

IN THE SUPREME COURT OF OHIO

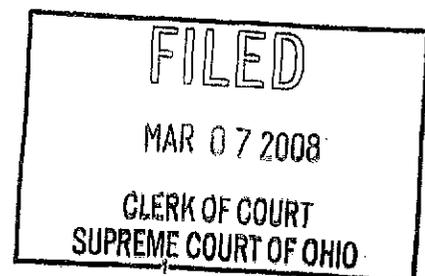
WILLIAM WHITEHOUSE, et al.,)
)
 Plaintiffs-Appellants)
)
 vs.)
)
 THE CUSTOMER IS)
)
 EVERYTHING!, LTD. dba AVENUE)
)
 GRILLE & BAR, et al.,)
)
 Defendants-Appellees)

CASE NO. 2008-0292
On Appeal from the Lake County Court of Appeals, Eleventh Appellate District
Court of Appeals Case No. 2007-L-069

**MEMORANDUM IN OPPOSITION TO PLAINTIFFS-APPELLANTS'
MEMORANDUM IN SUPPORT OF JURISDICTION**

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INTRODUCTION

Not one of the issues presented by Plaintiffs-Appellants qualifies as an issue of public or great general interest and, therefore, neither warrant this Court's discretionary review. The trial court simply followed and applied the plain language of the Civil Rules of Procedure and well-established precedent to a specific set of facts. The Court of Appeals affirmed the trial court's decision finding no abuse of discretion. Plaintiffs-Appellants' arguments were simply insufficient to warrant the trial court's withdrawal of admissions or to cause the Court of Appeals to find that the trial court abused its discretion. This is evidenced by the rulings of both the trial and appellate courts in this matter.

Although Plaintiffs-Appellants make two arguments why this Court should accept this case for review, neither have merit. Plaintiffs-Appellants assert that the trial court and the Court of Appeals improperly applied this Court's decision in *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 485 N.E.2d 1052, in determining whether to allow the withdrawal of admissions. To the contrary, both the trial court and Court of Appeals opinions specifically cite, and properly apply, Civ. R. 36(B) and *Willis*. Neither decision broke new ground or departed from this Court's well-established principles. While Plaintiffs-Appellants dispute the trial court's and appellate court's findings, the issues they raise are fact specific and not of great general or public interest.

Plaintiffs-Appellants' assert, however, that the discretionary provisions of Civ. R. 36(B) and this Court's decision in *Willis, supra*, regarding the withdrawal of admissions are mandatory if the merits of the dispute would be subserved thereby and if the party who obtained the admissions fails to prove that they justifiable relied upon the admissions. To the contrary, neither the language of Civ. R. 36(B) nor this Court's decision in *Willis* mandate that a court allow a party to withdraw admissions. Both Civ. R. 36(B) and *Willis* provide that a court "may" allow the withdrawal of

admissions but do not require a court to do so. Accordingly, this Court should decline review of this case.

STATEMENT OF CASE AND FACTS

This case is fact-intensive and a complete rendition of the underlying events is required. This is a slip and fall case. Appellants filed their Complaint against Appellee alleging that the service entrance at Appellee's establishment was made "unreasonably dangerous" due to an "unnatural accumulation of ice" causing Appellant William Whitehouse to fall "violently to the floor" and injure his "neck and back." Appellee timely filed an Answer to Plaintiffs/Appellants' Complaint pleading, among other affirmative defenses, assumption of the risk and the open and obvious doctrine.

On November 20, 2007, Appellee propounded its discovery to Appellants, including, *inter alia*, *First Request for Admissions to Plaintiff William Whitehouse* in hard copy and via electronic format. Pursuant to Civ. R. 36, Appellants' answers to the Request for Admissions were due on December 18, 2006. The answers were already late when Appellants' counsel's office called requesting a 30 day extension until January 22, 2007 in which to respond to the discovery. Appellee, through counsel, agreed and an appropriate stipulation was filed with the trial court. On January 22, 2007, the date the responses were due, counsel for Appellee received another call from Appellants' counsel's office requesting a second extension until January 29, 2007. Appellee again agreed and an appropriate stipulation was filed with the trial court. Pursuant to the second extension of time, the answers were due on January 29, 2007. However, no answers to the admissions were received.

On February 9, 2007, Appellee filed its *Motion for Summary Judgment* based on the unanswered admissions and Civ.R. 36. By the time Appellee filed its Motion for Summary Judgment, Appellants had 80 days in which to respond to the Request for Admissions, but failed to do so. On

or about February 21, 2007, Appellants filed their *Memorandum in Opposition to Defendant's Motion for Summary Judgment*, and, as an attachment thereto, Appellant provided answers to Appellee's Request for Admissions. In their Memorandum in Opposition, Appellants argued that: (1) Appellee's Request for Admissions were accidentally misplaced by Appellants' counsel's paralegal; (2) since the responses to the Request for Admissions were now provided the "error has now been corrected"; and (3) Appellants should be permitted to withdraw their admissions or, in the alternative, be given an additional 21 days to respond.

In their initial answers to the Request for Admissions, provided to Appellee as an attachment to the Memorandum in Opposition on February 21, 2007, Appellants answered, in pertinent part, as follows:

1. Admit that the ice upon which you slipped and which gives rise to your Complaint was an open and obvious danger.

ANSWER: Denied. Plaintiff could not see *the ice upon which he slipped*.

3. 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.

ANSWER: Denied. *The ice* resulted from a negligent attempt to remove snow and from not appropriately cleaning the service entrance.

4. Admit that the service entrance was not unreasonably dangerous on February 3, 2003.

ANSWER: Denied. Plaintiff *could not see the ice* and did not know it was there. Moreover, the service entrance was specifically designed to receive deliveries.

(Emphasis added). Also attached to their Memorandum in Opposition, was the Affidavit of Appellants' counsel, which averred in pertinent part: "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.” Appellants’ also attached an Affidavit of their counsel averring that counsel was too busy to meet with his clients and too busy to respond to the Request for Admissions.

Appellee then filed its *Reply Brief of Defendant*, asserting to the trial court that the argument by counsel for Appellants that he was busy or that the answers were misplaced does not permit Appellants to utterly fail to adhere to the mandates of Civ. R. 36 or otherwise justify a withdrawal of the admissions, especially in light of the fact that Appellants had 80 days to provide the answers.

Appellants then filed their *Supplemental Memorandum and Evidence in (sic) Opposition to Defendant’s Motion for Summary Judgment*. In their Supplemental Memorandum, Appellants attached *Revised Responses to Defendants’ (sic) First Request for Admissions*. The Revised Responses directly contradicted Appellants’ claims in the case thus far as follows:

1. Admit that the ice upon which you slipped and which gives rise to your Complaint was an open and obvious danger.

ANSWER: Denied. *I did not slip on ice*. Moreover, the ice upon which I traversed was covered by snow.

3. 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.

ANSWER: Denied. *I did not slip on ice*. Moreover, the ice was not a natural accumulation. Rather, it resulted from *a gutter which leaked* onto the ramp.

4. Admit that the service entrance was not unreasonably dangerous on February 3, 2003.

ANSWER: Denied. The service entrance was unreasonably dangerous inasmuch as when I attempted to come into the building *I slipped on an unreasonably dangerous floor*, fell backwards, and was injured.

(Emphasis added). Also attached to Plaintiffs-Appellants' Supplemental Memorandum was the Affidavit of Plaintiff-Appellant William Whitehouse, where he directly contradicted his prior allegations and failed to provide any explanation whatsoever for the discrepancies.

Due to Appellants' new and different allegations, and new claims of leaking gutters and foreign substances on the floor, counsel for Appellee brought the inconsistencies to the attention of the trial court and filed *Defendant's Motion for Leave to File Sur-Reply and Sur-Reply*. Defendant-Appellee asserted to the court that Plaintiffs-Appellants' Revised Responses and accompanying Affidavit of William Whitehouse was an attempt to create an issue of fact through a self-serving, contradictory Affidavit, and that the same could be considered sufficient to prevent summary judgment.

The trial court agreed that there was no justification or compelling circumstances for allowing the withdrawal of the admissions and granted summary judgment to Appellee.¹ In its opinion, the trial court cited and relied upon this Court's opinion *Cleveland Trust Co. v. [Willis]*² (1985), 20 Ohio St.3d 66, 485 N.E.2d 1052, and Civ. R. 36.³ In doing so, it found that plaintiffs' counsel's inadvertent failure to send the responses "after being given two extensions of time to respond d[id]

¹ See *Whitehouse v. The Customer is Everything!, LTD., dba Avenue Grille & Bar*, Lake County Court of Common Pleas Case No. 06CV002516, Order filed March 20, 2007, ¶ 12.

² Although correctly identifying the applicable case numbers, The trial court inadvertently cited the case name as "*Cleveland Trust Co. v. Amer[i]trust Co.*", using the "now known as" name of the Plaintiff-Appellee as the name of the Defendant-Appellant.

³ See *Whitehouse v. The Customer is Everything!, LTD., dba Avenue Grille & Bar*, Lake County Court of Common Pleas Case No. 06CV002516, Order filed March 20, 2007, ¶ 8-10.

not justify the failure to respond.”⁴ It further noted that “even after two extensions of time to respond, the plaintiffs not only failed to respond timely, but apparently failed to adequately investigate their own allegations and contracting themselves.”⁵

Appellants filed an appeal, and the Eleventh District Court of Appeals affirmed the trial court. The Court of Appeals held that, pursuant to, *inter alia*, *Willis*, Appellants were required to set forth compelling circumstances to justify their failure to respond to the admission and did not do so and, thus, the trial court did not abuse its discretion in denying Appellants’ request to withdraw the admissions.

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

The Court should decline review because the case is fact-specific. The lower courts’ opinions did not depart from precedent or change the law. Rather, the trial court followed and applied the plain language of Civ. R. 36(B) and the well-established precedent in considering whether to permit the withdrawal of admissions. The Court of Appeals also properly reviewed the trial court’s ruling as to the withdrawal of the admissions under an abuse of discretion standard and found no abuse of discretion. Accordingly, the case herein is a fact-specific application of well delineated law, and, thus, a review of the same is unwarranted.

⁴ *Id.* at ¶ 12.

⁵ *Id.*

PROPOSITION OF LAW NO. I: Plaintiffs-Appellants contend that 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.

Plaintiffs-Appellants contend that 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. They assert that, in applying this standard, the trial court and appellate court failed to follow Civ. R. 36(B) and this Court's holding in *Willis, supra*. Plaintiffs-Appellees' arguments pertaining to this issue are unfounded. There is no requirement, in Civ. R. 36 or otherwise, that a request to withdraw admissions must be granted where the merits of the dispute would be subserved thereby and the party that obtained the admissions does not prove that he justifiable relied upon the admissions.

Foremost, it is well-established in Ohio that a trial court has broad discretion in managing the discovery process.⁶ Further, Civ. R. 36(B) provides that it is within the trial court's discretion whether to allow the withdrawal of admissions.⁷ A plain reading of the language of Civ. R. 36(B) makes clear that there is *no requirement* that a court allow the withdrawal of admissions. Civ. R. 36(B) clearly provides that "any matter admitted under this rule is conclusively established" and that "the court *may* permit withdrawal" of the admissions.⁸ It does *not* delineate that a court "shall," "must," or "is required to" allow the withdrawal of admissions. Accordingly, Plaintiffs-Appellants' argument that a court is required to withdraw the admissions when the merits of the dispute would

⁶ *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 592, 664 N.E.2d 1272.

⁷ Civ. R. 36.

⁸ *Id.*

be subserved thereby and the party that obtained the admissions does not prove that he justifiable relied upon the admissions.

In addition, in *Willis*, this Court did *not* state that a court *must* allow the withdrawal of admissions where the merits of the dispute would be subserved thereby and the party that obtained the admissions does not prove that he justifiable relied upon the admissions either. *Willis* merely recognizes that the withdrawal of admissions pursuant to Civ. R. 36 is discretionary and that admissions may be withdrawn under compelling circumstances so long as where the merits of the dispute would be subserved thereby and the party that obtained the admissions does not prove that he justifiable relied upon the admissions:

Civ.R. 36 requires that when requests for admissions are filed by a party, the opposing party must timely respond either by objection or answer. Failure to respond at all to the requests will result in the requests becoming admissions. *Under compelling circumstances, the court may allow untimely replies to avoid the admissions.*

Any matter admitted under Civ.R. 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Civ.R. 36(B). *The court may permit the withdrawal* if it will aid in presenting the merits of the case and the party who obtained the admission fails to satisfy the court that withdrawal will prejudice him in maintaining his action. *Balson v. Dodds* (1980), 62 Ohio St.2d 287, 405 N.E.2d 293 [16 O.O.3d 329], paragraph two of the syllabus.

(Emphasis added).⁹

In determining whether to allow the withdrawal of the admissions, the trial court below cited Civ. R. 36(B) and *Willis* and their discretionary provisions. The trial court found there to be no circumstances in the case at hand to be compelling enough to warrant withdrawal of the admissions. In doing so, it found that plaintiffs' counsels inadvertent failure to send the responses "after being

⁹ *Willis* at 67.

given two extensions of time to respond d[id] not justify the failure to respond.”¹⁰ It further noted that “even after two extensions of time to respond, the plaintiffs not only failed to respond timely, but apparently failed to adequately investigate their own allegations and contracting themselves.”¹¹ There can be no dispute that trial court applied the applicable rule and law. Plaintiffs-Appellants’ just do not agree with the trial court’s decision.

A trial court's decision on the management of discovery matters are reviewed under an abuse of discretion standard.¹² An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable.¹³ In the case *sub judice*, the Court of Appeals duty was to determine whether the trial court abused its discretion in denying Plaintiffs’-Appellants’ request to withdraw the admissions. The appellate court, in its Opinion, notes its responsibility in considering the trial court’s ruling on Plaintiffs-Appellants request to withdraw the admissions.¹⁴ Specifically, the appellate court at one point stated: “we cannot say that the trial court abused its discretion in accepting the admissions

¹⁰ *Id.* at ¶ 12.

¹¹ *Id.*

¹² *State ex rel. The v. Cos. v. Marshall*, 81 Ohio St.3d 467, 1998-Ohio-329; *State ex rel Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 57; *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 592, 664 N.E.2d 1272.

¹³ *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

¹⁴ *See Whitehouse v. The Customer is Everything!, LTD., dba Avenue Grille & Bar* (Dec. 24, 2007), 11th Dist. No. 2007-L-069, ¶ 27. (Attached to Memorandum in Support of Jurisdiction of Appellants).

based upon appellants' failure to timely provide answers."¹⁵ Clearly, the appellate court was well aware of its duty and ruled accordingly.

In this matter, it can not be doubted that the trial court considered the facts of this case and determined that there were not compelling circumstances justifying the withdrawal of Plaintiffs-Appellants' admissions. Further, it cannot be doubted that the Court of Appeals considered the same facts and determined that the trial court did not abuse its discretion in denying Plaintiffs-Appellants' request to withdraw their admissions. The lower courts' analysis was quite simple with regard to the language of Civ. R. 36(B) and *Willis* and the facts at hand.

Plaintiffs-Appellants now seek to disparage those findings for self-serving purposes and assert that the discretionary language of Civ. R. 36(B), *i.e.*, "the court *may* permit withdrawal," are to be read as a directive, *e.g.*, "the court *shall* permit withdrawal," when the presentation of the merits of the action will be subverted 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 is no basis for Plaintiffs-Appellants' argument that a discretionary rule must be read to be mandatory. The record does not support Plaintiffs-Appellants' position that the lower courts' incorrectly applied the law in this case. Accordingly, this Court should decline review of this case.

PROPOSITION OF LAW NO. II: Plaintiffs-Appellants contend that requiring a demonstration of compelling circumstances is too stringent of a standard for deciding if just cause exists for withdrawing default admissions.

Plaintiffs-Appellants contend that requiring a party to demonstrate compelling circumstances in determining if just cause exists for the withdrawal of default admissions is too stringent. Plaintiffs-Appellants argument is without merit.

¹⁵ *Id.* at ¶ 34 (Emphasis added).

This Court's "compelling circumstances" language of *Willis* has long been followed by Ohio's Court of Appeals.¹⁶ Without any explanation, though, Plaintiff-Appellants assert that having to establish "compelling circumstances" to withdraw admissions is just too stringent of a requirement.¹⁷ They even argue that a party seeking to withdraw admissions need not even show "excusable neglect."¹⁸ Simply put, Plaintiffs-Appellants assert that a party requesting the withdrawal of admissions should not be required to show any basis for the failure to comply with Civ. R. 36 and that the court should be required to withdraw the admissions so long as 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 is no legal basis for this assertion.

Plaintiffs-Appellants' assert that a showing of compelling circumstances is too stringent merely because the lower courts did not believe that Plaintiffs-Appellants established "compelling circumstances" for the failure to answer their admissions. They cite no authority, *e.g.*, Ohio or otherwise, that provides that a showing of compelling circumstances is too stringent in the determining the withdrawal of admitted facts or admissions. More importantly, though, the Court

¹⁶ See, *e.g.*, *Farah v. Chatman* (February 20, 2007) 10th Dist. No. 06APP-502, 2007 -Ohio- 697; *Vilardo v. Sheets* (July 3, 2006), 12th Dist. No. CA2005-09-091, 2005 -Ohio- 3473; *Ramirez v. D & M Drywall, Inc.* (Decided Feb. 17, 2006), 6th Dist. No. H-05-016, 2006 -Ohio- 725; *Farmers Ins. of Columbus, Inc. v. Lister* (Jan. 9, 2006), 5th Dist. No. 2005-CA-29, 2006 -Ohio- 142; *Illum. Co. v. Riverside Racquet Club, Ltd.* (2005), 165 Ohio App.3d 153, 845 N.E.2d 526, 2005 -Ohio- 5548; *Sullinger v. Moyer* (Aug. 6, 1997) 7th Dist. No. 96 C.A. 152; *Sciranka v. Hobart Intern., Inc.* (Sept. 4, 1992), 2nd Dist. No. 91 CA 61; *Albrecht, Inc. v. Hambones Corp.* (Oct. 30, 2002), 9th Dist. No. 20993, 2002 -Ohio- 5939.

¹⁷ See Memorandum in Support of Jurisdiction of Appellants p. 10.

¹⁸ *Id.* at 10.

of Appeals even held that Plaintiffs-Appellants' failure to respond *did not constitute excusable neglect* either. The Court of Appeals stated: "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."¹⁹ Thus, Plaintiffs-Appellants cannot argue that had it been a lower standard, they would have prevailed.

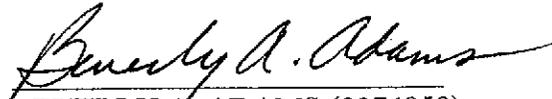
The language of Civ. R. 36(B) and *Willis* is clear. The record reflects that the Court of Appeals properly applied an abuse of discretion standard and found, that under the facts of the case, the trial court properly applied the provisions of Civ. R. 36(B) and *Willis*. Plaintiffs-Appellants' arguments are not issues of public or great general interest in this matter but are merely disagreements with the lower courts' determinations. Therefore, neither warrant this Court's discretionary review.

¹⁹ See *Whitehouse v. The Customer is Everything!, LTD., dba Avenue Grille & Bar* (Dec. 24, 2007), 11th Dist. No. 2007-L-069, ¶ 45 (Attached to Memorandum in Support of Jurisdiction of Appellants).

Conclusion:

Based upon the foregoing and the lower courts' opinions, Defendant-Appellee respectfully requests that this Court decline Plaintiffs-Appellants' request for jurisdiction regarding this matter.

Respectfully submitted,



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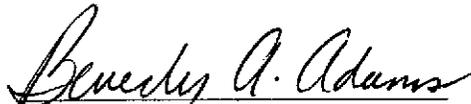
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CERTIFICATE OF SERVICE

A copy of the foregoing is being served via regular U.S. Mail, postage prepaid on this 6th day of March, 2008, upon the following:

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