IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, Plaintiff, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. CV-2016-09-3928 Judge Todd McKenney

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO WITHDRAW AND AMEND ADMISSIONS UNDER CIV. R. 36(B)

I. Issue Presented

> Courts nationwide, including in Ohio and the Ninth District, routinely hold, consistent with Civ.R. 36(B)'s plain language, that a trial court deciding a motion to amend or withdraw admissions should "focus on the effect upon the litigation and prejudice to the resisting party … rather than focusing on the moving party's excuses for an erroneous admission." Yet Defendants insist that this Court must require Plaintiff to show that "compelling circumstances" caused her to respond to their requests ten days late. Should this Court reject Defendants' argument and allow Plaintiff to withdraw and amend her admissions in the absence of any resulting prejudice?

II. Introduction

Courts in Ohio and nationwide routinely respond with disapproval of the "meritless gamesmanship" Defendants have employed in asking this Court to dispose of this lawsuit because Plaintiff was ten days late in responding to requests for admission. *Fifth Third Bank v. Meadow Park,*

LLC, 12th Dist. Clinton No. CA2015-07-012, 2016-Ohio-753, ¶¶ 10, 29. As the 11th Circuit has stated,

> [w]hen a party uses the rule [Rule 36] to establish uncontested facts and to narrow the issues for trial, then the rule functions properly. When a party . . . however, uses the rule to harass the other side, or as in this case, with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements (that the party has already denied in its answer), the rule's time-saving function ceases; the rule instead becomes a weapon, dragging out the litigation and wasting valuable resources.

Perez v. Miami-Dade County, 297 F.3d 1255, 1258 (11th Cir. 2002).

In their Opposition to Named Plaintiff's Motion to Withdraw and Amend Admissions, Defendants misrepresent the law to wrongly claim that dicta from the Ohio Supreme Court's opinion in *Cleveland Trust Co. v. Willis*, 20 Ohio St. 3d 66, 67, 485 N.E.2d 1052 (1985) requires a party seeking to amend or withdraw admissions under Civ.R. 36(B) to "establish[] compelling circumstances *for failing to timely respond*." Defs' Opp. at 1 (emphasis added). This Reply brief[1] is necessary to point out that the *Willis* court never imposed any such requirement, which would be inconsistent with its holding that courts "may permit the withdrawal [under Rule 36(B)] 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." *Id.* at 67. And the Ninth District, in *Albrecht, Inc. v. Hambones Corp.*, 9th Dist. Summit No. 20933, 2002-Ohio-5939, ¶¶ 16–21, did not impose any such requirement in finding an abuse of discretion where the trial court failed to allow amendment under identical circumstances to those at issue here.

Ohio courts have explained that *Willis* imposes no "compelling circumstances" requirement to a party's failure to timely respond in deciding on a motion to amend or withdraw admissions. Thus, as explained below, the Court should follow Civ.R. 36(B)'s plain language, the *Willis* court's

[1] Defendants apparently filed their Opposition to Plaintiff's Motion to Withdraw and Amend admissions on Wednesday, November 23, 2016, but this document was not served on Plaintiff until Monday, November 28, by the Court's electronic-filing system.

holding, and the Ninth District's holdings in *Albrecht* and related cases, and uphold the "basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Perotti v. Ferguson*, 7 Ohio St.3d 1, 3, 454 N.E.2d 951 (1983).

III. Law and Argument

a. Contrary to Defendants' argument, the Ohio Supreme Court, in *Cleveland Trust Co. v. Willis*, did not "require the responding party to establish compelling circumstances for failing to timely respond" to requests for admission.

Defendants' base their argument on the proposition that the Ohio Supreme Court, in *Cleveland Trust Co. v. Willis*, 20 Ohio St. 3d 66, 67, 485 N.E.2d 1052 (1985), "require[d] a three-prong analysis" in deciding on a motion to withdraw or amend admissions, including a requirement that "the responding party establish[] compelling circumstances for failing to timely respond." Defs' Opp. at 3. But the *Willis* decision imposes no such third prong, which would directly contradict the Civ.R. 36(B)'s plain language, the "basic tenet of Ohio jurisprudence that cases should be decided on their merits," and the *Willis* court's actual holding, which tracks Civ.R. 36(B)'s two-prong test in stating that courts "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." *Willis* at 67. The *Willis* court further stated that Civ.R. 36(B) "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. Refusing to allow withdrawal or amendment based on a 10-day delay and no conceivable prejudice, as Defendants' request here, would completely contradict these principles announced in *Willis* as well as Civ.R. 36(B)'s plain language. It would also be inconsistent with the principle that dismissal is an extreme sanction even in cases of willful discovery abuses and violations of court orders. *See Gilbert v. WNIR 100 FM*, 142 Ohio App. 3d 725, 745–46, 142, 756 N.E.2d 1263 (9th Dist. 2001).

Of course, where allowing withdrawal or amendment of admissions would aid in resolving the case on its merits, and where no prejudice would result, compelling circumstances exist *for allowing the amendment or withdrawal*, apart from the reasons for the responding party's failure to timely respond. This is consistent with *Willis*, which only stated of "compelling circumstances" that, "under compelling circumstances, the court may allow untimely replies to avoid the admissions." It's also consistent with the Ninth District's decision in *Albrecht, Inc. v. Hambones Corp.*, 2002-Ohio-5939, ¶¶ 16–21, where the Court allowed amended admissions under Rule 36(B) even where it expressly found that there were no "compelling circumstances" behind the erroneous admissions. The Second District Court of Appeals justified these holdings with sound reasoning in rejecting the "third-prong" argument that Defendants make here:

> There is no textual basis for requiring the movant to provide compelling circumstances for why he or she failed to meet the deadline within Civ.R. 36 to withdraw the admission. The lack of a textual basis in Civ.R. 36(B) for the compelling circumstance requirement should in itself suggest a new approach to the issue. . . .
>
> The ['compelling circumstances'] passage [in *Willis*] does not indicate what the trial court may do in instances where there were not compelling circumstances, nor does the Supreme Court define what constitutes compelling circumstances. Furthermore, the analysis used in *Willis* suggests that the passage should be treated as dicta. … [T]he Ohio Supreme Court noted that appellant's alleged illness did not provide a compelling justification for missing the deadline. *Id.* at 68. However, the court also focused on the prejudice appellee would endure if the appellant's admissions were withdrawn. *Id.* at 68. Specifically, the response to the request for admissions came on the first day of trial and therefore would have clearly prejudiced appellee's strategy. *Id.* The court's opinion therefore was based on the prejudice the appellee would endure that justified affirming the lower court.

Crespo v. Harvey, 2014-Ohio-1755, 11 N.E.3d 1206, ¶ 21 (2nd Dist.). The Fifth District explained further, also rejecting the argument that a party must demonstrate "compelling circumstances" for failing to timely respond in requesting to amend or withdraw admissions:

> In *Willis*, the request to withdraw the admissions was made on the first day of trial. Further, the court in *Willis* noted 'Charles did not cooperate with discovery requests and defied court orders directing him to give his deposition. Because of this conduct Cleveland Trust relied on the requests for admissions as proof of potentially disputed issues. On the first day of trial Charles sought to file his untimely response to the requests for admissions. To permit filing of Charles' response not only would have prejudiced Cleveland Trust's pursuit of its remedy and entailed further delay, but it would have put a premium upon lack of diligence.'

Kutscherousky v. Integrated Communs. Solutions, LLC, 5th Dist. Stark No. 2004 CA 00038, 2005-Ohio-4275, ¶¶ 22. Thus, "compelling circumstances" did not exist for allowing withdrawal of the deemed admissions in *Willis*. The *Willis* court did not require that the compelling circumstances always relate to the party's failure to timely respond.

The concurring opinions in *Crespo* cast more light on this issue by explaining as follows:

> Admissions are not compelled to be final and not subject to withdrawal or amendment if a tardy response is the result of nominal negligence, without any resulting prejudice, and not part of a 'pattern of neglect or obstructionism' or a 'conscious effort to ignore the request … .' … The deemed-admitted consequence is not a "gotcha" for the minimally dilatory when it resolves the litigation in a manner completely prejudicial to one side without any prejudice to the other.

Crespo, 2014-Ohio-1755 at ¶¶ 26–27 (Froelich, J., concurring) citing *Builders Services, Inc. v. Habitat Condominium Owners Ass'n*, 2nd Dist. Montgomery No. 17247, 1999 Ohio App. LEXIS 104, *6 (Jan. 22, 1999), (internal citations omitted).

> Once the [two] prerequisites [of Civ.R. 36(B)] have been satisfied, and the trial court has discretion, the sound exercise of that discretion requires a consideration of the culpability of the negligent party (in having failed to respond timely to the request for admissions) in comparison with the inconvenience to the trial court and to the adverse party or parties if the deemed admissions are modified or

> withdrawn. If the culpability of the negligent party is great, perhaps because the party has demonstrated a pattern of indifference to discovery and to orders of the court, and the inconvenience to the trial court and to the adverse parties is great, perhaps because the trial date is imminent and the adverse parties and the trial court have prepared for trial, then the sound exercise of discretion would lead a reasonable trial court to overrule a motion to modify or withdraw deemed admissions. Conversely, if both the culpability of the negligent party and the inconvenience to the trial court and the adverse parties are slight, then the sound exercise of discretion would lead a reasonable trial court to sustain the motion.
>
> Obviously, there will be cases lying somewhere midway between these extremes, in which a reasonable trial court, exercising its sound discretion, could either sustain or overrule the motion. But the case before us appears to me to lie near the extremes of slight negligence and slight inconvenience.

Crespo, 2014-Ohio-1755 at ¶¶ 30–31 (Fain, J., concurring).

Thus, Ohio Courts, including the Ninth District, routinely decide on motions to withdraw or amend under Civ.R. 36(B) without reference to the "circumstances" behind a party's failure to timely respond to requests for admission. *Albrecht, Inc. v. Hambones Corp.*, 9th Dist. Summit No. 20933, 2002-Ohio-5939, ¶¶ 16–21 (finding an abuse of discretion where the trial court denied a party's request to withdraw admissions when "the … case was only in the beginning phase"). *See also Fifth Third Bank v. Meadow Park, LLC*, 12th Dist. Clinton No. CA2015-07-012, 2016-Ohio-753, ¶¶ 26–30 ("[Appellant's] attempts to avoid a deficiency judgment through [deemed admissions] was 'full of gamesmanship and without merit.'"); *State ex rel. Davila v. City of Bucyrus*, 194 Ohio App. 3d 325; 2011-Ohio-1731; 956 N.E.2d 332, ¶¶ 29–31 (3rd Dist.) (finding an abuse of discretion where the trial court denied a party's request to withdraw admissions where result was "contrary to the basic tenet of Ohio jurisprudence that cases should be decided on their merits."); *Lakeview Loan Servicing, LLC v. Amborski*, 6th Dist. Lucas No. No. L-14-1242, 2016-Ohio-2978, ¶¶ 14–22 ("[T]he trial court is directed to focus on the 'effect upon the litigation and prejudice to the resisting party … rather than focusing on the moving party's excuses for an erroneous admission.'"); *Stevens v. Cox*,

6th Dist. Wood No. WD-08-020, 2009-Ohio-391, ¶¶ 43–55 ("The trial court is directed to focus on the effect upon the litigation and prejudice to the resisting party rather than focusing on the moving party's excuses for an erroneous admission."); *Kutscherousky v. Integrated Communs. Solutions, LLC*, 5th Dist. Stark No. 2004 CA 00038, 2005-Ohio-4275, ¶ 28 ("It does not further the interests of justice to automatically determine all the issues in a lawsuit and enter summary judgment against a party because a deadline was missed."). These decisions are properly in accord with federal precedent holding that courts deciding on a motion to amend or withdraw admissions under the identical Fed.R.Civ.P. 36(B) "is directed to focus on the effect upon the litigation and prejudice to the resisting party … rather than focusing on the moving party's excuses for an erroneous admission." *E.g.*, *FDIC v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994); *Raiser v. Utah County*, 409 F.3d 1243, 1247 (10th Cir. 2005); *Kahrs Int'l, Inc. v. United States*, 33 C.I.T. 117, 120 (Ct. Int'l Trade 2009). *See also Riley v. Kurtz*, 1999 U.S. App. LEXIS 24341 (6th Cir. 1999) (applying Rule 36(B)'s two-pronged test).

b. This Court should follow the Ninth District's decision in *Albrecht, Inc. v. Hambones Corp*. and apply the two-pronged test of Rule 36(B) without regard to the circumstances behind the failure to timely respond to the requests for admission.

In *Albrecht*, the Ninth District held that the trial court abused its discretion in denying appellants' motion to amend or withdraw admissions under Rule 36(B). *Albrecht,* 2002-Ohio-5939, ¶¶ 16–21. The *Albrecht* court specifically concluded that appellants "did not present evidence of any compelling circumstances that prevented them from" timely responding to appellees' requests for admission, and therefore could not avoid the consequence of having their non-responses deemed admitted. *Id.* at ¶ 15. But this finding was irrelevant to the Court's analysis of whether appellants should have been permitted to amend or withdraw those deemed admissions under Rule 36(B). Here, the *Albrecht* court applied the rule's two-pronged test, finding that "allowing withdrawal or amendment of the admissions would aid in the presentation of the merits of the[] case" by permitting appellants to make a certain argument. *Id.* at ¶ 19. Because appellee did not meet its

"burden of showing that allowing withdrawal or amendment of the admissions would prejudice it," and because the case "was only in the beginning phase," the court reversed the trial court's decision, citing the "basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Id.* at ¶¶ 19–20, citing *Perotti v. Ferguson*, 7 Ohio St.3d 1, 3, 454 N.E.2d 951 (1983).

Identical circumstances are at issue here, where the facts that Plaintiff will prove at trial are substantially at odds with the admissions that Defendants have sought, and Defendants do not make any claim of prejudice at this early stage of the litigation. Thus, following the Ninth District's decision in *Albrecht*, the Court should grant Named Plaintiff leave to withdraw and amend her admissions.

c. The cases Defendants cite are distinguishable and support Plaintiff's argument.

The cases Defendants cite in their opposition brief are distinguishable and support Plaintiff's argument for withdrawal and amendment under Rule 36(B). Most of the cases Defendants cite do not involve motions to withdraw or amend under Rule 36(B) at all, but instead apply a "compelling circumstances" test to decide, like the *Albrecht* court did, whether a party can avoid deemed admissions even when that party does not otherwise move to withdraw or amend under Rule 36(B). *Mgmt. Recruiters-Southwest v. Holiday Inn-Denver*, 9th Dist. Medina No. 2582-M, 1997 Ohio App. LEXIS 1609, *4 (Defs' Opp. at 4, 6–8) ("In this case, appellant made no motion to withdraw or amend."); *Nat'l City Bank v. Moore*, 9th Dist. Summit No. 19465, 2000 Ohio App. LEXIS 723, *6–7 (Defs' Opp. at 4–8) ("The record reflects that [appellants] …did not … move the court to allow withdrawal of [their] default admissions."); *Marusa v. City of Brunswick*, 9th Dist. Medina No. 04CA0038-M, 2005-Ohio-1135, ¶22 (Defs' Opp. at 4) ("The record shows that not only did Appellant fail to respond to the request for admissions, which resulted in default admissions, but he also failed to file leave to reply or ask the court to grant him leave to withdraw the admissions."); *PDL Serv., Inc. v. Eastern Well Surveys, Inc.*, 5th Dist. Stark No. 1999CA00168, 1999 Ohio App. LEXIS

5838, *9 (Defs' Opp. at 6–8) ("The record indicates … that [appellant's attorney] never moved to withdraw or amend any of the admissions."); *J.P. Morgan Chase Bank v. Inudstr. Power Generation, Ltd.*, 11th Dist. Trumbull No. 2007-T-0026, 2007-Ohio-6008, ¶31 (Defs' Opp. at 6–8) (no analysis of Rule 36(B) where appellants did not "otherwise request relief from the duty of responding to these requests for admissions.").

These cases, like the Ninth District's opinion in *Albrecht*, make clear that any third-prong "compelling circumstances" test to avoid deemed admissions is separate from the two-pronged decision whether to withdraw and amend under Rule 36(B). For example, in *Amer, Cunningham, Brennan Co., L.P.A. v. Sheeler*, 9th Dist. Summit No. 19093, 1999 Ohio App. LEXIS 1995, *9 (Defs' Opp. at 6, 8), the Ninth District concluded that there were no "compelling circumstances" to allow the appellant to "avoid the consequences" of having his requests deemed admitted under Rule 36(A). But the *Amer* court, like the *Albrecht* court, then went on to separately analyze whether "the [trial] court abused its discretion when it refused to permit [appellant] to withdraw or amend those admissions." *Id.* at *9. Here, the Ninth District again properly analyzed Rule 36(B) as a two-pronged test with no "compelling circumstances" requirement, and found that "both conditions" of Rule 36(B) were not met because "the record [did] not indicate that [appellant] established that withdrawal of the admissions would aid in the presentation of the merits of the case." *Id.* at *10–11.

IV. Conclusion

Dismissal is an extreme sanction even in cases involving willful discovery abuses and violations of court orders. *See Gilbert v. WNIR 100 FM*, 142 Ohio App. 3d 725, 745-746, 142, 756 N.E.2d 1263 (9th Dist. 2001). Dismissal based on an inadvertent and completely harmless delay of ten days in responding to requests for admission would be an absurd result that cannot be squared with the plain language of Civ.R. 36(B), the Ohio Supreme Court's decision in *Willis*, the Ninth District's decision in *Albrecht*, or the fundamental principle that cases should be decided on their

merits. Thus, the Court should permit Named Plaintiff to withdraw and amend her Admissions, and grant Named Plaintiff's Motion to Stay Summary Judgment Proceedings.

Dated: December 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on all necessary parties by operation of the Court's e-filing system on December 5, 2016.

/s/ Peter Pattakos
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