or amending the admissions, and without considering whether there was justifiable reliance upon the admissions is an incorrect legal standard.

The importance of this question cannot be understated. There have been literally hundreds of cases decided in the last ten years based upon default admissions. As this Court recognized in *Willis*, any matter admitted under Civ. R. 36 is “conclusively established” and that such admissions become “facts of record which the courts must recognize.” *Willis, supra* at 67; Ohio R. Civ. Proc. 36(B). Frequently these “facts of record” bear little or no resemblance to the truth. For this reason, Civ. R. 36(B) recognizes that a court “on motion [may] permit withdrawal or amendment of the admission.” The proper standard that a court should apply when faced with

a request to withdraw or amend admissions is whether allowing withdrawal would aid “in presenting the merits of the case” and whether the “party who obtained the admission fails to satisfy the court that withdrawal will prejudice him in maintaining his action.” *Willis, supra* citing *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 405 N.E.2d 293, paragraph two of the syllabus. This standard “emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.” *Id.* at 67.

In the case at bar, the trial court focused on whether “compelling circumstances” justified the default which gave rise to the admissions, rather than on how the merits would be served by withdrawal, and whether Appellee justifiably relied upon the default admissions. The record will show that Appellants were not permitted to withdraw their admissions despite (1) making the request promptly after the admissions came into effect (*i.e.* within 22 days); (2) making the request very early in the case when discovery was just beginning and before even a pretrial conference had been scheduled or held; and (3) Appellee’s failure to show any justifiable reliance upon the admissions is preparing for trial.

Numerous courts have recognized that whether to permit the withdrawal or amendment of an admission is committed to the sound discretion of the court. Regrettably, a number of these courts, notably including the lower courts in this case, have seized on the “compelling circumstances” language in *Willis* to ignore the actual factors this Court said should be considered in deciding whether to permit default admissions to be withdrawn.

This case thus presents an ideal opportunity for this Court to clarify the correct legal standard for withdrawing or amending inadvertent admissions in a case where a party promptly

seeks to withdraw default admissions early on in a case and where no tenable claim of justifiable reliance is advanced. Simply put, the standard should not be whether there are “compelling circumstances” but, rather, whether the party seeking withdrawal can demonstrate that withdrawing the admissions would further the presentation of the merits of the action and whether withdrawal will prejudice the party that has obtained the admissions. This is exactly the standard that the Fifth Appellate District expressed in *Kutscherousky v. Integrated Communications Solutions, LLC*, Stark App. No. 2004 CA 00338, 2005 WL 1985228, 2005-Ohio-4275, ¶ 18.

We urge this Court to clarify *Willis* and to make it clear that a court’s focus when considering a request to withdraw admissions should not be upon whether “compelling circumstances” exist for the failure to timely answer, but upon the effects that would result from the withdrawal or amendment, viz. whether the merits of the case would be served by allowing the amendment juxtaposed against whether the party who obtained the admissions justifiably relied upon them in its preparation for trial. Given the fact that this Court has repeatedly held that cases should be decided upon their merits wherever possible, our proposed construction of Civ. R. 36 is fully justified.

STATEMENT OF THE CASE AND FACTS

William Whitehouse sustained serious injuries when he slipped and fell as he entered a restaurant owned by the Appellee in Willoughby, Ohio. Whitehouse was delivering produce to the restaurant. He pulled a handcart up a snowy ramp and fell as he was entering the building. The complaint alleged that he encountered a “dangerous condition” as he entered the building

and that this condition included, “*but was not limited to,*” an unnatural accumulation of ice. (Emphasis supplied.) Whitehouse alleged that the owner of the restaurant “knew or should have known about, but negligently failed to take steps to abate or to warn persons such as [himself] of,” the dangerous condition at the service entrance to the restaurant.²

Appellee was served with process and filed its Answer on November 21, 2006. The Answer contained mostly denials and listed 12 affirmative defenses. Appellee then served each of the Appellants with separate sets of Interrogatories and Requests for Production of Documents. At the same time, Appellee served Whitehouse with a Request for Admissions.

Appellee asked Whitehouse to admit that ice upon which he allegedly fell (he never fell on ice) was an open an obvious danger, that he saw the alleged ice before falling, that the ice was a natural accumulation, that the service entrance was not unreasonably dangerous, that he was aware before he fell that he could fall on ice, and that he assumed the risk of falling on ice.

Responses to these requested admissions were due within 28 days of service, or by December 22, 2006. However, the parties agreed that Whitehouse’s response date could be extended to January 22, 2007; a stipulation to this effect was filed on December 22, 2006. The answer date was later extended by one more week to January 29, 2007; a stipulation to this effect was filed on January 23, 2007.

Whitehouse did not respond to the requests for admissions until February 20, 2007, which was 22 days after they were due. He provided amended answers on March 2, 2007.

Nine days after the responses were due, Appellee filed a Motion for Summary Judgment (on February 7, 2007) based solely on the fact that Whitehouse had not timely responded to its

². Whitehouse’s wife, Charlene, made a separate claim for loss of consortium.

Request for Admissions. On February 21, 2007 Appellants filed a Memorandum in Opposition to the Motion for Summary Judgment. They attached two Affidavits, one from their counsel and one from a paralegal in his office, explaining why the request for admissions not been answered until February 20, 2007.³ They also asked for permission to withdraw their inadvertent admissions or, alternatively, for a extension of time to respond to the requested admissions. A true copy of the answers to the requested admissions was also provided with the Memorandum in Opposition to Summary Judgment.

Appellee filed a reply brief on February 27, 2007 opposing any withdrawal of the default admissions or any extension of time to respond thereto.

On March 2, 2007 Appellants filed a Supplemental Memorandum in Opposition to the Motion for Summary Judgment. They attached a verified copy of Whitehouse's revised answers to the requested admissions, as well has his own detailed Affidavit describing exactly how he fell and was injured on February 3, 2003. Appellees sought leave to file a surreply on March 7, 2007. The Trial Court granted leave to file the surreply on March 20, 2007. This was done within the body of its Judgment Entry granting summary judgment to Appellee.

³. These affidavits showed that timely answers to the requested admissions were prepared on Sunday, January 28, 2007. Appellants' counsel left the completed answers on a paralegal's desk with instructions that they be served the next day. As a result of back-to-back trials, counsel was not in his office for the next five days and, thus, did not realize that the answers had not been served despite his instructions and expectations. He realized this fact when, on Sunday, February 11, 2007 he read Appellee's Motion for Summary Judgment wherein it was noted that it was entirely based upon the requested admissions. Counsel was scheduled to start a medical malpractice trial in Marion County, Ohio the next morning, which continued for the remainder of the week (except for Tuesday and Wednesday when the Court was closed due to a severe winter storm). When counsel returned to his office in Cleveland, he learned that the answers he had prepared had been inadvertently commingled into a large volume of documents that the paralegal was sorting in another case and had been misplaced. These facts were verified by the paralegal in a separate affidavit.

Appellant appealed to the Court of Appeals for Lake County, Ohio on April 19, 2007. After full briefing and oral argument, the Court of Appeals, on a vote of 2-1, affirmed the decision of the Trial Court on December 24, 2007. The majority opinion said that “[w]e agree with the trial court that appellants must set forth ‘compelling circumstances’ to justify their failure to respond to the request for admissions.” *Whitehouse v. Customer is Everything!, Ltd.*, (Lake App. No. 2007-L-269), 2007 WL 4497850, 2007-Ohio-6936, ¶ 34.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A request to withdraw an admission under Civ. R. 36(B) should be based upon whether the merits of the dispute would be subserved thereby and whether the party that obtained the admissions justifiable relied upon the admissions.

The focus of a trial court when considering a motion to withdraw admissions should not be on whether there are “compelling circumstances” that justified failure to timely respond to the admissions, whether as an initial matter or as an ultimate legal standard. Rather, consistent with *Willis, supra*, the focus must be upon (1) whether the merits of the case would be served by allowing the admissions to be withdrawn or amended; and (2) whether the party that secured the admissions justifiably relied upon the admissions in preparing for trial. This has long been the law in Ohio as announced by this Court in *Willis* and *Balson*, both *supra*. The notion that “compelling circumstances” must be shown for failing to timely respond in the first place is misplaced and ignores this Court’s precedents. Further, it is not a reasoned interpretation of Civ. R. 38(B) and is contrary to the well-established principle in Ohio that cases should be decided

upon their merits wherever possible.

The lower courts in this case misinterpreted and misapplied Civ. R. 38(B) to require much more than “excusable neglect” for not timely responding to requests for admissions. By focusing on why Appellants were a mere 22 days late in responding to the requests for admissions, the lower courts ignored Appellants’ demonstration that withdrawal and/or amendment of the admissions strongly favored a decision on the merits, and the fact that, under no circumstances, could or did the Appellee demonstrate justifiable reliance upon the admissions in preparation for trial.

The decision of the majority of the court of appeals below ignored that the case was nowhere near trial (in fact, no interaction with the trial court had yet occurred) and that discovery was just beginning.

The focus on whether there were “compelling circumstances” for allowing withdrawal or amendment of the admissions was simply the wrong focus and the wrong legal standard. As a result, the judgment should be reversed.

Proposition of Law No. 2. Requiring a demonstration of compelling circumstances is far too harsh a standard for deciding if just cause exists for withdrawing default admissions.

Ohio R. Civ. Proc. 6(B), to the extent it is applicable to a request to withdraw default admissions, requires a party to demonstrate “excusable neglect” for permitting an act to be done after the time for doing so has passed. It is well settled that “excusable neglect” under Civ. R. 6(B) requires considerably less than “excusable neglect” under Ohio R. Civ. Proc. 60(B). See, *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 650 N.E.2d 1343,

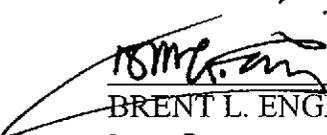
1995-Ohio-49 (“Although excusable neglect cannot be defined in the abstract, the test for excusable neglect under Civ. R. 6(B)(2) is less stringent than that applied under Civ. R. 60(B).”

The lower court’s application of a “compelling circumstances” standard is far more stringent than the “excusable neglect” standard in Civ. R. 6(B) or, for that matter, in Civ. R. 60(B). While we do not urge that parties seeking to withdraw default admissions must demonstrate “excusable neglect,” we staunchly deny that a far higher standard of “compelling circumstances” be applied. Simply put, there is no justification for such a standard. Rather, the focus should be on the effects of withdrawing the admissions (whether the merits would be served thereby and whether the adverse party would be adversely affected by virtue of having justifiably relied upon the admissions in preparing for trial). The lower courts in this case clearly erred by not applying the correct standard and then by imposing a Draconian legal standard where no justification for that standard exists.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellants respectfully request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,


BRENT L. ENGLISH

LAW OFFICES OF BRENT L. ENGLISH
Attorney for Appellants, William and Charlene Whitehouse

PROOF OF SERVICE

I hereby certify that a true and complete copy of Appellants' Memorandum in Support of Jurisdiction was served by first class U.S. Mail, postage prepaid, upon Beverly A. Adams, Esq., Attorney for Appellee, The Customer is Everything!, Ltd., d.b.a. Avenue Grill & Bar, Davis & Young, LPA, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, Ohio 44114-2654 on this ~~7th~~ day of February 2008.


BRENT L. ENGLISH

LAW OFFICES OF BRENT L. ENGLISH
Attorney for Appellants, Bill and
Charlene Whitehouse

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

WILLIAM WHITEHOUSE, et al., : OPINION

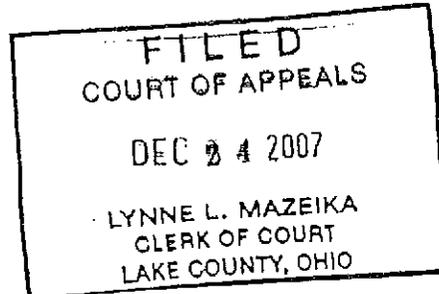
Plaintiffs-Appellants, :

CASE NO. 2007-L-069

- vs - :

THE CUSTOMER IS EVERYTHING!, LTD., d.b.a. AVENUE GRILLE & BAR, et al., :

Defendants-Appellees. :



Civil Appeal from the Court of Common Pleas, Case No. 06 CV 002516.

Judgment: Affirmed.

Brent L. English, Law Offices of Brent L. English, 470 M.K. Ferguson Plaza, 1500 West Third Street, Cleveland, OH 44113-1422 (For Plaintiffs-Appellants).

Kristi L. Haude, Davis & Young, L.P.A., 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114 (For Defendants-Appellees).

TIMOTHY P. CANNON, J.

{¶1} Appellants, William Whitehouse and Charlene Whitehouse, appeal from the March 20, 2007 judgment of the Lake County Court of Common Pleas granting the motion for summary judgment of appellee, The Customer is Everything!, Ltd., d.b.a Avenue Grille & Bar. For the reasons stated below, we affirm the judgment of the trial court.

{¶2} On February 3, 2003, William Whitehouse, while in the scope of his employment with Premier Produce, Inc., delivered produce to appellee. Mr. Whitehouse slipped and fell as he was entering the service entrance of appellee.

{¶3} On October 25, 2006, appellants, Mr. Whitehouse and his wife, Charlene Whitehouse, filed a complaint in the Lake County Court of Common Pleas. In this complaint, appellants alleged "Defendants *** caused, permitted and allowed a dangerous condition to develop and exist at the service entrance including, without limitation, an unnatural accumulation of ice." Appellants further alleged "the service entrance was unreasonably dangerous on February 3, 2003 at 10:00 a.m." Mr. Whitehouse alleged he sustained bodily injuries as a "direct and proximate cause of the fall." Mrs. Whitehouse alleged loss of love, support, services, and consortium of her husband as a direct result of the negligence of appellee.

{¶4} Appellee timely filed an answer on November 21, 2006, pleading among other affirmative defenses, assumption of risk and the open and obvious doctrine. On November 18, 2006, appellee propounded discovery requests upon appellants, including request for admissions of Mr. Whitehouse.

{¶5} The responses to the request for admissions were due by December 22, 2006. Appellants' counsel, on December 21, 2006, requested a 30-day extension until January 22, 2007. An appropriate stipulation was filed with the trial court on December 22, 2006. Again, on January 22, 2007, appellants' counsel requested an additional seven days, or until January 29, 2007, to file the request for admissions. A stipulation was filed reflecting the additional extension. Appellants did not respond.

{¶6} Appellee moved for summary judgment on February 9, 2007. As part of the motion for summary judgment, appellee sought to have the admissions served upon appellants admitted since appellants failed to respond. Attached to appellee's motion for summary judgment was a copy of the request for admissions. Appellants failed to respond to the following request for admissions:

{¶7} "Admit that the ice upon which you slipped and which gives rise to your Complaint was an open and obvious danger.

{¶8} "Admit that you observed the ice upon which you slipped and which gives rise to your Complaint prior to stepping onto the ice.

{¶9} "Admit that the ice upon which you slipped and which gives rise to your Complaint was the result of a natural accumulation of ice and/or snow.

{¶10} "Admit that the service entrance was not unreasonably dangerous on February 3, 2003.

{¶11} "Admit that prior to the incident which gives rise to your Complaint you were aware of the potential dangers of slipping and falling on ice.

{¶12} "Admit that you assumed the risk of slipping and falling on ice when you decided to step onto the ice near the service entrance.

{¶13} "Admit the darkness did not cause or contribute in any way to the slip and fall which gives rise to your Complaint."

{¶14} Appellants timely replied to appellee's motion for summary judgment on February 21, 2007. In that memorandum, appellants claimed they "should be permitted to withdraw their accidental admissions or, alternatively, given an additional 21 days from January 29, 2007 to serve responses thereto." Appellants attached an affidavit of

their counsel, which stated he had prepared the admissions on Sunday, January 28, 2007, and left them on the desk of his paralegal with instructions to be served the next day. However, the admissions were inadvertently misplaced with other documents. Since appellants' counsel was in Richland County for the next week due to two trials, he did not know the admissions were not served. Further, appellants attached, as an exhibit, their responses to the request for admissions.

{¶15} Appellee filed its reply brief on February 27, 2007. Appellants filed a supplemental memorandum in opposition on March 2, 2007, attaching revised responses to appellee's request for admissions and an affidavit of Mr. Whitehouse. In his affidavit, Mr. Whitehouse states:

{¶16} "As I pulled the dolly in, I slipped on the floor, fell onto my back, and the cases of produce fell over onto me. *** I examined the floor and found it to be very slippery. Someone had spilled something on the floor which made it very slippery. I had my work boots on. I had never before encountered such a slippery floor in that establishment. I am certain that I did not slip on water and that some foreign material had been spilled on the floor."

{¶17} Appellee filed a surreply on March 7, 2007.

{¶18} The trial court issued a March 20, 2007 judgment entry granting appellee's motion for summary judgment. From this judgment, appellants filed a timely notice of appeal.

{¶19} Appellants' first assignment of error states:

{¶20} "The trial court abused its discretion and committed reversible error by not permitting appellants to withdraw their inadvertent admissions."

{¶21} Appellants assert the trial court abused its discretion by not withdrawing the admissions. Requests for admission are governed by Civ.R. 36, which provides, in pertinent part:

{¶22} **“(A) Availability; procedures for use**

{¶23} “*** Each matter of which an admission is requested shall be separately set forth. The party to whom the requests for admissions have been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within a period designated in the request, *** the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, or signed by the party or by the party’s attorney. ***

{¶24} **“(B) Effect of admission**

{¶25} “Any matter admitted under this rule is conclusively established *unless the court on motion permits withdrawal or amendment of the admission*. Subject to the provisions of Civ.R. 16 governing modification of a pretrial order, 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.” (Emphasis added.)

{¶26} When a party fails to timely respond to the request for admissions, “the admissions [become] facts of record which the courts must recognize.” *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67. It is within the trial court’s discretion whether it will allow the withdrawal of admissions. *Szigeti v. Loss Realty Group*, 6th Dist. No. L-

03-1160, 2004-Ohio-1339, at ¶19. Further, whether to accept the filing of late responses to requests for admissions is also within the trial court's discretion. *Sandler v. Gossick* (1993), 87 Ohio App.3d 372, 378. (Citations omitted.) Therefore, "[u]nder compelling circumstances, the court may allow untimely replies to avoid the admissions." *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d at 67.

{¶27} The issue in this case is not whether this court would have allowed the admissions to be filed after expiration of the second extension of time. The manner and specifics with which a trial court directs and controls discovery in its civil cases rests with the sound discretion of the trial court. Unless the trial court has abused its discretion, an appellate court will not disturb a trial court's decision in this regard. "The term "abuse of discretion" connotes more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary or unconscionable." (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. This court must be mindful of the fact that when applying the abuse of discretion standard, we "may not substitute [our] judgment for that of the trial court." *Women's Care, Inc. v. Belcher*, 5th Dist. No. 2004-CA-0047, 2005-Ohio-543, at ¶29, citing *S. Ohio Coal Co. v. Kidney* (1995), 100 Ohio App.3d 661, 667.

{¶28} In order to support their argument, appellants cite *Kutscherousky v. Integrated Communications Solutions, LLC*, 5th Dist. No. 2004 CA 00338, 2005-Ohio-4275, where the Fifth Appellate District found the trial court abused its discretion by not permitting withdrawal of the admissions when the appellant was nine days late in answering a request for admissions. In the judgment entry in *Kutscherousky*, the trial court noted that before it could determine "whether or not the Plaintiff would be

prejudiced by the withdrawal of admissions, the Court must first determine whether or not there is a compelling reason to accept the Defendant's late responses to the request for admissions." Id. at ¶21. The *Kutscherousky* Court disagreed with the trial court's analysis. The *Kutscherousky* Court noted Civ.R. 36 does not mention excusable neglect. Id. at ¶17. Moreover, although the Supreme Court of Ohio, in *Willis*, supra, at 67, held "under compelling circumstances, the court may allow untimely replies to avoid admissions," *** the request to withdraw admissions [in *Willis*] was made on the first day of trial." Id. at ¶22.

{¶29} The Fifth Appellate District stated the test for withdrawal or amendment of admissions has two prongs: "[f]irst, the court must look to whether the 'presentation of the merits will be subserved' by allowing the amendment. Second, the court must address whether the withdrawal will prejudice the party that has obtained the admissions." Id. at ¶18. The *Kutscherousky* Court noted that since both prongs of the test were satisfied, the trial court erred in granting the appellee's motion to deem request for admissions admitted and further erred when it denied the motion to withdraw said admissions. Id. at ¶18-30.

{¶30} However, in the dissent, Judge Wise maintains the party seeking withdrawal of the admissions must set forth "compelling circumstances" in support of the request, as recognized by the Supreme Court of Ohio. Id. at ¶48. (Wise, J., concurring in part and dissenting in part.) See, also, *Cleveland Trust Co. v. Willis*, supra, at 67. This requirement is in addition to those set forth in Civ.R. 36(B). Id.

{¶31} Therefore, "if the party seeking to withdraw the admissions sets forth 'compelling circumstances' for the late filing of the answers to the requests for

admissions, the trial court must next determine whether the withdrawal of the admissions will aid in presenting the merits of the case. [*Cleveland Trust Co. v. Willis*, supra.] Finally, if the trial court determines that withdrawal of the admissions will aid in the presentation of the case, the burden shifts to the party who obtained the admissions to establish that withdrawal will prejudice him or her in maintaining their action.” Id. at ¶49.

{¶32} As stated in Judge Wise’s dissent, examples of instances where a trial court has used the “compelling circumstances” analysis include: *Albrecht, Inc. v. Hambones Corp.*, Summit App. No. 20993, 2002-Ohio-5939 at ¶15; *Natl. City Bank v. Moore* (Mar. 1, 2000), Summit App. No. 19465, 2000 Ohio App. LEXIS 723, at *6; *Amer. Cunningham, Brennan, Co., L.P.A. v. Sheeler* (Apr. 28, 1999), Summit App. No. 19093, 1999 Ohio App. LEXIS 1995, at *4; *Sullinger v. Moyer* (Aug. 6, 1997), Mahoning App. No. 96 C.A. 152, 1997 Ohio App. LEXIS 3605, at *20; *Loveday v. Wolny* (July 16, 1997), Medina App. No. 2617-M, 1997 Ohio App. LEXIS 3037, at *9; *Mgmt. Recruiters-Southwest v. Holiday Inn-Denver* (Apr. 23, 1997), Medina App. No. 2582-M, 1997 Ohio App. LEXIS 1609, at *4; *Colopy v. Nationwide Ins. Co.* (Aug. 23, 1995), Summit App. No. C.A. No. 17019, 1995 Ohio App. LEXIS 3462, at *6; *Kurelov v. Szabo* (Sept. 8, 1994), Cuyahoga App. No. 66292, 1994 Ohio App. LEXIS 3994, at *7; and *Gwinn v. Dave Dennis Volkswagen* (Feb. 8, 1988), Greene App. No. 87-CA-56, 1988 Ohio App. LEXIS 450, at *7. Id. at ¶50.

{¶33} In the case sub judice, the trial court found that appellants failed to provide compelling circumstances to justify a withdrawal of the admissions. Appellants urged the trial court to withdraw their Civ.R. 36(A) admissions since the failure to respond was

inadvertent, accidental, and excusable. Appellants informed the trial court that appellants' counsel prepared the admissions on January 28, 2007 and left them on his paralegal's desk to be served; however, the admissions were accidentally misplaced by his paralegal. Appellants' counsel stated he did not become aware of the fact that the admissions were not served until appellee moved for summary judgment on February 9, 2007. Additionally, appellants claim appellee clearly did not demonstrate any prejudice that would result from the withdrawal of said admissions.

{¶34} We agree with the trial court that appellants must set forth "compelling circumstances" to justify their failure to respond to the request for admissions. In the instant case, the reasons appellants provide do not constitute compelling circumstances that would suggest the trial court abused its discretion. See *Thompson v. Weaver* (Aug. 7, 1998), 6th Dist. No. WD-97-099, 1998 Ohio App. LEXIS 3595 (Where the appellant argued "he unsuccessfully tried to contact appellees' attorney 'just prior to the deadline and after' to request additional time in which to respond. Appellant's lack of success in such an eleventh-hour effort [could] not be considered a 'compelling' reason to accept late admissions.") See, also, *Willis*, supra, at 67 (The trial court determined Willis failed to set forth a compelling reason for the late filing of the responses. Willis claimed he was ill.) Further, appellee was entitled to rely on the Civ.R. 36(A) admissions as proof of potentially disputed fact. Therefore, we cannot say that the trial court abused its discretion in accepting the admissions based upon appellants' failure to timely provide answers.

{¶35} The first assignment of error is overruled.

{¶36} Appellants' second assignment of error states:

{¶37} "The trial court erred by *sub silentio* denying appellants' request for an enlargement of time within which to respond to the requests for admission."

{¶38} Civ.R. 6(B) gives the trial court discretion to grant extensions of time to respond to pleadings in the case of excusable neglect. The rule provides, in pertinent part:

{¶39} "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion ***, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect ***." Civ.R. 6(B).

{¶40} A determination under Civ.R. 6(B)(2) rests within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.* (1995), 72 Ohio St.3d 464, 465. (Citations omitted.)

{¶41} The trial court, when determining whether neglect is excusable or inexcusable, must take into consideration all surrounding facts and circumstances. *Marion Production Credit Assn. v. Cochran* (1989), 40 Ohio St.3d 265, 271. (Citations omitted).

{¶42} "Examples of instances where a court might find excusable neglect include the following: the party had neither knowledge nor notice of the pending legal action; counsel of record suffers from personal and family illness; and counsel of record fails to appear for trial because he has not received notice of a rescheduled trial date."

Reimund v. Reimund, 3d Dist. No. 5-04-52, 2005-Ohio-2775, at ¶15. (Citations omitted.)

{¶43} Moreover, "a majority of the cases finding excusable neglect also have found unusual or special circumstances that justified the neglect of the party or attorney." *Id.*, citing *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20. Therefore, under Civ.R. 6(B)(2), the trial court had to decide whether there was excusable neglect that would have permitted appellants to respond to the request for admissions beyond January 29, 2007.

{¶44} In order to justify the untimely response, appellants' counsel asserts he prepared the responses to the request for admissions on Sunday, January 28, 2007. The responses were placed on his paralegal's desk for service, but the paralegal "inadvertently misplaced them as he was sorting through other documents in a complex environmental case on January 29, 2007." Appellants claim that this inadvertent misfiling delay constitutes excusable neglect.

{¶45} Under the facts and circumstances of the instant case, we determine the trial court reasonably concluded that appellants' counsel's inadvertence to respond to the request for admissions did not constitute excusable neglect. Therefore, an extension of time to respond to the request for admissions was not justified. Appellants' counsel was served with the request for admissions on November 18, 2007. The responses to the request for admissions were due on December 22, 2006. After two extensions of time, the responses were due on January 29, 2007. However, appellants' attorney never responded to the request for admissions.

{¶46} Moreover, while appellants' counsel averred that he received appellee's motion for summary judgment on February 7, 2007, he did not learn of, or read, appellee's motion for summary judgment until February 11, 2007. Appellants' counsel cites to other legal obligations as the reason for the delay. Furthermore, although appellants' counsel read appellee's motion for summary judgment on February 11, 2007, he did not respond until February 20, 2007. Again, appellants' counsel cites to other legal obligations for the delay.

{¶47} Applying the law to the facts of this case, we cannot say that the trial court abused its discretion under the standards set forth herein. Accordingly, the second assignment of error is without merit.

{¶48} Appellants' third assignment of error states:

{¶49} "The trial court erred in granting summary judgment to the appellee."

{¶50} In order for a motion for summary judgment to be granted, the moving party must prove:

{¶51} "(1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶52} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, *written admissions*, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material

fact ***." Civ.R. 56(C). (Emphasis added.) Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.*, (1986), 477 U.S. 242, 248.

{¶53} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E), provides:

{¶54} "When a motion for summary judgment is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." (Emphasis added.)

{¶55} Summary judgment is appropriate pursuant to Civ.R. 56(E), if the nonmoving party does not meet this burden.

{¶56} Appellate courts review a trial court's grant of summary judgment *de novo*. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶57} The Supreme Court of Ohio has held that the failure to respond to requests for admissions renders the matter requested conclusively established for the

purpose of the suit. *Cleveland Trust Co. v. Willis*, supra, at 67. "A request for admission can be used to establish a fact, even if it goes to the heart of the case." *Id.* This court has previously held, "unanswered requests for admissions are a written admission fulfilling the requirements for summary judgment, pursuant to Civ.R. 56." *Balli v. Zukowski*, 11th Dist. No. 2004-G-2560, 2004-Ohio-6702, at ¶36.

{¶58} Appellants' complaint alleges appellee "caused, permitted and allowed a dangerous condition to develop and exist at the service entrance including, without limitation, an unnatural accumulation of ice." Further, "the service entrance was unreasonably dangerous on February 3, 2003 at 10:00 a.m., and William Whitehouse slipped and fell as a direct and proximate result of the dangerous conditions which Defendants allowed to develop at the service entrance and which they knew, or should have known about, but negligently failed to take steps to abate or to warn persons such as William Whitehouse."

{¶59} In the instant case, the unanswered request for admissions establish that the ice upon which Mr. Whitehouse slipped was an open and obvious danger; Mr. Whitehouse observed the ice upon which he slipped prior to stepping on the ice; the ice upon which Mr. Whitehouse slipped was the result of a natural accumulation of ice and/or snow; the service entrance was not unreasonably dangerous on February 3, 2003; prior to the incident, Mr. Whitehouse was aware of the potential dangers of slipping and falling on ice; and Mr. Whitehouse assumed the risk of slipping and falling on ice when he decided to step onto the ice near the service entrance.

{¶60} In appellants' brief, they concede that unanswered requests for admissions may be considered written admissions under Civ.R. 56(C). However,

appellants argue that the default admissions were not material facts, and a genuine issue of material fact exists. Appellants assert the above admissions do not satisfy the evidentiary burden for summary judgment purposes. In support of this argument, appellants claim their complaint merely stated Mr. Whitehouse slipped and fell on a "dangerous condition" at the service entrance of appellee's establishment, which included an unnatural accumulation of ice. It did not state Mr. Whitehouse slipped and fell on ice per se.

{¶61} Appellants allege that appellee was negligent in connection with the fall of Mr. Whitehouse. In order to succeed on this claim, they must prove an existence of a duty, a breach of the duty, and an injury proximately resulting from the breach. The duty of the defendant, however, "depends on the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 645. (Citations omitted.)

{¶62} In the instant case, Mr. Whitehouse, while in the scope of his employment, was delivering produce to appellee. Therefore, Mr. Whitehouse was an invitee. "[B]usiness invitees are those persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Baldauf v. Kent State Univ.* (1988), 49 Ohio App.3d 46, 47. Also, an invitee is anyone who is expressly or impliedly invited to come upon the premises. *Englehardt v. Philipps* (1939), 136 Ohio St. 73, 77. "The general rule is that if one comes upon the premises with the owner's consent, for some purpose in which the owner may be interested, he is deemed to have been expressly or impliedly invited." *Blair v. Ohio Dept. of Rehab. &*

Corr. (1989), 61 Ohio Misc.2d 649, 654, citing *Hager v. Cleveland Trust Co.* (1928), 29 Ohio App. 32.

{¶63} In *Baldauf v. Kent State Univ.*, the court noted, “[i]n order to recover from the occupier of premises for personal injuries sustained in a fall claimed to have been caused by the condition of those premises, a business invitee must allege and prove that the fall was proximately caused by some *unreasonably dangerous* condition of the premises.” *Baldauf v. Kent State Univ.*, 49 Ohio App.3d at 48, quoting *Smith v. United Properties, Inc.* (1965), 2 Ohio St.2d 310, 316. (Emphasis added by Tenth District.) In addition, the plaintiff must prove the defendant was aware or on notice of the unreasonably dangerous condition. *Butch v. Univ. of Cincinnati* (1997), 90 Ohio Misc.2d 28, 30. “Even in those cases in which actual or imputed notice of a defect is not required, it is first necessary to establish that an unreasonably dangerous condition, i.e., a duty, actually did exist.” *Bond v. Mathias* (Mar. 17, 1995), 11th Dist No. 94-T-5081, 1995 Ohio App. LEXIS 979, at *8. (Citation omitted.)

{¶64} Appellee, in the motion for summary judgment, attached a copy of the request for admissions, which appellants’ failed to answer. The unanswered request for admissions in this case conclusively established that the service entrance was not unreasonably dangerous on February 3, 2003. As such, appellee, as the moving party, satisfied the burden of putting evidence forth which demonstrated an absence of a genuine issue of material fact.

{¶65} In order to support their argument that a genuine issue of material fact did exist, appellants put forth a self-serving affidavit of Mr. Whitehouse. In his affidavit, Mr. Whitehouse stated:

{¶66} "[W]hen I got to the top of the ramp I banged on the door to get the attention of someone inside. A young man named Dave opened the door for me. *** As I pulled the dolly in, I slipped on the floor, fell onto my back, and the cases of produce fell over onto me. The man named Dave helped me up. I examined the floor and found it to be very slippery. Someone had spilled something on the floor which made it very slippery. I had my work boots on. I had never before encountered such a slippery floor in that establishment. I am certain that I did not slip on water and that some foreign material had been spilled on the floor."

{¶67} The affidavit of Mr. Whitehouse was not presented with the initial memorandum in opposition of summary judgment. This self-serving affidavit was attached to appellants' supplemental memorandum and evidence in opposition to appellee's motion for summary judgment. In fact, in their initial memorandum in opposition of summary judgment, appellants stated, "[p]laintiffs, who are husband and wife, alleged that on February 3, 2003, William Whitehouse sustained serious bodily injuries when he slipped on a *dangerous and unnatural accumulation of ice* at the service entrance to Defendant's restaurant while making a delivery of produce at about 10:00 a.m." (Emphasis added.) Further, this same assertion was reiterated in appellants' counsel's affidavit provided in opposition of summary judgment which read, "[m]y clients' Complaint alleged that on February 3, 2003 William Whitehouse sustained bodily injuries when he slipped on a 'dangerous and unnatural accumulation of ice.'"

{¶68} The affidavit of Mr. Whitehouse is nothing more than a self-serving affidavit that contradicts much of what he had previously alleged. Such evidence will not be adequate under Civ.R. 56 to create a genuine issue of material fact.

{¶69} "This court has previously held that a nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit contradicting the evidence offered by the moving party. *** This rule is based upon judicial economy: Permitting a nonmoving party to avoid summary judgment by asserting nothing more than 'bald contradictions of the evidence offered by the moving party' would necessarily abrogate the utility of the summary judgment exercise. *** Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early state of the litigation and unnecessarily dilate the civil process." *Greaney v. Ohio Turnpike Comm.*, 11th Dist. No. 2005-P-0012, 2005-Ohio-5284, at ¶16. (Internal citations omitted.)

{¶70} In summary, appellants failed to rebut appellee's motion for summary judgment with anything other than a self-serving affidavit of Mr. Whitehouse, which is insufficient to affirmatively demonstrate a genuine issue of material fact. In addition, this affidavit contradicted appellants' assertions previously made in pleadings presented to the trial court. Appellants did not present any additional evidence to illustrate their claim of negligence. Consequently, the trial court properly entered summary judgment in favor of appellee, as no genuine issue of material fact exists.

{¶71} Furthermore, based on the admissions, the ice upon which Mr. Whitehouse slipped was the result of a natural accumulation of ice and/or snow. In Ohio, the hazards of ice and snow are a part of winter. *Lopatkovich v. Tiffin* (1986), 28 Ohio St.3d 204, 206-207. This court has noted, "[i]n Ohio, no liability will attach to the occupier of premises for a slip and fall occurring due to natural accumulations of ice and snow, these being deemed open and obvious hazards in Ohio's climate, from which persons entering the premises must protect themselves." *Sherwood v. Mentor Corners*

Ltd. Partnership, 11th Dist. No. 2006-L-020, 2006-Ohio-6865, at ¶13. Therefore, this admission is also sufficient to enter summary judgment in favor of appellee.

{¶72} Next, even if Mr. Whitehouse slipped on the “unnatural accumulation of ice,” summary judgment was still appropriate. It was established the ice upon which Mr. Whitehouse slipped was an open and obvious danger. Under the open and obvious doctrine, the owner of a premises does not owe a duty to persons entering those premises regarding dangers that are open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 48 (Citations omitted.); See, also, *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶13. “[T]he open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.” *Armstrong*, supra, at ¶5, quoting *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d at 644. When the open and obvious doctrine is applicable, it “obviates the duty to warn and acts as a complete bar to recovery.” *Armstrong*, supra, at ¶5. Therefore, based on this doctrine, it is clear that appellee owed no duty to Mr. Whitehouse, and appellee is entitled to judgment as a matter of law.

{¶73} Therefore, appellants’ third assignment of error is without merit.

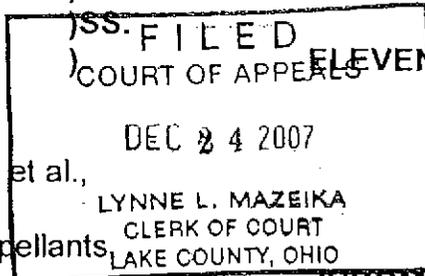
{¶74} The judgment of the trial court is hereby affirmed.

CYNTHIA WESTCOTT RICE, P.J., concurs,

DIANE V. GRENDELL, J., dissents.

STATE OF OHIO
COUNTY OF LAKE

)
IN THE COURT OF APPEALS



ELEVENTH DISTRICT

WILLIAM WHITEHOUSE, et al.,

Plaintiffs-Appellants

LYNNE L. MAZEIKA
CLERK OF COURT
LAKE COUNTY, OHIO

JUDGMENT ENTRY

- VS -

CASE NO. 2007-L-069

THE CUSTOMER IS EVERYTHING!, LTD.,
d.b.a. AVENUE GRILLE & BAR, et al.,

Defendants-Appellees.

For the reasons stated in the opinion of this court, appellants' assignments of error are overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.


JUDGE TIMOTHY P. CANNON

CYNTHIA WESTCOTT RICE, P.J., concurs,

DIANE V. GRENDALL, J., dissents.