IN THE SUPREME COURT OF OHIO

22-1467

JESSICA MCCOWN

Plaintiff/Appellee

v.

RAYMOND EICHENBERGER

Defendant/Appellant

On Appeal from the Licking County Court of Appeals, Fifth Appellate District

Court of Appeals
Case No. 22 CAG 01 0001

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RAYMOND L. EICHENBERGER

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Small Claims Court monetary jurisidictional limits in Ohio now are a maximum amount of Six Thousand Dollars ($6,000) in an original action Complaint. Not only is the amount capable of being sought in Small Claims Court not "small," but Small Claims Court cases are brought before the Court under important modifications of the Civil Rules which are often used to violate the rights of party Defendants to Due Process of Law and a fair hearing. The "speed up" rules of Small Claims Courts in Ohio often rob party Defendants of a fair trial and seriously violate standards of Due Process of Law and fundamental fairness in the process.

The case at bar illustrates the worst applications of these Small Claims Court rules and the cavalier attitudes of Small Claims Court Magistrates and Judges as they carelessly and negligently trample on the rights of party Defendants in that Court.

In the case at bar, service of Summons and Complaint were issued by the Small Claims Court clerk by ordinary mail after certified mail service went unclaimed. The accompanying Summons served by ordinary mail set a hearing date less than seven days after the mailing date of the Summons and Complaint. A hearing was conducted on that date, without the presence of the Defendant, and a Judgment was entered against the Defendant in the amount of Six Thousand Dollars.

The Defendant did not receive the Summons and Complaint by the date upon which the hearing occurred, and was notified of the case by the Clerk of Courts literally the day after the hearing when a copy of the Judgment Entry was sent to the Defendant

by e-mail. The Defendant promptly filed a Motion to Vacate the Judgment, asserting that he had not received the Summons and Complaint in the U.S. mail by the time of the hearing. The Motion was denied by the Small Claim Court Magistrate, and a Notice of Appeal was filed within the time limits of the denial of the Motion to Vacate (and within thirty days).

The Court of Appeals refused to rule on the issue of the rebuttable nature of the service of Summons and Complaint concerning ordinary mail service (the Decision of the Court was completely silent as to the Assignment of Error concerning lack of validity of service).

At its core, fundamental Due Process of law is notice and opportunity to be heard of the existence of a Complaint filed in any Court in Ohio and in the United States. Due process of law is violated when a party Defendant receives no notice of the pendency of civil litigation, and has no opportunity to present defenses and counterclaims to such a Complaint before a judgment is rendered.

Ordinary mail service is a dangerous form of service of Summons and Complaint due to the recent vagaries and uncertainties of the United States Postal Service. There is no longer a guarantee when a letter is placed into a United States Postal Service depository that it will be delivered in a timely manner, or indeed delivered at all.

Due to the problems with the United States Mail, Courts in Ohio must be considerate and aware of the rights of party Defendants to challenge the receipt of ordinary mail service, particularly in such matters as when the Court sets a hearing date in a Small Claims case less than seven (7) full days after a piece of mail is placed in the United States mail system.

Conversely, a Small Claims Court Defendant must be given a right to file an Answer and Counterclaim in the case pursuant to the Ohio Revised Code. A quick determination of a Small Claims Court hearing date, less than seven (7) fulls days after Summons and Complaint are placed into the United States Mail system, deny party Defendants the right to file a Counterclaim as called for by Ohio statute.

The facts of the case at bar are further exacerbated by the fact that the named party Defendant owns only 10% of any alleged bill due to the Plaintiff. The Plaintiff's Complaint failed to join the Defendant LLC which owns 90% of the racehorses in question.

With the increased use of Small Claims Court, the above issues concerning sufficiency and legality of service of Summons and Complaint, and the scheduling of Small Claims Court hearings less than seven (7) full days after alleged service of Summons and Complaint, are vital issues of Due Process of law which must be addressed by the Court if Small Claims Court Magistrates are evidently so willing to violate the rights of litigants in these areas.

STATEMENT OF THE CASE AND FACTS

This case was decided solely on a Default Judgment granted against the Defendant and without the presence of the Defendant at a hearing which occurred on November 23, 2021. (Rec. 10)

The Complaint of the Plaintiff, Jessica McCown, was filed on October 19, 2021. (Rec. 1). The Complaint was based upon alleged unpaid bills for the training of two (2) harness racehorses. The Plaintiff only filed the action against the individual Defendant, who only owns 10 percent of the racehorses in question. Plaintiff

McCown failed to join as a party Defendant the LLC which owns 90% of the racehorses in question.

Service of Summons and Complaint was first attempted upon the Defendant by certified mail at 7673 N. Oakbrook, Reynoldsburg, Ohio on October 19, 2021. (Rec. 3).

Inexplicably, the Plaintiff then directed that ordinary mail service be made upon the Defendant on November 17, 2021, at a different address. (Rec. 8)

After mailing of the ordinary mail Summons and Complaint to the Defendant on November 17, 2021,, the Delaware County Small Claims Court let stand a hearing date previously scheduled and determined for November 23, 2021 six (6) days later.

The hearing was conducted on November 23, 2021 without the presence of the Defendant, and a Default Judgment against the Defendant was granted to the Plaintiff on that same date. (Rec. 10, Judgment entered on November 24).

The Delaware County Municipal Court Clerk e-mailed a copy of the Default Judgment Entry to the Defendant the day after the hearing was conducted, November 24. That e-mail was the Defendant's only Notice of the existence of the case. (Rec. 17, Affidavit of Defendant).

The Defendant immediately filed a Motion to Vacate Judgment on December 3, 2021. (Rec. 12).

The Defendant's Motion to Vacate included a supporting Affidavit in which the Defendant stated, 1) that he never received the regular mail Summons and Complaint in the matter, and had no notice of the case before the Clerk sent him the e-mail attachment of the Default Judgment Entry, 2) that he had valid defenses

to the claims of the Plaintiff, and 3) that he had other counterclaims to present against the Defendant, her husband, and other third parties. (Rec. 12).

The Delaware County Small Claims Court refused to vacate the Default Judgment against the Defendant on December 23, 2021. (Rec. 18).

The Defendant had filed a Complaint against the Defendant, her husband, and other third parties in Franklin County Common Pleas Court on or about December 1, 2021. (Rec. 12, Affidavit of Defendant attached to Motion to Vacate).

The Defendant filed his Notice of Appeal in the case on January 4, 2022.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1

JUST AS ANY OTHER FORM OF SERVICE OF SUMMONS AND COMPLAINT UNDER THE CIVIL RULES, THE RECEIPT OF ORDINARY MAIL SERVICE IS A REBUTTABLE PRESUMPTION AND CAN BE REBUTTED BY A SWORN AFFIDAVIT OF THE DEFENDANT IN A CIVIL CASE STATING THAT SERVICE OF SUMMONS AND COMPLAINT WAS NEVER RECEIVED.

Procedural due process of law is guaranteed to all citizens of the United States and Ohio under the United States Constitution and the Ohio Constitution. Procedural due process is always defined as "notice and opportunity to be heard."

A fundamental purpose of the Ohio Civil Rules in regard to service of Summons and Complaint in any civil matter is that procedural due process be complied with by giving someone who has been civilly sued the opportunity to Answer and to defend against allegations before a Judgment is entered against them.

"Due process requires, at a minimum, that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Armstrong v. Manzo, 380 U. S. 545 at 550, 85 S.Ct. 1187 at 1190,

14 L.Ed.2d 62 (1965).

The Ohio Supreme Court has echoed the same legal principle about the strict requirements of notice and opportunity to be heard when it stated, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Samson Sales, Inc. v. Honeywell, Inc., 66 Ohio St.2d 290, 293, 421 N.E.2d 522, 524 (1981).

For the reasons stated above by both the United States Supreme Court and the Ohio Supreme Court, the law has never favored judgments by Default against civil litigants, especially when a party Defendant alleges lack of proper Service of Summons and Complaint, and when the affected party possesses and wants to assert their defenses and opposing claims against the Plaintiff.

The facts of this case are particularly egregious.

The Delaware County Small Claims Court allegedly mailed ordinary mail service of Summons and Complaint to the Defendant on November 17, 2021, and then kept a hearing date scheduled in the case for less than a week later, on November 23, 2021. (Rec. 10, Judgment Entry). Even if the Defendant had received the Summons and Complaint in the case in a timely manner, the time needed for mail to arrive and for the Defendant to defend against the claims of the Plaintiff and to present his Counterclaims would have been non-existent.

Then, the facts of this case are even more greatly exacerbated because the Defendant brought it to the attention of the Small Claim Court that he NEVER received the

Summons and Complaint in the case before the Default Judgment hearing was conducted on November 23, 2021. The Defendant stated in his Affidavit filed with his original Motion to Vacate Default Judgment in this case that the first time that he learned of the existence of the case at all was then the Court Clerk sent him the Entry of Default Judgment via an e-mail attachment the day after the Default Judgment was entered on November 23, 2021. Rec. 17, Motion to Vacate.

If service of process is not perfected in a civil matter, a trial Court lacks jurisdiction to enter a Default Judgment in a case, and the Judgment is therefore void. There is merely a rebuttable presumption of receipt of service of process when the Civil Rules are seemingly complied with as to service- in other words, the presumption of service can be overcome. As to all of the above, Lauver v. Ohio Valley Selective Harvesting, LLC, 2017 Ohio 5777 (Clermont, 2017).

Perhaps even any presumption of receipt of ordinary United States mail service should be totally negated by this Court. In the past two to three years the myriad operating and delivery problems of the United States Postal Service have been chronicled and recorded in print news reports and on the internet, and even by the United States Congress. It is now common knowledge, which this Court can certainly acknowledge by taking judicial notice of these facts, that there is no longer any guarantee of the timely delivery of United States mail. This Defendant would assert that there is no longer any guarantee that any particular piece of mail will EVER be delivered when it is deposited into a United States mail receptacle to enter the mailing system.

That is exactly what happened in this case- the ordinary mail Summons and Complaint allegedly mailed to the Defendant by the Delaware County Clerk did not

arrive in the hands of the Defendant by the time that the Court conducted the Default Judgment hearing without the presence of the Defendant on November 23, 2021. Rec 10.

The failure of service in this case is especially egregious, in that the named Defendant only owns a 10% interest in the racehorses which are the subject of the Plaintiff's Complaint- the Defendant failed to join to the Small Claims matter as a party Defendant the LLC which owns 90% of the racehorses in question.

Interestingly, case law exists in Ohio stating that a Motion to Vacate a Default Judgment under Ohio law due to insufficiency of Service of Process and other issues does not really rest under the authority of Civil Rule 60, but instead is a common law cause of action available to the Courts under a more comprehensive set of facts than what is provided for by Civil Rule 60. Lauver v. Ohio Valley Selective Harvesting, LLC, 2017 Ohio 5777 (Clermont, 2017).

In other words, in the Appeal of this matter the default Judgment itself is inconsequential, as the lack of proper service of Summons negates any jurisdiction of the Court at all. The true thrust of the Appeal of the Defendant in this case was due to the failure of the trial Court to Vacate and negate the Judgment due to lack of Service.

The Delaware County Court of Appeals had already decided a case very similar to the case at bar, which pointedly agreed with the arguments of the Defendant in this case, and which reiterated the law of this case as clearly set forth above by this Defendant.

In the case of TM Three Adverstising LLC v. Rodriguez, 2021 Ohio 2759, (Delaware County Court of Appeals, 2021) the Court of Appeals had another service issue before

it very similar to the one in the case at bar, In that case, a Default Judgment was taken against a Defendant based on alleged personal service upon the Defendant by a process server while the Defendant was in Florida.

In TM Three Adverstising LLC v. Rodriguez, 2021 Ohio 2759, (Delaware County Court of Appeals, 2021) this Court held,

1) A presumption of valid service according to the standards of the Civil Rules can be rebutted,

2) A trial Court lacks jurisdiction over the case if there is not valid service of process, and any resulting judgment is void ab initio, and

3) It is an abuse of discretion by the Trial Court, and a violation of due process of law for a trial Court to proceed with a case without jurisdiction when service has not been properly perfected upon a party Defendant.

The Court in TM Three Adverstising LLC v. Rodriguez, 2021 Ohio 2759, (Delaware County Court of Appeals, 2021) emphasized that fundamental rights of Due Process in a civil case include the right of notice and opportunity to be heard concerning the topics of the litigation- actual receipt of a Summons and Complaint.

In the case at bar, the Defendant properly brought before the trial Court the fact that within the seven (7) days after the Small Claims Complaint of the Plaintiff had allegedly been mailed to him by ordinary U.S. mail, he had not actually received service of the Summons and Complaint. Motion to Vacate, Rec. 12. The Small Claims case was set for hearing in that less than seven (7) day period.

As the Defendant always argued in this case, the Small Claims Court should have taken judicial notice that mail service through the United States Postal Service has

become so bad and so irregular that it is perfectly understandable that a regular mail envelope cannot necessarily move between Delaware County and a Columbus suburb in seven (7) days. It is also very believable that a piece of mail placed into the United States Postal Service can become delayed for months or can even be lost and never arrive in the hands of the recipient at all.

Under the authority of TM Three Adverstising LLC v. Rodriguez, 2021 Ohio 2759 (Delaware County Court of Appeals, 2021) from this same Court of Appeals, the Default Judgment entered against the Defendant should have been vacated for lack of jurisdiction and lack of actual receipt of service of Summons and Complaint- the Court of Appeals ignored its own proper ruling in a previous case.

PROPOSITION OF LAW NO. 2

A SMALL CLAIM COURT HEARING CANNOT BE SCHEDULED UNTIL SEVEN DAYS AFTER REPUTED SERVICE OF SUMMONS AND COMPLAINT, TO ALLOW A DEFENDANT TO FILE A COUNTERCLAIM UNDER O.R.C. 1925.02.

A. CONDUCTING A DEFAULT JUDGMENT HEARING ON NOVEMBER 23, 2021 VIOLATED THE CIVIL RULES

This case involves the rather strange interplay between the Ohio Civil Rules and O.R.C. 1925, et. al. in regard to Small Claims Court, the applicability of the Civil Rules, and procedures which are adopted and in place which violate the mandates and spirit of both Rules and statutes. The interplay is strange because the Civil Rules and applicable statutes do not interchange well and work together in an understandable manner.

The Defendant would assert that the applicable statutes and local procedures in place which are actually being implemented are nonsensical and violate

fundamental rights and the spirit of the Civil Rules.

Litigants in Small Claims Court in Ohio are clearly governed by the mandates and policies of the Ohio Civil Rules. O.R.C. 1925.16. Also, Civil Rule 1 states that it also applies to Small Claims Court procedures and powers, unless "they would by their nature be clearly inapplicable."

The Ohio Civil Rules have always granted a Defendant in a lawsuit the time of twenty-eight (28) days to file an Answer to a Complaint, or to otherwise plead to a Complaint, after service of Summons and Complaint is perfected upon the Defendant. Civil Rule 12.

The Defendant asserts that, in regard to Small Claims Court, Civil Rule 12 requires and mandates that a Small Claims hearing cannot occur until that twenty-eight (28) days has passed in order to give the Defendant in a case time to Answer, and, more importantly, time to file any Counterclaims against the Plaintiff in the case. O.R.C. 1925.02 specifically recognizes the right of a party Defendant to file a Counterclaim in any Small Claims case.

In the case at bar, the Clerk's office mailed the Summons and Complaint to the Defendant less than seven (7) days before the time set for the hearing in the case. Irrespective of the fact that Defendant did not receive the ordinary mail Summons and Complaint, even if he had received the service from the Clerk he would not have been given enough time to assert a Counterclaim in the case under the Civil Rules.

Defendant has always liked to analyze legal issues under the thought of what should have occurred in any situation, including Court procedural matters. Simply put, in the case at bar, when the Summons and Complaint were mailed to the Defendant by ordinary

mail on November 17, the November 23, 2021 hearing date should have been continued for a period of at least twenty-eight (28) days in order to permit the Defendant to file an Answer to the Complaint and to assert any Counterclaims he had against the Plaintiff.

A Small Claims hearing can NOT occur, pursuant to the Civil Rules, until twenty-eight (28) days have elapsed since service of process by ordinary mail was allegedly sent.

B. CONDUCTING A HEARING LESS THAN SEVEN DAYS AFTER MAILING ORDINARY MAIL SERVICE OF SUMMONS AND COMPLAINT ALSO VIOLATED THE SMALL CLAIMS COURT STATUTES

The Ohio statutes governing Small Claims Court also contemplate that more than seven (7) days should be allotted after alleged service of Summons and Complaint for a party Defendant to Answer the Complaint, appear in a case, and to file any Counterclaims against the Plaintiff.

O.R.C. 1925.02 specifically mandates as to Small Claims Court that, "Any person who files a counterclaim or cross-claim shall file it with the small claims division and serve it on all other parties at least seven days prior to the date of the trial of the plaintiff's claim in the original action." O.R.C. 1925.02 C.

In other words, O.R.C. 1925.02 assumes that a hearing (trial) in a Small Claims case must only be set after service of Summons and Complaint for a period of time more than seven (7) days after perfected service of process, in order to give the party Defendant the required seven (7) days prior to trial in order to file and assert any Counterclaim in the matter.

That particular issue is the apparent conflict between the Civil Rules and the Small Claims statutes, and the Defendant would assert that the Civil Rules control the situation as to the requirement of twenty-eight (28) days to Answer and file

a Counterclaim in the case.

Even if the Plaintiff's assertion is not correct in regard to the primacy of the Civil Rules, the actions of the Small Claims Court in this case even violated the seven (7) days Counterclaim mandate of O.R.C. 1925.02.

It should also be mentioned herein that Local Rules of Court can be used to supplement and to perhaps make minor tweaks to the rules governing Small Claims Court as found in O.R.C. 1925. Civil Rule 83.

The Delaware County Municipal Court Local Rules do nothing to attempt to change the hearing timing sections of O.R.C. 1925, et. al, and the seven day requirements of O.R.C. 1925.

But, the Delaware County Municipal Court Local Rules and website do refer Small Claims Court litigants to a publication of the Ohio Judicial Conference and the Ohio State Bar Foundation titled, "Small Claims Court- A Citizens Guide." Tenth Edition (2013). That publication is linked on the Delaware County Municipal Website by doing a website search in the search box for "Small Claims Guide."

The above referenced Small Claims Court publication states "counter- and cross-Claims must be filed with the court in which the original claim was filed and at least seven days prior to the date of the hearing on plaintiff's original claim."
Small Claims Court- A Citizens Guide, at page 10 (2013).

Even this Small Claims Court agency authored and judicially sanctioned guide recognizes the fact that O.R.C. 1925 requires that a Defendant litigant must be given a time period of more than seven (7) days after service of a Summons and Complaint before a hearing date can be set by the Small Claims Court.

PROPOSITION OF LAW NO. 3

A CHALLENGE TO INSUFFICIENCY OF SERVICE OF SUMMONS AND COMPLAINT CAN BE MADE VIA A MOTION TO VACATE JUDGMENT, AND THE DATE OF THE DEFAULT JUDGMENT ENTERED AS A RESULT OF THE ALLEGED SERVICE OF PROCESS DOES NOT CONTROL THE DATE BY WHICH AN APPEAL MUST BE FILED- AN APPEAL CAN BE BROUGHT WITHIN THIRTY DAYS OF THE DENIAL OF THE MOTION TO VACATE JUDGMENT.

As already stated herein, lack of Service of Summons and Complaint in a case make any action by a trial Court void ab initio due to lack of jurisdiction. Lauver v. Ohio Valley Selective Harvesting, LLC, 2017 Ohio 5777 (Clermont, 2017), TM Three Adverstising LLC v. Rodriguez, 2021 Ohio 2759, (Delaware County Court of Appeals, 2021)

The appeal of the Defendant in this matter was not based upon the Default Judgment entered against him in the Small Claims Court, but instead was based upon the denial of Plaintiff's Motion to Vacate due to the insufficiency of service (lack of service) because of the failure of the ordinary mail service to be delivered to him before the hearing date.

Under the authority of the above case law, the failure of Service of Summons and Complaint made the Judgment entered against the Defendant on November 23, 2021 void ab initio.

The trial Court failed to properly consider the Appeal (it did not address the issue of lack of valid service at all), due to the erroneous holding that the Plaintiff's Notice of Appeal was not timely as to the date of the Small Claims Court's Default Judgment Entry.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum has been served upon the attorney for the Plaintiff via ordinary U. S. mail pursuant to the Appellate Rules this 30th day of November, 2022:

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
JESSICA MCCOWN	:	Hon. Earle E. Wise, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 22 CAG 01 0001
RAYMOND EICHENBERGER	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Delaware Municipal Court, Case No.21 CV I 1791

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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App 1

Gwin, J.

{¶1} Appellant Raymond Eichenberger appeals the December 23, 2021 judgment entry of the Delaware Municipal Court denying his motion to vacate.

Facts & Procedural History

{¶2} On October 19, 2021, appellee Jessica McCown filed a complaint in small claims court against appellant. Appellee sought judgment against appellant in the amount of $6,000, stating she was owed the amount, as "services provided not paid for; horses were cared for and trained, and bills were not paid." Attached to the complaint is an account statement from appellee regarding appellant's account. The account provides the total billed from January 1, 2020 to October 31, 2021 was $44,629, and appellant paid $33,386.00, with a total due of $12,243. Also attached to the complaint are numerous text messages between the parties.

{¶3} The Delaware County Clerk of Courts issued a summons on October 19, 2021, setting a trial date for November 23, 2021. The Clerk of Courts sent the summons certified mail to an address on Oakbrook Drive in Reynoldsburg, Ohio. On November 5, 2021, the Clerk of Courts sent the summons via certified mail to a P.O. Box in Reynoldsburg, Ohio. Both summonses were returned to clerk as "unclaimed." The summons was then sent via ordinary mail on November 17, 2021.

{¶4} The magistrate conducted a trial on appellee's complaint on November 23, 2021.

{¶5} The magistrate issued a judgment entry on November 24, 2021. The judgment entry states that the matter "came on for a bench trial on November 23, 2021," with an appearance by appellee, but no appearance by appellant. The magistrate granted

judgment for appellee against appellant for $6,000. The judgment entry specifically states, "based on the evidence adduced, the court finds defendant owes plaintiff $6,000+ on a delinquent account for horse training and care services." The trial court adopted the magistrate's entry as the final order of the court.

{¶6} Appellant did not appeal the trial court's November 24th judgment entry. Rather, on December 3, 2021, appellant filed a motion to vacate judgment; motion to quash service; and motion to transfer case to Franklin County Court of Common Pleas. Appellant attached an affidavit to his motions: confirming his address as the P.O. Box in Reynoldsburg; stating he did not receive summons of the complaint by any manner authorized by the Civil Rules prior to November 23, 2021; stating he learned of this action on November 24, 2021 via email; averring he has filed litigation against appellee in Franklin County; stating his defenses in this case are billing for unauthorized services, negligence, breach of contract in training horses, and harming the racehorses in question; and stating he should have been given time to answer the complaint.

{¶7} Appellee filed a memorandum contra to appellant's motions on December 22, 2021.

{¶8} The magistrate issued a judgment entry on December 23, 2021, denying appellant's motion to vacate, and findings his motions to quash and transfer moot. The magistrate noted appellant was properly served, and found that appellant did not claim a defense to appellee's complaint. Finally, the magistrate noted commencement of a new lawsuit after conclusion of these proceedings, such as the one filed by appellant in the Franklin County Court of Common Pleas on December 3, 2021, is not a basis for relief

from judgment. The trial court adopted and approved the magistrate's judgment entry on December 23, 2021.

{¶9} Appellant appeals the December 23, 2021 judgment entry of the Delaware Municipal Court, and assigns the following as error:

{¶10} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY THE GRANTING OF A DEFAULT JUDGMENT AGAINST THE DEFENDANT AND BY THEN FAILING TO VACATE THE DEFAULT JUDGMENT – EACH VIOLATED DUE PROCESS OF LAW AND THE LACK OF PROPER SERVICE DEPRIVED THE COURT OF JURISDICTION OVER THE MATTER AND MADE THE DEFAULT JUDGMENT VOID.

{¶11} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO GRANT THE DEFENDANT'S MOTION TO VACATE JUDGMENT.

{¶12} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN IGNORING THE CIVIL RULES AND OHIO STATUTES BY PURPORTING TO CONDUCT A DEFAULT JUDGMENT HEARING ON NOVEMBER 23, 2021 AND BY THEN GRANTING A DEFAULT JUDGMENT IN THIS CASE."

I., II., III.

{¶13} We address appellant's assignments of error together because they are interrelated. Appellant makes the following arguments: service of process was improper prior to the entry of the default judgment because it is a violation of the Civil Rules for a small claims court to conduct a hearing less than seven (7) days after a summons and complaint is mailed to a party; conducting a default judgment hearing on November 23,

2021 violated the Civil Rules; O.R.C. Section 1925 conflicts with and violates the fundamental right and spirit of the Civil Rules; a small claims hearing/trial cannot occur until 28 days have elapsed since service of process by ordinary mail was sent; and because R.C. 1925.02 conflicts with the Civil Rules, the Civil Rules should apply and a defendant in a small claims matter must be given 28 days to respond to a complaint.

{¶14} We first note that the premise underlying all of appellant's arguments is that the trial court committed error in granting default judgment against him.

{¶15} However, the judgment entry does not contain the language "default." It does indicate that appellant did not appear at the hearing; however, the entry states a "bench trial" was conducted and that, "based on the evidence adduced, the court finds Defendant owes Plaintiff $6,000+ on a delinquent account for horse training and care services." There is no indication from the judgment entry that the trial court based its decision on the failure of appellant to appear; rather, the judgment entry explicitly states the magistrate considered evidence and conducted a bench trial. The judgment entry denying appellant's motion to vacate states "plaintiff obtained judgment on the evidence." Appellant did not file a transcript of the November 23, 2021 trial, so this Court cannot review the proceedings to determine if the magistrate made any statements with regard to default at the trial. In the absence of a transcript, we must presume the regularity in the proceedings below and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 400 N.E.2d 384 (1981).

{¶16} Appellant further makes the general assertion that the default judgment against him "violated the civil rules." However, other than noting the twenty-eight-day

answer period requirement, he does not specify which other civil rules the trial court allegedly violated.

{¶17} Civil Rule 1(C) provides as follows: "these rules [the Rules of Civil Procedure], to the extent that they would by their nature by clearly inapplicable, shall not apply to procedure * * * (4) in small claims matters under Chapter 1925 of the Revised Code." The statutory provisions contained in Chapter 1925 of the Revised Code supersede the civil pleading rules. *Cleveland Bar Assn. v. Pearlman*, 106 Ohio St.3d 136, 2005-Ohio-4107, 832 N.E.2d 1193 (small claims hearings are simplified, as neither the Ohio Rules of Evidence nor the Ohio Rules of Civil Procedure apply).

{¶18} R.C. 1925.05(A) provides that "notice of the filing shall be served on the defendant as provided by the Rules of Civil Procedure." Accordingly, the civil rules apply for service of process in small claims court. Civil Rule 4.6(D) provides for ordinary mail service when certified mail is returned unclaimed. Civil Rule 4.6(D) was satisfied in this case. Service was properly completed by ordinary mail on the date the clerk sent the summons after certified mail went unclaimed, because the ordinary mail envelope was not returned as undeliverable. The notice of the trial date accompanying the ordinary mail was within the time parameters of R.C. 1925.04 ("the time set for such trial shall be not less than fifteen or more than forty days after the commencement of the action.")

{¶19} Appellant contends that, in a small claims action, a trial court is required to wait twenty-eight days to hold a trial so that a defendant has the opportunity to answer, pursuant to the time limitations contained in the Ohio Civil Rules. We disagree.

{¶20} "[T]he goal of small claims court is * * * to provide fast and fair adjudication as an alternative to the traditional judicial proceedings." *Cleveland Bar Assn. v.*

Pearlman, 106 Ohio St.3d 136, 2005-Ohio-4107, 832 N.E.2d 1193. Attorneys are not required to appear on behalf of any party in small claims court (R.C. 1925.01(D)), jurisdiction is limited to $6,000 and there is no subject-matter jurisdiction over claims for libel, slander, replevin, malicious prosecution, or abuse of process (R.C. 1925.02(A)(1)), claims for punitive damages are not permitted (R.C. 1925.02(A)(2)), there is no jury in small claims court (R.C. 1925.04), and claims move quickly, within 15-40 days after the complaint is filed (R.C. 1925.04(B). "[B]y design, proceedings in small claims court are informal and geared to allowing individuals to resolve uncomplicated disputes quickly and inexpensively * * * the process is an alternative to full-blown judicial dispute resolution." *Id.*

{¶21} An answer is not contemplated by the small claims statutes, R.C. 1925.01, et seq. Accordingly, the 28-day answer period is inapplicable. Rather, upon initiation of a claim in small claims court, the matter is promptly set for trial. "The time set for such trial shall be not less than fifteen or more than forty days after the commencement of the action." R.C. 1925.04(B). "Fifteen days for trial obviously does not permit 28 days for an answer." *Bellbrook Firefighters Assn. v. Haus*, 2nd Dist. Greene No. 2018-CA-43, 2019-Ohio-3194; see also *Figetakis v. My Pillow Inc.*, 9th Dist. Summit No. 29843, 2022-Ohio-1078 (the filing of an answer is not required in a small claim matter); *Tomety v. Dynamic Auto Service*, 10th Dist. Franklin No. 09AP-982, 2010-Ohio-3699 (small claims action does not contemplate use of formal answer prior to trial); *Powers v. Gawry*, 11th Dist. Geauga No. 2009-G-2883, 2009-Ohio-5061.

{¶22} As to appellant's argument that Chapter 1925 conflicts with the Civil Rules and in order to maintain the "spirit" and "fundamental fairness" provided by the Civil Rules,

the Civil Rules should apply in the case of a conflict, both Civil Rule 1(C) and R.C. 1925.16 explicitly state that Chapter 1925 applies to small claims actions, even when it conflicts with the Civil Rules. *Mueller v. City of North Canton*, 5th Dist. Stark No. 2012-CA-82, 2012-Ohio-3561.

{¶23} Finally, appellant contends the provisions of Chapter 1925 of the Revised Code are inherently in conflict, due to the time period specified to notify a party regarding counter-claims. However, appellant did not make this argument to the trial court. An appellate court will generally not consider any error which a 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 avoided or corrected by the trial court. *Pastor v. Pastor*, 5th Dist. Fairfield No. 04 CA 67, 2005-Ohio-6946, citing *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 522 N.E.2d 524 (1988). Additionally, as detailed below, this is an argument appellant could have made via direct appeal of the November 24, 2021 judgment entry. He cannot now make this argument in an appeal of a denial of a motion to vacate, as a motion to vacate cannot be used as a substitute for a timely appeal.

{¶24} In this case, appellant did not file a timely appeal of the trial court's November 24, 2021 judgment entry. Rather, he filed a motion to vacate the judgment, and subsequently appealed the denial of that motion to this Court. It is well-established that "a party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal." *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986).

{¶25} The arguments that appellant provides for vacating the November 24, 2021 order (violation to conduct hearing less than seven days after summons mailed, violation of civil rules, small claims hearing cannot occur until 28 days have elapsed since regular

mail sent, conflict between civil rules and Ohio Revised Code, Chapter 1925 is inherently in conflict) could have been raised in a timely direct appeal of that order. The claimed deficiencies or defects in the procedure followed by the trial court are matters that could have been raised and resolved on direct appeal, and appellant's motion to vacate was a substitute for appeal. Since a Civil Rule 60(B) motion cannot be used as a substitute for appeal, the trial court correctly denied the motion to vacate. *Erie Ins. Co. v. Haggerty*, 5th Dist. Licking No. CA-2682, 1980 WL 354101 (Aug. 1, 1980) (overruling appellant's appeal of denial of 60(B) motion arguing small claims court failed to follow correct procedure because the claimed deficiency in procedure could have been raised on direct appeal); *Miller v. Booth*, 5th Dist. Fairfield No. 06-CA-10, 2006-Ohio-5679 (when appellant did not appeal from judgment, but instead appealed from trial court's denial of motion to vacate, this Court would "not entertain a collateral attack upon the merits of the * * * judgment entry itself"); *In re Dankworth Tr.*, 7th Dist. Belmont No. 14 BE 9, 2014-Ohio-5825 (basis for vacating order could have been raised in direct appeal, so trial court correctly denied the motion to vacate); *Anderson v. Anderson*, 5th Dist. Holmes No. 04CA010, 2005-Ohio-2306 (whether trial court afforded appellant seven days' notice prior to hearing for default judgment was improper attempt to collaterally attack trial court's original entry when it was argued in a motion to vacate).

{¶26} Based on the foregoing, appellant's assignments of error are overruled. The December 23, 2021 judgment entry of the Delaware Municipal Court is affirmed.

By Gwin, J.,

Wise, Earle, J., and

Baldwin, J., concur

HON. W. SCOTT GWIN

HON. EARLE E. WISE, JR.

HON. CRAIG R. BALDWIN

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JESSICA MCCOWN	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RAYMOND EICHENBERGER	:	
Defendant-Appellant	:	CASE NO. 22 CAG 01 0001

For the reasons stated in our accompanying Memorandum-Opinion, the December 23, 2021 judgment entry of the Delaware Municipal Court is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. EARLE E. WISE, JR.

HON. CRAIG R. BALDWIN

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JESSICA MCCOWN Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RAYMOND EICHENBERGER Defendant-Appellant	:	CASE NO. 22 CAG 01 0001

This matter comes before the Court upon an Application for En Banc Consideration. The Court has reviewed the motion as well as the cases cited and denies the motion for en banc consideration as no majority in favor of granting the motion could be reached.

MOTION DENIED.

IT IS SO ORDERED.

W. Scott Gwin

HON. W. SCOTT GWIN

Earle E. Wise Jr.

HON. EARLE E. WISE, JR.

HON. CRAIG R. BALDWIN

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