

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| MANSFIELD TRUCK SALES & SERVICE, INC. FKA HEISLER'S TRUCK SALES & SERVICE, INC. | : | JUDGES: Hon. Sheila G. Farmer, P.J. Hon. W. Scott Gwin, J. Hon. William B. Hoffman, J. |
| | : | |
| Plaintiff-Appellee | : | Case No. 2008-COA-040 |
| | : | |
| -vs- | : | |
| | : | |
| SHAWN A. FORTNEY, ET AL | : | <u>OPINION</u> |
| | : | |
| Defendant-Appellant | : | |

CHARACTER OF PROCEEDING: Civil appeal from the Ashland County Court of Common Pleas, Case No. 01-CIV-36630

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 2, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, J.,

{¶1} Defendants-appellants Shawn A. and Vicki Fortney appeal a judgment of the Court of Common Pleas of Ashland County, Ohio, which sustained the motion of plaintiff-appellee Mansfield Truck Sales & Service, Inc. formerly known as Heisler's Truck Sales and Truck Service, Inc. to revive a judgment originally rendered on November 16, 2001. Appellants assign a single error to the trial court:

{¶2} "I. THE COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE PLAINTIFF-APPELLEE WITHOUT CONDUCTING A HEARING ON THE DEFENDANT-APPELLANT'S OBJECTION TO A MOTION TO REVIVE A JUDGMENT, ALLOWING THE INTRODUCTION OF EVIDENCE."

{¶3} The record indicates on June 11, 2008 plaintiff-appellee filed a motion to revive a default judgment against appellants for \$18,190.97. It was a deficiency judgment entered after appellee repossessed and sold appellants' vehicle in 2001.

{¶4} R.C. 2325.17 provides: "If sufficient cause is not shown to the contrary, the judgment or finding mentioned in section 2325.15 of the Revised Code shall stand revived, and thereafter may be made to operate as a lien upon the lands and tenements of each judgment debtor for the amount which the court finds to be due and unsatisfied thereon to the same extent and in the same manner as judgments or findings rendered in any other action."

{¶5} Both parties cite *Leroy Jenkins Evangelistic Association, Inc. v. Equities Diversified, Inc.* (1989), 64 Ohio App. 3d 82, 580 N.E.2d 812, which held a trial court must give a judgment debtor an opportunity at a hearing to show cause why a judgment should not be revived. Appellants argue the trial court here failed to provide them with

an opportunity to present evidence showing the judgment should not be revived. The court did conduct a hearing on October 2, 2008, but did not permit appellants to introduce evidence they were not notified of the correct date of the sale of the vehicle, and to show the deficiency judgment was inaccurate because the vehicle in question actually sold for more than appellee stated.

{¶16} The trial court cited *Heselden Plumbing Co. v. Justice* (March 13, 1986), Franklin App. No. 85AP-733. In the *Heselden* case, the Court of Appeals for the 10th Dist. explained a motion to revive a judgment can be defeated if the judgment debtor shows the judgment has been paid or settled, or is barred by the statute of limitations. *Heselden Plumbing* at 3, citing *Van Nover v. Eshleman* (1911), 14 Ohio C.C. (N.S.) 38 and *Eshleman v. Van Nover* (1913), 89 Ohio St. 48.

{¶17} If at the time it entered the original judgment, a court had subject matter jurisdiction and personal jurisdiction, any defense which could have been raised in the original action is waived and cannot asserted in a revivor proceeding. *Heselden Plumbing* at 1, citing *Lathrem v. Foreman* (Ohio App. 154), 145 N.E. 2d 837; *McAllister v. The Schlemmer & Graber Co.* (1930), 39 Ohio App. 434, 177 N.E. 841; *Jackson v. Marshall* (1947), 80 Ohio App. 280, 75 N.E.2d 78; and *Nestelrode v. Foster* (1893), 8 Ohio C.C.70, 4 Ohio C.D. 385, 1 Ohio Dec. 429.

{¶18} We have reviewed the record, and we agree with the trial court appellants sought to collaterally attack the original judgment and introduce evidence of defenses potentially available to them in the original action but subsequently waived.

{¶19} We find the trial court did not err in sustaining the motion to revive the original judgment. Accordingly, the assignment of error is overruled.

{¶10} For the foregoing reasons, the judgment of the Court of Common Pleas of Ashland County, Ohio, is affirmed.

By Gwin, J.,
Farmer, P.J., and
Hoffman, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. WILLIAM B. HOFFMAN

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