[Cite as *Anderson v. Holskey*, 2009-Ohio-3053.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SHAWN ANDERSON,	)	
	)	CASE NO. 08 BE 37
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	O P I N I O N
	)	
JEREMIAH HOLSKEY,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 07CV270.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 8, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Jeremiah Holskey appeals from the judgment of the Belmont County Common Pleas Court which granted default judgment to plaintiff-appellee Shawn Anderson on his intentional tort claim. Appellant argues that the court erred in failing to rule on a letter which purportedly requested participation in a hearing by telephone or satellite, that the court violated his right to defend by granting default judgment, and that the damage award constituted a violation of double jeopardy as he had already been convicted of a criminal offense against appellant for the incident from which this civil suit arose. For the following reasons, appellant's arguments are overruled, and the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On June 11, 2007, appellee filed a complaint against appellant sounding in battery and seeking compensatory and punitive damages. The complaint was based upon appellant's behavior on November 19, 2006 in Barnesville, Ohio.

¶{3} Appellee disclosed that he observed appellant engaged in a verbal and physical altercation with two females. When appellee tried to separate the participants, appellant beat appellee until he lost consciousness and then continued to beat him until a passing car stopped and pulled appellant from him. Appellee went into a coma. He had to be life-flighted from the local hospital to Columbus. He had suffered a loss of blood, injuries to his head, multiple facial bone fractures and bilateral crushed sinus cavities, which forced him to breathe only through his mouth for a year until corrective surgery could be performed.

¶{4} Appellee's civil complaint instructed the sheriff to serve appellant in the Belmont County Jail. A summons was issued the same day the complaint was filed. The summons contained the following typical language:

¶{5} "You are hereby summoned that a Complaint (a copy of which is hereto attached and made a part hereof) has been filed against you in this Court by the Plaintiff named herein.

¶{6} "You are required to serve upon the Plaintiff's attorney or upon the Plaintiff if they have no attorney of record, a copy of your Answer to the Complaint within 28 days after service of this summons upon you, exclusive of the day of service. Said answer must be filed with this Court within 3 days after served on Plaintiff's attorney [whose name and address were provided].

¶{7} "If you fail to appear and defend, judgment by default will be taken against you for the relief demanded in the Complaint."

¶{8} The record contains a successful return of service, evidencing that on June 12, 2007, the sheriff's process server personally served appellant with the summons and accompanying documents. Nothing was thereafter filed in the case until appellee filed a motion for default judgment on November 8, 2007.

¶{9} On March 21, 2008, the clerk date-stamped a letter from appellant asking for a copy of the docket in the case. On April 2, 2008, appellant filed a pro se motion to dismiss. First, he sought dismissal due to delay in the case. Second, he alleged that although a summons was served, he could not recall ever receiving a copy of the complaint. Third, he complained that he did not receive a copy of the motion for default judgment, noting that he recently received a copy of the docket to determine the status of the complaint. Fourth, he argued that he was constitutionally protected from the complaint as he was already serving time in prison for his actions.

¶{10} Appellee responded by pointing out that the return on personal service stated that appellant was successfully served with the summons and its attachments, that the summons says a complaint was attached, and that appellant admitted that he received the summons. Appellee further urged that default was warranted.

¶{11} On May 7, 2008, the court denied appellant's motion to dismiss, finding that appellant's unsworn claims that he could not recall receiving the complaint were insufficient to overcome the presumption of proper service where the requirements of the service rules were followed. The court then granted default judgment to appellee on the issue of liability. The court set the damages hearing for October to give appellant a chance to prepare in view of his incarceration. This hearing was later continued an additional month.

¶{12} On November 3, 2008, the hearing on damages proceeded where appellee set forth the details of the incident, described his injuries and their effects and submitted his medical bills. On November 5, 2008, the court awarded compensatory damages in the amount of $105,306.60, which represented the following categories: $49,106.50 in past medical expenses; $20,000 for pain and suffering; $5,000 for mental anguish; $15,000 for diminished capacity to enjoy life; $1,200 in lost wages; and, $15,000 for permanent disfigurement.

¶{13} Appellant filed timely notice of appeal and then a pro se brief. We have relocated and consolidated certain arguments for clarity and organization. For instance, appellant's arguments about a letter are addressed in the first assignment of error, and his arguments about granting default judgment are combined under the third assignment of error.

ASSIGNMENT OF ERROR NUMBER ONE

¶{14} Appellant sets forth four assignments of error, the first of which contends:

¶{15} "THE LOWER COURT ABUSED THEIR DISCRETION."

¶{16} Appellant claims here that the trial court abused its discretion in failing to rule on a letter, which he claims stated that he wished to be present via satellite or telephone. Appellant does not state when he wrote the letter. It is unclear if he is saying that he wrote this letter in regards to the damages hearing or the earlier hearing. Notably, the trial court at the damages hearing specifically stated that appellant did not communicate any intent to participate. (Tr. 3-4).

¶{17} When appellee's brief pointed this out and also pointed out that the docket and record contain no evidence of this letter, appellant replied only by pointing to his motion to dismiss filed on April 2, 2008, which did not contain any request to be present at any proceedings. Likewise, appellant did not provide a copy of the letter but instead attached the motion to dismiss. From this, one could conclude that the motion to dismiss is what he refers to as the letter. However, this motion does not contain a request for participation via telephone or satellite.

¶{18} In any event, the issue of the letter was not presented to the trial court, and thus, it is not properly before this court. It is a general rule that an appellate court will not consider any error which a party could have called but did not call to the trial

court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. Childs* (1968), 14 Ohio St.2d 56, syllabus at ¶3. For instance, if appellant had an issue with the court's ruling on default without his verbal participation and if he believed the court ignored some letter, he should have petitioned the court in the six months between the default ruling and the damages hearing, which delay the court ruled necessary to allow appellant to prepare from prison.

¶{19} Similarly, the letter is not a part of the record below, and items cannot be added to the record for the first time on appeal. *State v. Rouse*, 7th Dist. No. 04BE54, 2005-Ohio-6328, ¶16, citing *State v. Hill* (2001), 90 Ohio St.3d 571, 573; *Teague v. Cincinnati Ins. Co.*, 7th Dist. No. 02CA232, 2004-Ohio-3212, ¶21 (materials should be stricken from appellate record where there is no indication that they were submitted to the trial court for consideration), citing *McAuley v. Smith* (1998), 82 Ohio St.3d 393, 396. As such, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

¶{20} Appellant's second assignment of error alleges:

¶{21} "THE INITIAL COMPLAINT IS FRIVOLOUS."

¶{22} For the first time, appellant sets forth an argument that appellee initiated the altercation and caused his own injury. Once again, this argument was not presented to the court below as a reason to avoid or vacate the default judgment. As such, we cannot now evaluate it.

ASSIGNMENT OF ERROR NUMBER THREE

¶{23} Appellant's third assignment of error provides:

¶{24} "DENIED THE RIGHT TO ACCESS THE COURT."

¶{25} Appellant states that he was deprived of his right to defend by the entry of default judgment. However, where a defendant fails to answer, default is permissible under Civ.R. 55(A). None of the reasons provided in appellant's motion to dismiss (filed five months after the motion for default and ten months after the action was instituted) justified his failure to answer.

¶{26} First, he argued that the complaint should be dismissed due to delay. However, there is no right to a speedy trial for a civil defendant, and civil cases are not dismissed for delay, especially where the only delay is due to the defendant's failure to

answer and the court's failure to quickly act on the plaintiff's motion for default judgment. See Ohio Const. Art. I, Sec. 10.

¶{27} Second, appellant's motion acknowledged that a summons was served but alleged that he could not recall ever receiving a copy of the complaint. Pursuant to Civ.R. 4(A), a copy of the complaint shall be attached to the summons. However, appellant's motion to dismiss did not assert that he did not receive a copy of the complaint, it merely stated that he did not *recall* receiving it. In addition, as the trial court pointed out, his statement that he could not recall receiving the complaint was unsworn. Thus, the process server's statement that personal service was made of both the summons and complaint can be taken as true. As noted earlier, his motion did not request a hearing on the matter as required by Civ.R. 12(D).

¶{28} Regardless, a civil defendant who receives a summons with all of the information provided in the summons as recited supra, including a statement that the complaint is attached, has a duty to file an answer or a Civ.R. 12(B)(4) motion to dismiss on the grounds of insufficient process if the complaint is not actually attached. See Civ.R. 12(B)(4), (H)(1). See, also, *Sanborn v. Dean* (Mar. 31, 1993), 11th Dist. No. 92-G-1691 (where incorrect complaint was attached to summons defendant had duty to file motion to quash summons, motion to dismiss, answer asserting defense or answer merely answering after requesting correct complaint from clerk, and the failure to do so allows default to be entered). The failure to do so waives the argument. Id.; Civ.R. 12(H)(1).

¶{29} That is, appellant waived his right to defend by idly monitoring the case through docket requests rather than answering or filing a motion upon receiving the summons. See id.; *Faith v. Scuba*, 11th Dist. No. 2007-G-2767, 2007-Ohio-6563, ¶29, 34-35, 42-43 (return showed summons and complaint personally served on incarcerated defendant); *Security Natl. Bank & Trust Co. v. Jones* (July 6, 2001), 2d Dist. No. C.A. 2000-CA-59 (incarcerated defendant who alleged he may have received incomplete complaint did not relieve defendant of duties). For these reasons, appellant failed to meet his burden of rebutting the presumption of proper service in this situation. Id.

¶{30} Third, appellant's motion to dismiss complained that he did not receive a copy of the motion for default judgment, which he only discovered when he received the copy of the docket to determine the status of the complaint. However, a motion for default need not even be written, let alone served. Civ.R. 55(A). A defendant who has not appeared does not even get notice that a motion was filed. Id.

¶{31} Fourth, appellant's motion to dismiss argued that he was constitutionally protected from the complaint because he was already serving time in prison for his actions in this case. This argument is disposed of in appellant's next assignment of error.

¶{32} Finally, we point out regarding the lack of participation at the damages hearing, the court's liability entry specifically stated that it was waiting five months to set the damages hearing so the incarcerated defendant would have time to prepare. There is no recorded communication by appellant with the court thereafter. On the day of the hearing, appellant had neither filed a request nor otherwise arranged participation. The hearing was then continued for a month during which time appellant still did not seek to participate.

¶{33} The trial court nevertheless reviewed certain factors for determining whether proceeding to trial in the incarcerated defendant's absence was appropriate. (Tr. 3-4). See *Kampfer v. Donnalley* (1998), 125 Ohio App.3d 359, 363 (where this court held that there is no absolute right for an incarcerated party to be present in a civil action and reciting certain factors to be considered by the trial court). There is no argument concerning the application of these factors.

¶{34} Under all of these facts and circumstances existing before the trial court, appellant was not improperly denied his right to defend.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{35} Appellant's fourth assignment of error contends:

¶{36} "DENIED DUE PROCESS OF LAW AND THE PREVENTION OF MULTIPLE PUNISHMENT."

¶{37} Appellant's arguments concerning his absence were discussed above. Thereafter, he argues that his Fifth Amendment double jeopardy right was violated by

multiple punishments. He states that he was punished three times: prison, criminal restitution and civil damages.

¶{38} First, although the criminal case and its restitution order are not before us, we point out that a prison sentence combined with restitution does not violate the Double Jeopardy Clause as the defendant is not twice put in jeopardy merely due to different obligations being imposed within the same sentence. Cf. *State v. Bell*, 10th Dist. No. 03AP-1282, 2004-Ohio-5256, ¶16-17 (unless restitution is ordered after final sentencing order is journalized with no mention of later hearing to determine restitution).

¶{39} Second, after a criminal conviction and sentence, the subsequent "penalties" imposed upon the defendant for his conduct must constitute "criminal punishment" to fall under the Double Jeopardy Clause. *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, ¶18. A civil suit seeking damages due to an intentional tort is not criminal punishment. "[A] criminal conviction, even one including restitution, does not preclude a civil action." *Morgan v. Mikhail*, 10th Dist. Nos. 04AP195, 04AP196, 2004-Ohio-4598, ¶8.

¶{40} Notably, restitution orders imposed by state criminal courts as part of a criminal sentence are preserved from discharge in bankruptcy. Id. citing, *State v. Pettis* (1999), 133 Ohio App.3d 618, 622, fn. 1, citing Section 523(a)(7) of Chapter 7 of United States Bankruptcy Code. Yet, such criminal restitution order only includes economic loss. R.C. 2929.18(A)(1). Thus, there is an incentive for the victim to pursue both the civil and criminal avenues.

¶{41} We also point out that setoff is anticipated so that he will not be subject to paying the full amount of both criminal restitution and civil damages. See R.C. 2929.18(A)(1) ("All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender"). See, also, *State v. Shenefield* (1997), 122 Ohio App.3d 475, 481. As there was no indication given to the trial court that appellant has ever actually made any restitution payments, there was no credit to give under R.C. 2929.18(A)(1).

¶{42} Contrary to appellant's final suggestion, the "plaintiff" in a criminal case is not the victim. Rather, the state is the victim. Thus, res judicata principles do not bar

the civil action. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Hill*, 2d Dist. No. 2006CA24, 2007-Ohio-581, ¶9.

¶{43} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs.