IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DAVID D. WALSH	)	CASE NO: CV 08 675621
	)	
Plaintiff	)	JUDGE JOHN P. O'DONNELL
	)	
vs	)	
	)	
VICTOR J. SCHKURLEY, *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants	)	

John P. O'Donnell, J.:

David D. Walsh filed a complaint against Victor J. Schkurley on November, 6, 2008. The complaint alleges that Schkurley negligently caused a car accident on November 16, 2006, and that the plaintiff incurred injuries and other damages as a result. Certified mail service of the complaint was made upon the defendant on November 13, 2008.

The defendant did not file a responsive pleading, and, on January 6, 2009, the plaintiff filed a motion for default judgment, serving a copy on the defendant. That motion was filed just prior to a scheduled January 6 case management conference. Only the plaintiff and counsel appeared for the conference. No appearance was made by the defendant or on his behalf. The default motion was then set for a hearing on February 25, 2009.

On February 6, the defendant, through counsel, filed a motion for leave to file an answer *instanter*. A hearing on that motion was held on February 25. Because of the pending motion for leave to file an answer *instanter*, the default judgment hearing was postponed.

At the hearing, defense counsel provided evidence that, upon service, the defendant referred the complaint to his automobile liability insurance carrier with a request that it provide for his defense pursuant to his policy. The referral to the insurance company was made well within the 28 days allowed by Civil Rule 12(A)(1) for service of a responsive pleading. The insurance carrier did not retain counsel to represent the defendant until a day or two before the motion for leave was filed on February 6. No evidence was introduced to show who at the company received the defendant's referral of the suit or to support a reason why the insurance carrier took no action until having had the complaint for almost three months.

Civil Rule 6(B) provides, in pertinent part, as follows:

> (B) **Time: Extension**. 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 . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was a result of excusable neglect.

The proper standard by which a trial court is required to analyze a request for an extension of time is, as set forth in the rule, that of excusable neglect.[1] In determining whether neglect is excusable or inexcusable, the trial court must take into consideration all the surrounding facts and circumstances.[2] Although the term "excusable neglect" is an elusive concept that courts often find difficult to define and to apply, the cases discussing excusable neglect reveal some general principles.[3] 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 or family illness; and counsel of

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[1] *Marion Production Credit Ass'n v. Cochran* (1988), 40 Ohio St. 3d 265, 271, 533 N.E.2d 325.
[2] *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122, at syllabus.
[3] *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 1996 Ohio 430, 665 N.E.2d 1102.

record fails to appear for trial because he has not received notice of a rescheduled trial date.[4] A majority of the cases finding excusable neglect also have found unusual or special circumstances that justified the neglect of the party or attorney.[5]

Neglect is inexcusable, pursuant to Civil Rule 6(B), when a party's inaction can be classified as a "complete disregard for the judicial system."[6] Likewise, conduct falling "substantially below what is reasonable under the circumstances" constitutes inexcusable neglect.[7] Further, if the party could have prevented the circumstances from occurring, neglect will not be considered excusable.[8]

The term "excusable neglect" also appears in Civil Rule 60(B)(1) pertaining to relief from a judgment. Although some authorities feel that the standard of excusable neglect in Civil Rule 6 is less difficult to meet than that of Civil Rule 60(B)(1), it is true in either case that a person is not absolved from employing all necessary diligence and that mere negligence will not suffice as a ground for relief – the negligence must be excusable or it will not form the basis for relief.

In this case, there is certainly evidence of neglect since the defendant's request for a defense was ignored by his insurance company for almost three months. But there is no evidence of a reason, or excuse, for that neglect. Because of that lack of evidence, there is no way of knowing whether the defendant's insurance carrier was constrained by circumstances not of its making or beyond its control from retaining counsel to timely respond to the complaint.

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[4] *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 13, 371 N.E.2d 214; *The Bluffs of Wildwood Homeowners' Ass'n, Inc. v. Dinkel* (1994), 96 Ohio App. 3d 278, 281, 644 N.E.2d 1100, *Columbia Gas of Ohio v. Riley* (1987), 38 Ohio App.3d 151, 528 N.E.2d 593, paragraph two of the syllabus.
[5] *Kay,* supra.
[6] *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 153, 351 N.E.2d 113.
[7] *Id.* at 152.
[8] *McKinley v. Rhee,* Allen App. No. 1-01-168, 2002 Ohio 1768, citing *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 706 N.E.2d 825.

Without any evidence of why the company failed to act upon its policyholder's request for a defense, the court is left to assume that the company exhibited a complete disregard for the judicial system. It should not come as a surprise that no court is interested in turning over the administration of its docket to an insurance company, much less to the anonymous office staff of the insurance company. If the court were to find that the neglect here is excusable, then there is no neglect that is not excusable and Civil Rule 6(B)(2) is rendered meaningless.

Therefore, the defendant's motion for leave to file an answer *instanter* is denied. The defendant will, however, be able to participate at the hearing on the plaintiff's motion for default judgment. That hearing will be scheduled by a separate entry.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this ____ day of March, 2009, to the following:

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Judge John P. O'Donnell