[Cite as *Secrest v. Gibbs,* 2009-Ohio-3308.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

DEAN J. SECREST, et al,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2008-L-137**
- vs -	:	
ROBERT E. GIBBS, et al,	:	
Defendants-Appellants.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 99 CV 001635

Judgment: Affirmed.

Robert B. Weltman and *Henry J. Geha,* Weltman, Weinbert & Reis Co., L.P.A. Lakeside Place, #200, 323 Lakeside Avenue, West, Cleveland, OH 44113 (For Plaintiffs-Appellees).

Donald A. Richer, 270 Main Street, #160, P.O. Box 1575, Painesville, OH 44077 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.,

{¶1} Appellants, Robert E. Gibbs, et al., appeal from the judgment of the Lake County Court of Common Pleas granting appellees', Dean J. Secrest, et al., motion to revive the dormant judgment of the same court for compensatory and punitive damages, attorney fees, and costs issued on August 15, 2002 after a trial by jury. For the reasons herein, we affirm the judgment of the trial court.

{¶2} On August 15, 2002, after a trial by jury, appellees were awarded a judgment against appellants in the amount of $235,000 in combined compensatory and punitive damages. The jury also awarded appellees reasonable attorney fees which, after a hearing on the issue, amounted to $25,000. The judgment subsequently went dormant. On May 29, 2008, appellees filed a motion to revive the judgment. On July 1, 2008, appellants filed their brief in opposition. Appellees, in turn, filed a reply to appellant's brief in opposition. On September 5, 2008, appellees' motion to revive the judgment was granted as to the August 15, 2002 judgment in the amount of $235,000 plus interest, attorney fees, and costs. Appellants now appeal asserting one assignment of error, which provides:

{¶3} "The trial court committed reversible error in reviving the August 15, 2002 judgment."

{¶4} Under their sole assignment of error, appellants first argue the punitive damages included in the August 15, 2002 judgment could not be revived without first complying with R.C. 2315.21(D)(2). We disagree.

{¶5} R.C. 2315.21 is concerned with the procedure a court must use in torts where compensatory and punitive or exemplary damages are sought. It provides, in relevant part:

{¶6} "(D)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

{¶7} "(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

{¶8} "***

{¶9} "(b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section."

{¶10} Although appellants concede this statutory subsection had not been enacted at the time the original damages award was issued (it became effective on April 7, 2005), they argue it is applicable to this case because the motion to revive was filed subsequent to its enactment. Appellants therefore contend the trial court erred in reviving the judgment vis-à-vis the $150,000 in punitive damages without first considering whether the amount awarded complied with the dictates of R.C. 2315.21(D)(2).

{¶11} Appellants' position appears to be premised upon their belief that any legislation enacted prior to the filing of a motion to revive (or subsequent to a judgment falling dormant) applies to the judgment being revived. In support, appellants cite the Supreme Court of Ohio's decision in *Asset Acceptance LLC v. Mack,* 105 Ohio St.3d 323, 2005-Ohio-1829.

{¶12} In *Asset Acceptance,* the Court was asked to determine whether a dormant judgment accrues interest while it is dormant. The court answered the question in the affirmative, holding: "[a] judgment continues to accrue interest while it is dormant, if not subject to R.C. 2325.18(B), enacted by 2004 Sub. H.B. No. 212,

effective June 2, 2004." *Asset Acceptance,* supra, at syllabus. R.C. 2325.18(B), enacted by 2004 H.B. 212, expressly provides that "interest shall not accrue and shall not be computed from the date the judgment became dormant to the date the judgment is revived." Prior to the enactment of 2004 H.B. 212, the General Assembly had not addressed the accrual of interest during dormancy. Thus, the court held unless the motion to revive is controlled by the 2004 H.B. 212 version R.C. 2325.18, interest shall accrue on a dormant judgment.

{¶13} Appellants contend that the foregoing holding implies that modifications in the law resulting from the enactment of new legislation apply to all dormant judgments sought to be revived after the effective date of that new legislation. Nothing in *Asset Acceptance* supports appellants' sweeping interpretation. *Asset Acceptance* responded to the narrow question of whether interest accrues while a judgment is dormant. The Court concluded it did accrue to the extent the judgment was not subject to R.C. 2325.18(B), enacted by 2004 H.B. 212. In other words, if the motion for revivor is filed after June 2, 2004, interest does not accrue from the date the judgment fell dormant to the date the judgment is revived. This holding gives no guidance on whether new legislation generally applies to dormant judgments revived after the effective date of that legislation.

{¶14} Regardless of this analysis, a final, binding judgment was previously rendered on the issue of punitive damages and thus, R.C. 2315.21(D)(2) is inapplicable to the instant matter. That is, Title 23, of which Chapter 2315. et seq. is a part, addresses "trial procedures." R.C. 2315.21 explains the manner in which a tort action shall proceed when a plaintiff seeks both compensatory damages as well as punitive or

exemplary damages. R.C. 2325.21(D)(2) sets forth certain limitations on punitive or exemplary damages that a court must observe when the trier of fact has deemed such damages appropriate. R.C. 2325.21, when read in its entirety, contemplates trial procedures a court and/or jury must observe *prior to* the entry of final judgment. However, by its very nature, a motion to revive a judgment is a post-trial pleading, which affords a prevailing party the opportunity to collect damages on a *previously-entered* final judgment that has gone dormant. The procedures and limitations set forth under R.C. 2325.21 cannot logically apply to a motion for revivor because such a motion presumes the existence of a previously-entered valid final judgment which, for one reason or another, has been heretofore either uncollected or uncollectible. Appellants' argument is accordingly overruled.

{¶15} Appellants next assert the underlying motion to revive the August 15, 2002 judgment did not seek to revive the May 7, 2003 judgment, which set forth the amount appellees were entitled on the issue of attorney fees. Accordingly, appellants maintain the May 7, 2003 judgment remains dormant.

{¶16} Appellees' motion to revive sought "an Order reviving the Judgment rendered in these proceedings on August 15, 2002, on behalf of the Plaintiffs and against the Defendants, Robert E. Gibbs and R.E.G. Inc., in the sum of $235,000, together with interest at the rate of 10% per annum from August 15, 2002 to September 6, 2007, attorney fees and costs of these proceedings."

{¶17} Appellants are correct that the motion did not specifically state appellees sought revivor of the May 7, 2003 judgment, the entry which set forth the specific amount to which appellees were entitled pursuant to the August 15, 2002 judgment.

However, appellants did not raise this omission before the trial court. Had the matter been raised, any error or omission would have been corrected at that time. An appellate court will not consider any error which the party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been corrected or avoided by the trial court. *Schade v. Carnegie Body Co*. (1982), 70 Ohio St.2d 207. Appellants' failure to object to this issue before the trial court at trial constituted a waiver of this issue on appeal.

{¶18} Regardless of appellants' lack of objection, appellees' motion did mention they sought revivor of the $235,000 in damages which were specified in the August 15, 2002 judgment "together with" attorney fees. The August 15, 2002 judgment included an award of "reasonable attorney fees." Even though a separate entry was issued setting forth the amount which the court deemed "reasonable," that entry was supplemental to the original August 15, 2002 judgment, i.e., it simply specified the amount to which appellees were entitled by virtue of the August 15, 2002 order. Accordingly, we believe the motion, on its face, was sufficient to revive the entirety of the amounts owed resulting from the underlying August 15, 2002 judgment, viz., compensatory damages, punitive damages, and attorney fees.

{¶19} Finally, appellants claim the trial court erred in not dismissing the proceedings to revive the underlying judgment for failure of proper service.

{¶20} Here, appellees accomplished service on appellants' attorney pursuant to Civ.R. 5(B), the rule governing "[s]ervice and filing of pleadings and other papers subsequent to the original complaint." Appellants assert such service was insufficient. Specifically, appellants point out that Civ.R. 4(F), effective July 1, 2008, now requires a

motion to revive a dormant judgment be served on a defendant "in the same manner as *** service of a summons." Although appellees filed their motion to revive on May 29, 2008, prior to the effective date of Civ.R. 4(F), appellants claim such service has always been necessary. Appellants seize on the language of Rules Committee's Staff Notes, which provide:

{¶21} "The adoption of the Ohio Rules of Civil Procedure in 1970 left unclear the procedure and manner of service for a motion to revive a dormant judgment, formerly governed by R.C. 2325.15 and R.C. 2325.16 which referred to statutes superseded by the Rules. Division (F) of Rule 4 has been adopted to make clear that R.C. 2325.15 and R.C. 2325.16 are superseded by this new Rule. It requires, *consistent with the practice under the prior statutes*, that a motion to revive a dormant judgment *be served upon the judgment debtor in the same manner as service of summons* with complaint attached, affording the debtor an opportunity to show cause against the revivor." (Emphasis added.)

{¶22} Given the Rules Committee's comment regarding the "practice under the prior statutes," appellants conclude Civ.R. 5(B) service was improper even prior to the enactment of Civ.R. 4(F). We disagree.

{¶23} While the Staff Notes to Amended Civ.R. 4 seems to suggest service of a motion to revive has consistently required the judgment creditor to serve the judgment debtor(s), our review of the relevant statutes do not lead us to the same conclusion. The Rules Committee sets forth specific statutes in its Staff Notes which it maintains formerly governed service of process but have now been superseded by the enactment of Civ.R. 4(F), viz., R.C. 2325.15, R.C. 2325.16, and statutes internally referenced

under those provisions. Nothing in these statutes indicates service on a defendant in the same manner as service of summons was required prior to the enactment of Civ.R. 4(F). Actually, the statutory provisions cited by the Rules Committee do not specifically provide for a manner of service other than publication service, the minimum requirement to meet due process. While the statutory scheme did limit publication service to situations where personal service was originally made on the adverse party, the relevant statutes discussed by the Staff Notes fail to mention anything more stringent. See R.C. 2325.16.

{¶24} Here, appellees served appellants' attorney pursuant to Civ.R. 5(B). Appellants, through counsel, made an appearance, filed numerous pleadings in opposition, and defended the matter to its resolution. Because the filing seeking revivor of a judgment is a "motion" which was filed *before* the rule change *and* because our independent research has not revealed anything in the law requiring service on the defendant similar to service of a summons, we hold service was sufficient, under these circumstances, to meet the demands of due process. Appellants' final argument is without merit.

{¶25} For the reasons discussed above, appellants' sole assignment of error is without merit and the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.