

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Robert L. Hillman,	:	
Plaintiff-Appellant,	:	No. 08AP-1063 (C.P.C. No. 07CVH12-17248)
v.	:	No. 08AP-1064 (C.P.C. No. 07CVH09-12491)
W. Joseph Edwards,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 17, 2009

Robert L. Hillman, pro se.

W. Joseph Edwards, pro se.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Robert L. Hillman, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendant-appellee, W. Joseph Edwards. Because (1) the evidence supports the trial court's decision to grant summary judgment to defendant on plaintiff's substantive claim of legal malpractice, but (2) procedural error undermines the validity of that ruling as it now stands, we reverse and remand.

I. Procedural History

{¶2} Plaintiff is currently incarcerated as a result of his conviction on one count of burglary; defendant was plaintiff's court-appointed counsel for the appeal from that conviction. Unsatisfied with the results of the appeal, plaintiff filed a civil complaint against defendant on December 19, 2007, alleging legal misrepresentation, breach of contract, gross negligence, and deliberate indifference to the plaintiff's civil rights. On January 8, 2008, the return receipt reflecting service was filed. When defendant failed to respond to plaintiff's complaint, plaintiff on February 12, 2008 filed a motion for default judgment pursuant to Civ.R. 55. On February 26, 2008, defendant filed an answer to plaintiff's claim without leave of court, in response to which plaintiff filed multiple motions to strike the late answer.

{¶3} Given defendant's February 26, 2008 answer, the trial court denied plaintiff's motion for default judgment on February 29, 2008. Although plaintiff attempted an interlocutory appeal from the trial court's February 29 order, this court dismissed the appeal for lack of a final appealable order. On remand, the parties filed cross-motions for summary judgment. The trial court on November 26, 2008 denied plaintiff's motion for summary judgment and granted defendant's summary judgment motion, noting plaintiff's failure to present any expert testimony to support his motion.

II. Assignments of Error

{¶4} Plaintiff appeals, assigning two errors:

ASSIGNMENT OF ERROR NUMBER ONE:

THE TRIAL COURT ABUSED IT'S [sic] DISCRETION IN THREE INSTANCES WHICH DENIED APPELLANT OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

OF THE LAW UNDER BOTH THE UNITED STATES AND OHIO'S CONSTITUTIONS WHEN (1) THE TRIAL COURT OVERRULED APPELLANT'S MOTION FOR DEFAULT JUDGMENT, AND ALLOWED THE APPELLEE TO ANSWER BEYOND THE 28 DAY TIME PERIOD PRESCRIBED BY CIVIL RULE 12(A)(1) AND WITHOUT WRITTEN REQUEST FOR LEAVE TO FILE LATE, (2) FOR EXCEPTING [sic] SUCH ANSWER WITHOUT ANY SHOWING OF EXCUSABLE NEGLIGENCE FOR FILING LATE, AND (3) FOR NOT HOLDING A DEFAULT JUDGMENT HEARING ON DEFAULT THAT WAS FILED 13 DAYS PRIOR TO THE DEFENDANT'S ILLEGAL ANSWER WHEN ON CASE NUMBER 07CVH09-12491 DEFENDANT NEVER FILED AN ANSWER TO, AND CASE NUMBER 07CVH12-17248 DEFENDANT FILED HIS ANSWER LATE.

ASSIGNMENT OF ERROR NUMBER TWO:

THE TRIAL COURT DENIED APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE 1ST AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS WHEN (1) THE COURT GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND ERRONIOUSLY [sic] DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, BECAUSE IT FAILED TO APPLY THE PROPER STANDARD IN EVALUATING THE EVIDENCE, AND CONSTRUED THE CLAIMS INCORRECTLY. (2) THE TRIAL COURT ABUSED IT'S [sic] DISCRETION BY FORCING PLAINTIFF TO FILE MOTIONS UNDER A DISMISSED CASE NUMBER IN ORDER TO EXTEND DEFENDANT'S TIME TO FILE DISPOSITIVE MOTIONS.

III. First Assignment of Error

{¶5} Plaintiff's first assignment of error contends the trial court erred when it denied plaintiff's motion for default judgment, pending when defendant filed his out-of-rule answer. Plaintiff premises his argument on two points: (1) defendant did not first request leave of court to file his answer out of rule; and (2) defendant provided no explanation for his delay in filing an answer. Relying on *Suki v. Blume* (1983), 9 Ohio App.3d 289, 290, defendant contends his answer, albeit late, proved he was contesting plaintiff's claim, so

the trial court was within its discretion in allowing the answer and denying plaintiff's motion for default judgment.

{¶6} A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading. See Civ.R. 55. Only when the defendant "fails to contest the opposing party's allegations" by either pleading or otherwise defending does a default arise. *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 121. Generally, default judgments are disfavored. *Suki* at 290. Granting a default judgment, analogous to granting a dismissal, is a harsh remedy that should be imposed only when the actions of the defaulting party create a presumption of willfulness or bad faith. *Haddad v. English* (2001), 145 Ohio App.3d 598, 603. Instead, when possible, cases should be decided on their merits rather than on procedural grounds. *Fowler v. Coleman* (Dec. 28, 1999), 10th Dist. No. 99AP-319.

{¶7} To militate against the harshness of a default judgment, Civ.R. 6(B) permits a court to grant a moving party additional time to file a pleading or response, provided the requirements set forth in the rule are met. The determination of a matter pursuant to a Civ.R. 6(B) motion is addressed to the sound discretion of the trial court and will not be disturbed upon appeal "absent a showing of an abuse of discretion." *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271.

{¶8} Allowing a defendant to file an answer out of rule without moving for leave to file and showing excusable neglect under Civ.R. 6(B) is an abuse of discretion. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214; *Davis v. Immediate Med. Serv., Inc.*, 80 Ohio St.3d 10, 14-15, 1997-Ohio-363. Though a court may endeavor to quickly "reach the merits of a

controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment." *Miller* at 215; *Davis* at 15; see also *Fenner v. Kinney*, 10th Dist. No. 02AP-749, 2003-Ohio-989 (determining that where the appellant sent a letter to the court in place of a formal answer, that letter, even if it be deemed an answer, was not timely filed, and "an untimely filed answer does not prevent an entry of default judgment").

{¶9} In *Turner v. Alexander* (1995), 107 Ohio App.3d 853, this court applied the principles embodied in the civil procedural rules and addressed the issue plaintiff's first assignment of error raises. The plaintiff in *Turner* argued the trial court abused its discretion in permitting defendants to file a late answer without moving for leave to file an answer or showing excusable neglect. While the *Turner* defendants conceded to filing their answer late and without leave, they argued the trial court had the discretion to accept their answer when filed.

{¶10} Applying Civ.R. 6(B), *Turner* noted that "after the period for filing an answer prescribed in Civ.R. 12(A)(1) has expired, an answer may be filed only upon motion for leave and a showing of excusable neglect." *Id.* at 858. Accordingly, this court concluded "the trial court abused its discretion when it permitted defendants to file their answer, and when it failed to grant plaintiff's motion to strike defendants' answer." *Id.* Significantly, *Turner* pointed out that "on remand, this conclusion does not prevent the trial court from allowing defendants to file an answer in compliance with Civ.R. 6(B)(2)." *Id.*; see also *Rowe v. Stillpass*, 4th Dist. No. 06CA1, 2006-Ohio-3789, ¶17, fn. 1, and *In re Forfeiture of \$1952.00 U.S. Currency* (Nov. 16, 1993), 10th Dist. No. 93AP-957; and see *Faith Elec. Co. v. Kirk* (May 10, 2001), 10th Dist. No. 00AP-1186, quoting *Marion Prod.* at 272

(emphasizing the significance of an answer being on file before a motion for default judgment is submitted, as it "serves to enlarge the discretion of the trial court to allow a delayed responsive pleading").

{¶11} Similarly, in *Matthews v. Rader*, 11th Dist. No. 2003-L-092, 2005-Ohio-3271, ¶21, the appellate court affirmed the trial court's conclusion that, where the defendant submitted an answer two months after the motion for default judgment was filed and without seeking or obtaining leave of court to do so, the answer was a "nullity" because "defendant failed to move for an extension of time to file [an] answer and made no effort to demonstrate excusable neglect." *Id.* at ¶17. *Matthews* noted that although the trial court could have granted defendant an extension of time to file his answer had the defendant so moved and demonstrated excusable neglect for his failure to file an answer within the time allowed, the defendant failed to do either. *Id.*

{¶12} Applying the Ohio Supreme Court's holding in *Miller*, the appellate court concluded the defendant's failure to comply with the requirements of the Civil Rules and to demonstrate excusable neglect rendered the answer ineffective. *Id.* at ¶21; see also *Columbus v. Kahrl* (Mar. 12, 1996), 10th Dist. No. 95APG09-1204 (noting the Ohio Supreme Court in *Miller* "held that it constitutes an abuse of discretion to permit the filing of an answer out of rule where the defendant had not first filed a motion for leave to plead, pursuant to Civ.R. 6(B) setting forth grounds for excusable neglect"); *Scarefactory, Inc. v. D & B Imports, Ltd.*, 10th Dist. No. 01AP-607, 2002-Ohio-200 (recognizing the importance of demonstrating excusable neglect and noting "Civ.R. 6(B) permits the trial court to extend the time for filing a responsive motion after the prescribed time for filing

has expired, upon a showing that the failure to timely file was the result of excusable neglect").

{¶13} In determining whether neglect is excusable or inexcusable, a trial court must consider all the surrounding facts and circumstances, but also must be mindful of the admonition that cases should be decided on their merits, where possible, rather than on procedural grounds. *Marion Prod.* at 272. Inexcusable neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below that which is reasonable under the circumstances. *State ex rel. Weiss v. Indus. Comm.* (1992), 65 Ohio St.3d 470, 473, citing *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 152; *Davis* at 14.

{¶14} Such a standard is notably forgiving. See *Kahrl*, supra (referring to "the more lenient standard" for Civ.R. 6(B) motions). A court may permit an untimely answer where sufficient evidence of excusable neglect appears on the record. See *Faith Elec.* (stating defendant's mistaken belief she was within 28 days of receipt of the summons "indicates an oversight that would constitute excusable neglect"); cf. *Beck Durell Creative Dept., Inc. v. Imaging Power, Inc.*, 10th Dist. No. 02AP-281, 2002-Ohio-5908, citing *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20 (stating "the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system' ").

{¶15} Given those parameters, defendant here was required not only to submit a motion for leave to file out of rule, but to demonstrate excusable neglect for the delay in filing before the trial court could accept his late answer. *Miller* at 14 (stating "some showing of 'excusable neglect' [is] a necessary prelude to the filing of [a late] answer");

see *McDonald v. Berry* (1992), 84 Ohio App.3d 6, 9-10 (requiring a showing of excusable neglect on motion to the court before a party can be permitted to file an answer after the time to answer has expired); *Muskingum Cty. v. Melvin* (1990), 69 Ohio App.3d 811 (requiring a moving party to demonstrate excusable neglect for trial court to have discretion to permit filing of answer out of rule).

{¶16} Because, subsequent to plaintiff's filing a motion for default judgment defendant attempted to file a late answer without leave of court and without submitting accompanying evidence of excusable neglect, we are compelled to sustain plaintiff's first assignment of error and conclude the trial court abused its discretion in allowing defendant's answer. *Miller* at 214; *Davis* at 14-15. On remand, the trial court may entertain a properly filed and supported Civ.R. 6(B) motion for leave to file an untimely answer on the ground of excusable neglect. If the court allows the answer, plaintiff's second assignment of error will be pertinent, and so we address it.

IV. Second Assignment of Error

{¶17} Plaintiff's second assignment of error asserts the trial court improperly granted summary judgment to defendant on the merits of plaintiff's complaint when defendant, in his capacity as appellate counsel in plaintiff's direct appeal of his criminal conviction, (1) misstated six material facts regarding plaintiff's case, including the number of counts in the indictment against plaintiff, the venue at The Ohio State University where the offense occurred, and the items recovered, (2) failed to note a discrepancy between the victim's testimony and the police report, (3) failed to properly investigate, (4) failed to note the discrepancy in what plaintiff wore compared to what the victim said he wore, (5)

failed to order the complete transcript, and (6) failed to file documents to demonstrate the prosecution used false documents at trial.

A. Plaintiff's Claim for Relief

{¶18} Plaintiff initially asserts the trial court misconstrued his complaint as a legal malpractice claim when he was alleging fraudulent misrepresentation, breach of contract, gross negligence, and deliberate indifference to the plaintiff's civil rights.

{¶19} The trial court aptly noted "a client's claims that arise out of the manner in which an attorney represents the client within that attorney-client relationship, regardless of the names affixed to the theories of recovery or causes of action, are claims for legal malpractice." (Decision and Judgment Entry, 9, quoting *Sprouse v. Eisenman*, 10th Dist. No. 04AP-416, 2005-Ohio-463, ¶8.) The trial court therefore properly construed plaintiff's complaint as alleging legal malpractice "where the gist of the complaint sounds in malpractice, regardless of the labels given to the causes of actions." *Id.*

B. Summary Judgment

{¶20} Appropriately viewing plaintiff's complaint as a claim for legal malpractice, the trial court determined defendant's motion for summary judgment was well-taken. Plaintiff asserts the trial court erred in so concluding, as his evidence contradicts defendant's affidavit and supports plaintiff's legal malpractice complaint.

{¶21} An appellate court's review of summary judgment is conducted under a de novo standard. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, ¶37. Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as

a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶22} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the nonmoving party has no evidence to support their claim. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. Once that moving party discharges its initial burden, the nonmoving party bears the burden of offering specific facts demonstrating a genuine issue for trial. *Dresher* at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Id.*; Civ.R. 56(E).

{¶23} To prevail on a claim for legal malpractice based upon negligent representation, a plaintiff must establish: (1) the attorney owed a duty or obligation to the plaintiff; (2) the attorney breached that obligation and failed to conform to the requisite standard; and (3) the conduct complained of is causally connected to the resulting damage or loss. *Vahila* at syllabus. If a plaintiff fails to establish a genuine issue of

material fact as to any of the foregoing elements, the defendant is entitled to summary judgment. *Advanced Analytics Laboratories v. Kegler, Brown, Hill & Ritter, L.P.A.*, 148 Ohio App.3d 440, 2002-Ohio-3328, ¶34.

{¶24} Because a licensed attorney in a legal malpractice action may testify to whether the applicable standard of care has been met, independent expert testimony on that issue is not required. *Vahdati'bana v. Scott R. Roberts & Assoc. Co., L.P.A.*, 10th Dist. No. 07AP-581, 2008-Ohio-1219, ¶31, citing *Roselle v. Nims*, 10th Dist. No. 02AP-423, 2003-Ohio-630. With his motion for summary judgment, defendant submitted an affidavit that stated he did not commit legal malpractice in representing plaintiff, thus presenting expert opinion that his actions conformed to the requisite standard and carrying his initial burden under Civ.R. 56. Pursuant to *Dresher*, supra, the burden then shifted to plaintiff to point to or submit some evidentiary material demonstrating the existence of a genuine issue of material fact. See *Hooks v. Ciccolini*, 9th Dist. No. 20745, 2002-Ohio-2322 (stating an affidavit from a licensed attorney is a legally sufficient basis upon which to grant motion for summary judgment in legal malpractice action absent an opposing affidavit of a qualified expert witness asserting malpractice).

{¶25} Plaintiff did not submit the affidavit of an expert witness to address defendant's affidavit. Instead, plaintiff simply asserted defendant's representation was deficient in various ways. Plaintiff, however, is not qualified to testify as an expert witness. On that basis alone, plaintiff failed to carry his burden under Civ.R. 56.

{¶26} Moreover, to the extent plaintiff relies on defendant's alleged misstatements of fact, those also do not carry plaintiff's burden under Civ.R. 56 if the error was harmless. *Fortuna v. Ohio State Univ. Hosp.*, 164 Ohio App.3d 263, 2005-Ohio-5647 (concluding

that to determine for purposes of harmless error analysis whether an error affected a substantial right of a party, the reviewing court must weigh the prejudicial effect of the error and determine whether the fact finder likely would have arrived at the same conclusion but for the error). Because plaintiff was given the opportunity to submit a pro se supplemental brief in his criminal appeal to correct any misstatements defendant made, and because the appellate court in plaintiff's appeal of his criminal conviction considered not only all assignments of error presented but the full record as well, we cannot conclude, in the absence of an expert witness so averring, that any misstatements defendant made affected the outcome of the case. See *State v. Hillman*, 10th Dist. No. 06AP-1230, 2008-Ohio-2341.

{¶27} Beyond misstatements of fact, plaintiff's brief suggests his primary complaint is defendant's breach of duty through his unwillingness to advance certain arguments. Even if plaintiff more clearly had articulated his contention, his assignment of error still would be without merit. Well-established legal principle dictates that where the alleged negligence involves the exercise of professional skill and judgment, expert testimony is required to establish the prevailing standard of care, a breach of that standard, and resulting damages. *Ullmann v. Duffus*, 10th Dist. No. 05AP-299, 2005-Ohio-6060, ¶19, citing *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97, 102, 1992-Ohio-109. Plaintiff thus was required to present expert legal testimony to identify how defendant breached the requisite standard in representing plaintiff, as well as any causal connection between the alleged breach and resulting damages.

{¶28} In appealing the trial court's decision, plaintiff suggests his witness list includes the names of those who will contest defendant's affidavit. Plaintiff overlooks the

distinction between submitting a witness list that includes an expert witness and submitting adequate expert testimony. Names of witnesses are not evidence in plaintiff's case. Moreover, they do not fall within the parameters of evidence properly considered in a summary judgment motion. Civ.R. 56(C) states "summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." If any doubt were to exist about the nature of the evidence permissible in summary judgment motions, Civ.R. 56(C) concludes by stating "[n]o evidence or stipulation may be considered except as stated in this rule."

{¶29} As a result, plaintiff's assertion that the name of a potential expert on a witness list constitutes evidence sufficient to withstand summary judgment does not conform to the Ohio Civil Rules of Procedure. See *Blanton v. Cuyahoga Cty. Bd. of Elections*, 150 Ohio App.3d 61, 65, 2002-Ohio-6044; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222 (noting that where supporting documentary evidence is not of the type specifically listed in Civ.R. 56(C), the evidence must be presented in a properly framed affidavit). Because plaintiff failed to submit the requisite evidentiary material demonstrating the existence of genuine issues of material fact, he did not carry his Civ.R. 56 burden.

{¶30} Plaintiff additionally contends the trial court erred in not applying the doctrine of *res ipsa loquitur* when it examined the wrong defendant allegedly committed. Plaintiff did not raise the issue in the trial court, and a reviewing court generally will not

consider any issue a party fails to raise before the trial court. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 1997-Ohio-71. Even were we to consider it, plaintiff's *res ipsa loquitur* argument fails.

{¶31} "Res ipsa loquitur," literally translated from Latin means, "the thing speaks for itself." *Hickey v. Otis Elevator Co.*, 163 Ohio App.3d 765, 2005-Ohio-4279, ¶23, quoting Black's Law Dictionary (8th ed.2004). The doctrine is invoked when "circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence." *Id.*

{¶32} Res ipsa loquitur thus permits an inference of negligence on the part of defendant to be drawn from the factual circumstances surrounding the injury to the plaintiff. *Hake v. Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66. "To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed." *Id.* at 66-67.

{¶33} Because the doctrine of *res ipsa loquitur* is an evidentiary rule and not a substantive rule of law furnishing an independent ground for recovery, it cannot constitute a legally cognizable claim for relief. *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 172. Moreover, to the extent plaintiff contends the trial court erred in not applying the doctrine and finding in his favor, his contention is not well-taken: the result in

plaintiff's direct appeal of his criminal conviction plausibly is due to the lack of reversible error in the record rather than to any alleged negligence of defendant. *Id.* at 170 (stating that "[t]he doctrine of *res ipsa loquitur* does not alter the nature of plaintiff's claim in a negligence action," but "is merely a method of proving the defendant's negligence through the use of circumstantial evidence").

{¶34} In the final analysis, plaintiff was required to adequately rebut defendant's own expert opinion that he did not commit malpractice in handling plaintiff's appeal. Because plaintiff presented no evidence to carry his burden under Civ.R. 56, the trial court properly granted defendant's motion for summary judgment. Plaintiff's second assignment of error is overruled.

C. Dismissed Case Number

{¶35} In his second assignment of error, plaintiff also claims the trial court abused its discretion by forcing him to file motions under a dismissed case number, thus allowing defendant an extended period of time to file any reply. Although plaintiff gives little insight into the reasoning behind his claim, as best we can determine his argument is similar to that designated in his first assignment of error. In light of our disposition of plaintiff's first assignment of error, the issue of defendant's failure to file his answer within the time presented in the civil rules will be addressed in the trial court on remand.

V. Conclusion

{¶36} Having sustained plaintiff's first assignment of error and overruled his second assignment of error, we reverse the judgment of the trial court and remand this matter for proceedings consistent with this decision. On remand the trial court may permit defendant to submit a motion for leave to file an answer *instanter*, with an attached

answer. If the trial court finds the defendant's motion demonstrates excusable neglect under the standard of Civ.R. 6, then the affirmed summary judgment ruling should be reinstated. If the trial court finds defendant is unable to demonstrate excusable neglect to support his motion for leave to file his answer instantler, then default judgment should be entered for plaintiff.

*Judgment affirmed in part and
reversed in part; case remanded.*

McGRATH and TYACK, JJ., concur.
