IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
LAKELAND, FLORIDA

BOATS EXPRESS, INC., d/b/a BOATS EXPRESS CORP., et al.,

Appellants,

CASE NO.: 2D06-5713
LT CASE NO.: 00-2120-CI-15
[Pinellas County Circuit Court]

MARK THACKERAY,

Appellee.
_____/

ANSWER BRIEF

Submitted on behalf of the Appellee,
MARK THACKERY

THOMPSON, GOODIS, THOMPSON
GROSECLOSE & RICHARDSON, P.A.

KEVIN M. DAVIS, ESQ.
FBN# 0795941
ANDREA N. ZDANIEWSKI, ESQ.
FBN# 0647330
Post Office Box 90
St. Petersburg, FL 33731
(727) 823-0540
(727) 823-0230 (Fax)
Attorneys for Appellee, MARK THACKERAY

TABLE OF CONTENTS

TABLE OF CASES

Cases: Page:

Other Sources:

STATEMENT OF THE CASE AND FACTS

[Note: Citations to the Record will read: [R:]

This action arises out of the enforcement of a foreign judgment. [R: Vol. I, p. 15] On March 23, 1998, the Appellee, Mark Thackeray [THACKERAY], filed suit in Ohio against the Appellant, Boats Express Inc. [BEI] alleging violations of Ohio law. [R. Vol. I, pp. 16-97][1] BEI subsequently sought to remove THACKERAY's action from state court to federal court on April 30, 1998, arguing federal law preempted THACKERAY's causes of action. [R. Vol. I, pp. 16-97] The United States District Court for the Southern District of Ohio, however, disagreed, entered an Order denying BEI's removal, and remanding the case back to state court. [R. Vol. I, pp. 16-97] On March 29, 1999, BEI asked the District Court to reconsider its Order, which the District Court declined to do in its April 29, 1999 Order. [R. Vol. I, pp. 16-97] BEI then moved to stay the state court action so that it could appeal the District Court's decision. [R. Vol. I, pp. 16-97] The District Court, however, denied BEI's Motion for Stay Pending Appeal. [R. Vol. I, pp. 16-97][2] In addition, on August 16, 1999, the United States Court of

---

[1]Specifically, THACKERAY alleged BEI breached its contract with THACKERAY, committed unfair, deceptive, and unconscionable acts and practices in violation of Ohio law, and committed conversion. [R. Vol. I, pp. 16-97]

[2]According to the Order denying BEI's Motion to Stay Pending Appeal, the District Court held, "Defendant's motion to stay pending appeal is not well-taken and is DENIED." [R. Vol. I,

Appeals for the Sixth Circuit issued an Order granting THACKERAY's Motion to Dismiss BEI's appeal for lack of jurisdiction. [R. Vol. I, pp. 16-97] Accordingly, the Common Pleas Court of Hamilton County, Ohio adjudicated the case.

The trial of this matter before the Common Pleas Court of Hamilton County, Ohio was scheduled for January 27, 2000, at which time BEI failed to appear. [R. Vol. II, pp. 272-287] Accordingly, the Common Pleas Court of Hamilton County, Ohio entered a entered a judgment in favor of THACKERAY, and against BEI in the amount of $45,975.42, inclusive of attorney's fees. [R: Vol. I, pp. 1-14][3] THACKERAY subsequently filed the judgment as a Foreign Judgment with the Pinellas County Circuit Court since BEI was a Florida Corporation with its business address located in Clearwater, Pinellas County, Florida, and a Lis Pendens. [R: Vol. I, pp. 15, 98][4]

On April 21, 2000, BEI answered THACKERAY's notice of Filing of Foreign Judgment by contesting the jurisdiction of the Ohio court. [R. Vol. I, pp.

---

pp. 16-97]

[3]The Common Pleas Court of Hamilton County, Ohio made the following factual findings: (1) BEI breached its contract with THACKERAY; (2) BEI violated the Ohio Consumer Sales Practice Act; (3) BEI acted fraudulently; and (4) that BEI committed conversion. The Common Pleas Court of Hamilton County, Ohio also held THACKERAY was entitled to compensatory and punitive damages, and attorney's fees. [BEI]. [R: Vol. I, pp. 1-14]

[4]Specifically, BEI's business address was 2451 McMullen Booth Road, Suite 200, Clearwater, Florida 33759. [R. Vol. I, pp. 16-97]

16-97][5] Thereafter, THACKERAY responded to BEI's action to contest jurisdiction in his May 10, 2000 response. [R. Vol. I, pp. 99-167] There, THACKERAY argued the doctrines of res judicata and estoppel by judgment barred all of the BEI's contentions, that the state and federal courts of Ohio had already resolved said issues, and that the Judgement of the Common Pleas Court of Hamilton, County, Ohio was entitled to full faith and credit, and enforcement. [R. Vol. I, pp. 99-167] The Pinellas County Circuit Court agreed with THACKERAY, and entered an Order denying dismissal for lack of subject matter jurisdiction on July 17, 2000. [R. Vol. II, pp. 184-187][6] THACKERAY then prematurely moved to file a Writ of Garnishment, suggesting First Union National Bank [FIRST UNION] as Garnishee. [R. Vol. II, p. 188] At the time THACKERAY initially moved for the Writ of Garnishment, BEI had $43,609.35 in its account with FIRST UNION as Garnishee. [R. Vol. II, pp. 194-197][7]

---

[5]Here, and despite the fact two federal courts ruled they did not have jurisdiction, and that the Ohio court had already entered a Final Judgment, BEI again argued the Pinellas County Circuit Court did not have jurisdiction because the Ohio court never ruled on its Motion to Dismiss based on federal preemption. [R. Vol. I, pp. 16-97]

[6]According to the Pinellas County Circuit Court, the Common Pleas Court of Hamilton County, Ohio did have subject matter jurisdiction over the claims of both THACKERAY and BEI. [R. Vol. I, pp. 184-187]

[7]According to FIRST UNION's Answer of Garnishee and Demand for Garnishment Deposit, "[a]t the time of service of said Writ and at the time of this Answer, and in between said times, the Garnishee was indebted to Defendant(s) 'Boats Express, Inc.', in the amount of $43,609.35 by virtue of an account in the name of 'Boats Express, Inc.'. . ." [R. Vol. II, pp. 194-

Nevertheless, since THACKERAY's Motion to File a Writ of Garnishment was premature, the Pinellas County Circuit Court dissolved the Writ of Garnishment on July 26, 2000. [R. Vol. II, p. 193] In addition, FIRST UNION's records show Gregory Hutchens [HUTCHENS], sole shareholder and president of BEI during all material times [R. Vol. III, pp. 466-498], emptied the account in a single withdraw the very next day (July 27, 2000)–making BEI virtually insolvent. [R. Vol. III, pp. 321, 339; 466-498]

On July 28, 2000, BEI then moved for a rehearing on the Pinellas County Circuit Court's July 17, 2000 Order denying BEI's Motion to Dismiss for Lack of Subject Matter Jurisdiction. [R. Vol. II, pp. 198-201] In its Motion for Rehearing, BEI again argued federal law preempted the Common Pleas Court of Hamilton County, Ohio. [R. Vol. II, pp. 198-201] THACKERAY responded to BEI's Motion for Rehearing on August 3, 2000. [R. Vol. II, pp. 202-203] There, THACKERAY argued, *inter alea,* "[t]he issue of federal preemption was thoroughly litigated in the federal court, and it is clear from the record that the federal court soundly rejected that argument." [R. Vol. II, pp. 202-2003] On November 7, 2000, the Pinellas County Circuit Court, after previously granting BEI's Motion for Rehearing on August 14, 2000, again denied BEI's Motion to

---

197]

Dismiss. [R. Vol. II, pp. 209-210; 258]

Ten days later (November 17, 2000), THACKERY timely moved for a Writ of Garnishment, again identifying FIRST UNION as the Garnishee. [R. Vol. II, p. 259] On December 4, 2000, FIRST UNION filed its Answer of Garnishee and Demand for Garnishment Deposit. [R. Vol. II, pp. 268-271] According to FIRST UNION's pleading, although BEI's account totaled $43,609.35 at the time of THACKERY's first Writ of Garnishment, the amount had decreased to $372.27 by the time THACKERY filed his second Writ of Garnishment. [R. Vol. II, pp. 268-271]

In addition, BEI filed with the Common Pleas Court of Hamilton County, Ohio a Motion to Reconsider, Set Aside and/or Vacate the original judgement on January 12, 2001–again, on preemption grounds, as well as BEI's allegation it never received a copy of the Final Judgment. [R. Vol. II, pp. 272-287] Moreover, and in connection with this recent Ohio filing, BEI also filed with the Pinellas County Circuit Court a Motion to Stay Execution of the Judgment, and any discovery related thereto. [R. Vol. II, pp. 272-287] Nevertheless, on August 10, 2001, Ohio judge, Judge Schweikert of the Court of Common Pleas of Hamilton County, Ohio entered Final Entry Overruling Objections to Magistrate's Decision and Adopting Magistrate's Decision and thus, denied BEI's Motion to Vacate the

previously entered judgment. [R. Vol. II, pp. 351-358]

In aid of execution of the judgment, and in order to determine what happed to the funds in BEI's FIRST UNION account, THACKERAY deposed HUTCHENS on February 14, 2001. [R. Vol. III, pp. 466-498] During the deposition, HUTCHENS testified that he made the July 27, 2000 withdraw in order to pay bills. [R. Vol. III, pp. 466-498] HUTCHENS further argued he lost any and all records relating to these bills. [R. Vol. III, pp. 466-498] However, HUTCHENS later testified during the Proceedings Supplementary to withdrawing the funds in order to escape a future writ of garnishment. [R Vol. V, pp. 705-807][8]

---

[8]Specifically, HUTCHENS testified as follows:

Q: Why is it, sir, that all of a sudden on July 7th of 2000 that you start–July 27th of 2000 that you all of a sudden started paying your bills in cash?

A: As I recall on 07/20, $34,917.35 was taken out of my account and on 07/25 another garnishment of $8,692 was taken out of my account.

Q: That wasn't my question, sir.

A: I'm gonna finish. Can I finish?

Q: Yes, sir, please do.

A: *Because of the acts of Attorney Spanolios* [THACKERAY's previous counsel]. *I was advised by my attorney to pay my bills with money orders and I was fearful that they were gonna take the money out of my account again and then I would be in court for nonpayment of my bills.*

THE WITNESS: Judge, several of these contracts that we have with our carriers can run anywhere between $7,000 to $10,000 to $15,000 when they do–when they transport a boat for us. *The fear that I had is that they were gonna come back and*

On August 4, 2004, THACKERAY filed his Motion for Proceedings Supplementary. [R. Vol. II, p. 302] After conducting a hearing on the matter on January 25, 2005, the Pinellas County Circuit Court issued an Order stating, "[BEI] shall have forty-five (45) days to evidence the proceedings in the Ohio court system have not been resolved . . . If [BEI] cannot evidence the proceedings in the Ohio court system have not been resolved, a special magistrate will be appointed to hear the proceedings supplementary." [R. Vol. II, p. 305] Accordingly, and after the expiration of forty-five (45) days without BEI evidencing the proceedings in the Ohio court system to be active pursuant to the above Order, THACKERAY moved for a special magistrate on March 25, 2005.

---

garnish my account again and that I would be in trouble with my carriers for not paying them off. So I was advised by my attorney at the time to get money orders, certified checks, cashiers checks, whatever it took to pay off my carriers to keep my credit line in shape.

Q: So it's your testimony, sir, that the reason you withdrew the $43,609.35 on 07/27 of 2000 was to avoid the second writ of garnishment.

A: No, the reason I did it was to pay off my carriers, pay off my debts. That's why I did it.

Q: Prior to the second writ of garnishment being issued?

A: *I had fear, yes. I had fear that they were gonna take the money out again, sure. That's pretty obvious.* But if you look at the statements here you'll see that our receivables ran anywhere between $20,000 to $30,000 a month, maybe even more.

[R Vol. V, pp. 705-807] (Emphasis added).

[R. Vol. II, pp. 306-307]

Then on August 8, 2005, BEI once again moved for dismissal on the grounds BEI's Ohio counsel allegedly never received service of the Final Judgment against BEI the Common Pleas Court of Hamilton County, Ohio entered on August 10, 2001. [R. Vol. II, pp. 308-313] According to BEI's argument, THACKERAY had a duty pursuant to Florida Rules of Civil Procedure to serve BEI withthe August 10, 2001 Order issued by an Ohio court. [R. Vol. II, pp. 308-313] Nevertheless, the Pinellas County Circuit Court entered an Order appointing a Special Magistrate on August 8, 2005. [R. Vol. II, p. 314] THACKERAY, however, then moved to have the Pinellas County Circuit Court, as opposed to a magistrate, preside over the Proceeding Supplementary on September 14, 2005, and which he later amended in order to implead HUTCHENS, the sole shareholder and president of BEI during all times relevant hereto. [R. Vol. II, pp. 319-339] In this motion, THACKERAY further argued, based on HUTCHENS' deposition testimony, HUTCHENS made the July 27, 2000 withdraw of BEI's funds from its FIRST UNION account with the intent to hinder, delay or defraud THACKERAY's action to recover the judgement. [R. Vol. II, pp. 321-339]

On October 20, 2005, THACKERAY also filed his Memorandum of Law in Opposition to BEI's more recent Motion to Dismiss for Lack of Subject Matter

Jurisdiction. [R. Vol. III, pp. 351-358] In this motion, THACKERAY attacked BEI's contention THACKERAY had a duty to serve the August 10, 2005 Order on BEI, which was issued by an Ohio court. [R. Vol. II, pp. 351-358] Moreover, THACKERAY cited Ohio law as opposed to Florida law. [R. Vol. II, pp. 351-358] In support, THACKERAY also filed the Affidavit of THACKERAY's Ohio counsel, Michael Paolucci. [R. Vol. II, pp. 360-361] According to Attorney Paolucci, he received the August 10, 2001 Order. [R. Vol. II, pp. 360-361] More importantly, however, Attorney Paolucci stated BEI's Ohio counsel, John J. Williams, indicated he, too, received the August 10, 2001 Order, and that Attorney Williams considered the Ohio portion of the litigation to be over. [R. Vol. II, pp. 360-361;Vol. III, pp. 382-383] As such, the Pinellas County Circuit Court entered an Order denying BEI's Motion to Dismiss for Lack of Subject Matter Jurisdiction on December 14, 2005. [R. Vol. III, p. 384] In addition, the Pinellas County Circuit Court also granted THACKERAY's Motion requesting the court preside over the Proceedings Supplementary and to Implead HUTCHENS on January 17, 2006. [R. Vol. III, pp. 385-386] The Pinellas County Circuit Court issued this Order to both THACKERAY's counsel, and HUTCHENS' counsel, John Bangos.[R. Vol. III, p. 385-386]

On May 30, 2006, after entering an Order impleading HUTCHENS, the

Pinellas County Circuit Court commenced the Proceedings Supplementary Examination of HUTCHENS, who appeared with representation, and after receiving notice through Attorney Bangos,[9] and who defended his actions. [R. Vol. III, p. 499; Vol. V, pp. 705-807] Moreover, Attorney Bangos gave an opening statement and cross examined HUTCHENS in further defense of HUTCHENS' actions. [R Vol. V, pp. 705-807]

The Pinellas County Circuit Court subsequently issued an Order following the May 30, 2006 proceeding, which held the matter would reconvene on August 31, 2006, and that HUTCHENS would produce various material on that date. [R. Vol. III, p. 499][10] HUTCHENS' failure to produce this material also forced the Pinellas County Circuit Court to enter an Order to Show Cause on the same date (January 8, 2005). [R. Vol. III, pp. 500-501]

---

[9]The forms of notice for the Proceedings Supplementary HUTCHENS received via Attorney Bangos include: THACKERAY's September 13, 2005 Motion to Amend Proceedings Supplementary for Execution and to Implead HUTCHENS, the September Notice of Hearing on THACKERAY's September 13, 2005 Motion, the September 28, 2005 Notice of Hearing amending the hearing date on THACKERAY's September 13, 2005 Motion, the January 12, 2006 Notice of hearing for the March 28, 2006 Case Management Conference, and the January 17, 2006 Orders granting THACKERAY's September 13, 2005 Motion, and granting THACKERAY's Motion that the trial court both implead HUTCHENS and conduct the Proceedings Supplementary. [R. Vol. II, pp. 321-339, Vol. III, pp. 385-386].

[10]The Pinellas County Circuit Court specifically sought HUTCHENS' individual tax returns for 2000 through 2005, all documents related to HUTCHENS' Charles Schwab Stock Accounts, all account records/statements for all corporations for which HUTCHENS is an officer, and all corporate tax returns for BEI, Specialty Shipping, Inc., and Bass and Flats, Inc. for 2000-2006. [R. Vol. III, p. 499]

HUTCHENS failed to comply with the January 8, 2005 Orders. [R. Vol. III, pp. 502-505] As such, THACKERAY moved for an Order to Show Cause and Continue the Proceeding Supplementary. [R. Vol. III, pp. 502-505] On September 14, 2006, the Pinellas County Circuit Court granted THACKERAY's Motion to Show Cause and to Continue the Proceeding Supplementary, and ordered HUTCHENS to produce the material in question on September 18, 2006. [R. Vol. III, pp. 502-505][11]

On November 8, 2006, the Pinellas County Circuit Court convened the Proceedings Supplementary. [R. Vol. V, pp. 808-809] The Court subsequently entered its Final Order on Proceedings Supplementary/Entry of Final Judgment Against BEI and HUTCHENS on November 21, 2006. [R. Vol. V, pp. 808-809] According to the Order, the Pinellas County Circuit Court found HUTCHENS' July 27, 2000 transfer of the funds from the FIRST UNION account was done so "fraudulently and for the express purpose of avoiding payment of the January 27, 2000 Final Judgment rendered against" BEI, and that HUTCHENS' fraudulent transfer of monies to and from corporate accounts which he controlled . . . renders HUTCHENS personally liable for this debt." [R. Vol. V, pp. 808-809] The

[11]The Pinellas County Circuit Court also held HUTCHENS in contempt, sentenced him to five-months incarceration, but deferred the incarceration until September 18, 2006 provided HUTCHENS produced all said material. [R. Vol. III, pp. 502-505]

Pinellas County Circuit Court subsequently entered an Amended Final Order on Proceedings Supplementary/Entry of Final Judgment Against BEI and HUTCHENS, which simply added a paragraph requiring HUTCHENS to complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet). The Appellants appealed this Order, as well as the previous Orders denying BEI's Motions to Dismiss for Lack of Subject Matter Jurisdiction.

SUMMARY OF THE ARGUMENT

The time has come to end this litigation as to THACKERAY via an affirmance of the Pinellas County Circuit Court's July 17, 2000, August 14, 2000 and December 14, 2005 Orders issued by the Pinellas County Circuit Court denying BEI's Motions to Dismiss for Lack of Subject Matter Jurisdiction, and the December 18, 2006 Amended Final Judgment. Instead of raising an appealable issue supported by law or evidence, the Appellants have instead chosev to rely upon speculation in direct contradiction to the evidence before this Honorable Court. Specifically, HUTCHENS did receive due process; the record evidence shows HUTCHENS did receive notice of the Proceedings Supplementary, appeared at the Proceedings Supplementary, and defended his actions before a neutral judge. Moreover, HUTCHENS' contention he be formally served with process for the Proceedings Supplementary is baseless. In other words, the Appellants' appeal in this regard, which is basically based on an unsuccessful "gotcha!" tactic, is yet another example of the Appellants' attempt to purposefully evaded their legal obligation to make THACKERAY whole.

Further, the Appellants argue THACKERAY failed to meet *THACKERAY's* burden to prove, pursuant to *Florida* law, the Common Pleas Court of Hamilton County, *Ohio* served BEI with the August 10, 2001 Final Order. As such,

according to the Appellants, they were unable to appeal the matter, which in turn means the Pinellas County Circuit Court lacked subject matter jurisdiction. The Appellants' argument fails, however, for two main reasons. First, *Ohio* law, not *Florida* law, applies to this issue. According to Ohio law, THACKERAY had no such burden to prove the Common Pleas Court of Hamilton County, Ohio served the August 10, 2001 Order on BEI. Second, the Appellants proffered no evidence showing they did not receive the August 10, 2001 Order. In fact, the only evidence regarding the issue is the affidavit of Attorney Paolucci, where he testifies the Appellants' Ohio counsel, Attorney Williams, did, in fact, receive the August 10, 2001 Order and considered the matter over. As such, the Pinellas County Circuit Court did have subject matter jurisdiction.

ARGUMENT

THE FINAL JUDGMENT SHOULD BE AFFIRMED BECAUSE HUTCHENS RECEIVED DUE PROCESS AND THE TRIAL COURT DID HAVE SUBJECT MATTER JURISDICTION

A. Standard of Review

"The basic due process guarantee of the Florida Constitution provides that '[n]o person shall be deprived of life, liberty or property without due process of law.' Art. I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same." *Henderson v. Dept. of Health,* 954 So.2d 77, 80 (Fla. 5th DCA 2007). As such, "mixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting de novo review of the constitutional issue." *Hilton v. State,* 2007 WL 1932071 (Fla. 2007). Further, "[w]hether a court has subject matter is a question of law reviewed de novo." *Sanchez v. Fernandez,* 915 So.2d 192 (Fla. 4th DCA 2005).

B. HUTCHENS Received Constitutional Due Process

In the "Question Presented" portion of Appellants' Brief, Appellants state an issue this Honorable Court is to address is "whether *Plaintiff* followed constitutional due process requirements in obtaining a judgment against Gregory

D. Hutchens." "Constitutional due process protections do not extend to private conduct abridging individual rights; only state action is subject to scrutiny under a due process analysis." *Baycare Health System, Inc. v. Agency for Health Care Administration,* 940 So.2d 563, 569 (Fla. 2d DCA 2006); *citing Davis v. Prudential Sec. Inc.,* 59 F.3d 1186, 1190 (11th Cir. 1995); *see also Northside Motors of Florida, Inc. v. Brinkley,* 282 So.2d 617, 620 (Fla. 1973) (where the Florida Supreme Court held due process is "directed solely to state action and individual invasion of individual rights is not the subject matter thereof") *see also Martin Memorial Hosp. Ass'n., Inc. v. Noble,* 496 So.2d 222, 224 (Fla. 4th DCA 1986) (where the Fourth District Court of Appeal held state involvement must be demonstrated before a court can determine a party violated one's rights to due process); *see also Jeffries v. Ga. Residential Fin. Auth.,* 678 F.2d 919, 922 (11th Cir. 1982) (explaining that "the fourteenth amendment proscription against deprivation of property without due process of law reaches only government action and does not inhibit the conduct of purely private persons in their ordinary activities"). Accordingly, THACKERAY, a private person, could not have violated HUTCHINS' due process rights as the Appellants contend in their Brief.

Nevertheless, in their Brief, the Appellants argue service of process was not

effectuated on HUTCHENS regarding THACKERAY's Motion to Implead HUTCHENS. As such, according to the Appellants, HUTCHENS lacked notice, and was unable to defend himself at a full and fair hearing, which in turn constituted a violation of HUTCHENS' due process. Of course, the facts of this case show otherwise since several filings, motions, and notices concerning the Proceedings Supplementary were directed to HUTCHENS via his counsel, Attorney Bangos, and since HUTCHENS did appear at the Proceedings Supplemental to defend his actions.

Florida law does not support HUTCHENS' contention a third party must receive service of process in order for a court to implead the third party. Indeed the case law HUTCHENS' cited in his brief do not support HUTCHENS' position he must be served in order to be impled, despite the fact HUTCHENS had sufficient notice of the proceedings supplementary. For instance, *Merritt v. Hefferman,* 195 So. 145 (Fla. 1940) is factually distinguishable from this present matter. Specifically, the case did not concern impleading a party, but instead, whether proper service was made on the appellants' place of abode. Further, *Arcadia Citrus Growers Ass'n v. Hollingsworth,* 185 So. 431 (Fla. 1939) dealt with "whether a final judgment, entered by a clerk upon a default, is null and void and subject to collateral attack when the defendant was properly served . . ."

Ironically, however, is the fact the Florida Supreme Court also held in that case, "'[a] defendant may waive defects in attempted services, whether the process is actual or constructive. Such waiver is always implied from *voluntary appearance* without questioning jurisdiction . . ." (Emphasis added). Accordingly, if this Honorable Court is to procure anything from *Arcadia Citrus Growers Ass'n.*, it should be that HUTCHENS' waived defects of service, if any, by appearing at the proceedings supplementary. Further, neither *Ryan's Furniture Exchange, Inc. v. McNair,* 162 So. 483 (Fla. 1935), nor *Machado v. Foreign Trade, Inc.,* 544 So.2d 1061 (Fla. 3d DCA 1989), hold "[s]ervice should be perfected by serving a summons and the Motion to Implead, along with the Order Granting the motion on the impleaded party by personal or substitute service" as the Appellants suggest in their Brief. *Ryan's Furniture Exchange* actually provides in part:

> In proceedings supplemental to execution under the Florida statutes, due process of law must be observed whereever rights of third parties are required to be adjudicated, and, in order to adjudicate the rights of such third parties, they must be made actual parties to the proceedings, either by their own *voluntary intervention* or by the service of an appropriate rule nisi upon them to appear and show cause why their asserted claims to disputed assets in their hands, possession, or control should not be inquired into and held to be voidable as to the plaintiff in execution who is seeking to reach such disputed assets in order to satisfy his judgment against his judgment debtor whose assets he claims they in reality are.

Id. at 487-488. (Emphasis added). Moreover, *Machado* cites *Ryan's Furniture*

Exchange by holding,

> no rights of such third parties should be adjudged to be affected, impaired, or finally cut off by any order of the court made in such proceedings supplementary to execution, unless such third parties have been first fully impleaded and brought into the case as actual parties to the proceeding, and, as such, given an opportunity to fully and fairly present their claims *as parties* entitled to full and fair hearing after the making up of definite issues to be tried, and not as mere spectators or bystanders in the cause.

Machado, 544 So.2d at 1062. Accordingly, if the notice provided to HUTCHENS via his legal representation, Attorney Bangos, was insufficient, then at the very least, his appearance constituted *voluntary intervention* pursuant to *Ryan's Furniture Exchange.* And as the record clearly shows, HUTCHENS did receive a full and fair hearing upon his appearance.

Further, the case of *United Presidential Life Insurance Co. v. King,* 361 So.2d 710 (Fla. 1978) does not even concern section 56.29. Instead, the case concerned the constitutionality of sections 77.01 and 77.03, Florida Statutes, which deal with the issuance of writs of garnishment. In addition, *Whipple v. JSZ Financial Co., Inc.,* 885 So.2d 933 (Fla. 4th DCA 2004) concerned a final judgment enforcing a Texas judgment the Florida Fourth District Court of Appeal held to be void because the appellee failed to properly serve the appellant in Texas. Here, service of process upon HUTCHENS in Ohio is not an issue. On the

same note, *Greisel v. Gregg,* 733 So.2d 1119 (Fla. 5th DCA 1999) is as equally unrelated as *Whipple* to the present matter. *Greisel* concerned the appellant not receiving service of process because the appellee sent it to the wrong address. As a result of the improper service, the court entered a default judgment. Here, however, BEI never contested Ohio service of process, and there was never a default judgment. In fact, BEI litigated the matter up-and-until it neglected to appear at trial.

Additionally, *Fisher v. State,* 840 So.2d 325 (Fla. 5th DCA 2003) dealt with whether a parent received proper notice of her financial responsibility for a restitution order the juvenile court issued against the parent's minor daughter for an arson conviction. The present matter, however, does not concern proper notice. The records here clearly show HUTCHENS received notice of the proceedings supplementary since he appeared. Moreover, *Ramagli Realty Co. v. Craver,* 121 So.2d 648 (Fla. 1960) concerned whether a district court of appeal can entertain an appeal more than sixty days after final judgment, which is not even remotely related to the present matter.

BEX was the party

The final case HUTCHENS cites in support of his position section 56.79 requires a third party be served with a summons is *M.L. Builders, Inc. v. Ward,* 769 So.2d 1079 (Fla. 4th DCA 2000). *M.L. Builders* dealt with an appellant not

being served in a suit for fraudulent lien and slander of title, and as a consequence, the Fourth District court of Appeal vacated the final judgment. *M.L. Builders,* however, neither concerned section 56.29, nor the procedures related to proceedings supplementaries.

The case probably most supportive of HUTCHENS' position is *Robert B. Ehmann, Inc. v. Bergh,* 363 So.2d 613 (Fla. 1st DCA 1978), which the Florida Supreme Court has since overruled in *Exceletech, Inc. v. Williams*, 597 So.2d 275 (Fla. 1992), and which the Florida Fourth District Court of Appeal disproved in *Sverdahl v. Farmers and Merchants Savings Bank*, 582 So.2d 738, 740 (Fla. 4th DCA 1991). In *Sverdahl*, the Fourth District held:

> The *Robert B. Ehlmann* court also suggested that the rules of civil procedure were not applicable to the statutory proceedings and, even if they were, the proposed third party defendants had to be served with the motion to implead *before they could merely be impleaded.* Again, when one considers the function of creditors' bills, the first district's requirement for section 56.29 impleader of third parties appear quit unnecessary and unrequired by anything in the statutes.

(Emphasis provided by the Court).

Additionally, the case of *Varveris v. Alberto M. Carbonell, P.A.,* 773 So.2d 1275, 1276 (Fla. 3d DCA 2000) provides a judgment debtor can serve a third party impleader defendant "personally *or by a substituted method sufficient to confer jurisdiction upon the court."* (Emphasis added). In *Varveris,* the judgment debtor,

Carbonell, sought to recover a judgment from Alexander Varveris, and sought to implead Alexander Varveris' wife, Marie Varveris. Carbonell, however, was unable to serve Marie Varveris. Nevertheless, the trial court conducted an evidentiary hearing, impleaded Marie Varveris, and found her husband's transfers to her were fraudulent. Accordingly, the trial court ordered Marie Varveris satisfy the outstanding judgment. On appeal, however, the Third District reversed, reasoning "it is undisputed that Maria was not served personally *or by a substituted method sufficient to confer jurisdiction upon the court*." *Id.* (Emphasis added).

Like Marie Varveris, HUTCHENS contends on appeal THACKERAY never served him personally. Unlike Marie Varveris, however, HUTCHENS did receive "a substituted method sufficient to confer jurisdiction upon the court." In other words, HUTCHENS received ample notice of the Proceedings Supplementary via filings, motions, notices and orders forwarded to HUTCHINS' counsel, Attorney Bangos.

Further, the Florida Fifth District Court of Appeal's ruling in *Wieczoreck v. H & H Builders, Inc.*, 450 So.2d 867 (Fla. 5th DCA 1984), *overruled on other grounds by Exceletech, Inc. v. Williams,* 579 So.2d 850 (Fla. 5th DCA 1991), a factually analogous case, also addresses the present issue. According to

Wieczoreck, "[a]lthough section 56.29, Florida Statutes (1981), does not prescribe the procedure for impleading third party defendants, the case law of this State establishes the proper procedure. *Robert B. Ehmann, Inc. v. Bargh,* 363 So.2d 613 at 615 (Fla. 1st DCA 1978)."[12] *Id.* at 871. In addition, courts are to give section 56.29 "liberal construction so as to afford the judgment creditor the most complete relief possible." *Id. citing Richard v. McNair,* 164 So. 836 at 840 (Fla. 1935). Further, *Wieczoreck* Court also held that "[t]he fundamentals of procedural due process are (1) a hearing (2) before an impartial decision-maker, after (3) fair notice of the charges and allegations, (4) with an opportunity to present one's own case." *Id. citing Neff v. Adler,* 416 So.2d 1240 at 1242-43 (Fla. 4th DCA 1982); *and Mission Bay Compland, Inc. v. Summer Financial Corp.,* 71 F.R.D. 432 at 435 (M.D. Fla. 1976).

In *Wieczoreck*, the appellee obtained a final judgment against Nelson Davis. The appellee subsequently moved to implead a third party, and filed an affidavit stating the third party received a conveyance from Nelson Davis on the date

---

[12]The Fifth District continued by stating in relevant part, "[u]nder the decisional law interpreting section 56.29, there are two jurisdictional prerequisites for supplementary postjudgment proceedings: (1) a return and unsatisfied writ of execution; and (2) an affidavit averring that the writ is valid and unsatisfied, along with a list of third persons to be impleaded. *Tomayko v. Thomas,* 143 So.2d 227 at 229-30 (Fla. 3d DCA 1962)." Note, however, these elements are not longer necessary. *See Standard Property Investment Trust, Inc. v. Luskins,* 585 So.2d 1099, 1101 (Fla. 4th DCA 1998). Nevertheless, THACKERAY met these requirements.

appellee filed the action in attempt to hinder or defraud the appellant's creditors. The trial court ultimately entered a final judgment against the appellant pursuant to section 56.29. The final judgment also impleaded the appellant as a third party, and found null and void the conveyance to the appellant "since it constituted a fraudulent conveyance for the purpose of delaying, hindering or defrauding the creditors" of the appellee.

Appellant subsequently appealed, maintaining "that he was denied due process of law because he was not fully impleaded as a third party until the final judgment which simultaneously divested him of any and all interest in the real property deeded to him by Nelson L. Davis . . ." *Id.* at 871. According to the Fifth District, "the appellant received (1) a hearing (2) before an impartial decision-maker, after (3) fair notice of the charges and allegations, (4) with an opportunity to present his own case." *Id.* at 872. Further, the Fifth District went on to hold, "Although it may have been better procedure for the trial court to have entered an order first impleading the appellant and then an order setting aside the conveyance, we cannot say that the procedure utilized in the case at bar did not comport with procedural due process of law." *Id.* (Emphasis added).

The procedural history of the present matter is analogous to *Wieczoreck* for several reasons. For instance, THACKERAY filed a complaint against BEI to

recover money, just like the appellee in *Wieczoreck* filed a complaint against Nelson Davis to recover money. Further, THACKERAY, again like the appellee in *Wieczoreck*, filed an affidavit to support his contention the trial court should implead a third party. In *Wieczoreck*, the affidavit cited the appellant as the prospective third party the court should implead. Here, the September 5, 2005 Amended Affidavit of THACKERAY cited HUTCHENS as the prospective third party the court should implead. In addition, THACKERAY's affidavit requested HUTCHENS show cause why he should not be impleaded, just like the trial court in *Wieczoreck* issued such a notice to Davis.

Not given the opportunity here

The results following the Proceedings Supplementary in the present matter, too, is analogous to the results following the proceedings supplementary in *Wieczoreck*. Specifically, the Pinellas County Circuit Court found HUTCHENS' transfer of funds from BEI's FIRST UNION account was done so "fraudulently and for the express purpose of avoiding payment of the January 27, 2000 Final Judgment rendered against" BEI. Likewise, the trial court in *Wieczoreck* held the transfer of assets in that case constituted a fraudulent conveyance for the purpose of delaying, hindering or defrauding the appellee. Also, HUTCHENS, like the appellant in *Wieczoreck,* filed an appeal from a final judgment entered in a supplementary proceeding pursuant to section 56.29 on due process grounds.

Accordingly, since both *Wieczoreck* and the present matter mirror one another factually, this Honorable Court should utilize the analysis found in the *Wieczoreck* opinion. In doing so, this Honorable Court should determine whether THACKERAY met the jurisdictional prerequisites for supplementary postjudgment proceedings–that is, an unsatisfied writ of execution, and an affidavit averring that the writ is valid and unsatisfied, along with identification of third persons to be impleaded. And upon review of the record, this Honorable Court will find THACKERY did meet the necessary requirements. Specifically, on September 14, 2005, THACKERAY filed his September 5, 2005 Amended Affidavit, stating he had an unsatisfied judgment, identifying HUTCHENS as a third party whom the Pinellas County Circuit Court should examine, and requesting that both BEI and HUTCHENS "show cause, if any he can, why the property in the name of [BEI] or [HUTCHENS] should not be subject to satisfaction of the said execution." Moreover, on September 14, 2005, THACKERAY filed his Amended Motion for Proceedings Supplementary so as to Implead HUTCHENS. Further, all these filings, and all the orders and notices regarding the Proceedings Supplementary were served on Attorney Bangos, HUTCHENS' representation at the May 30, 2006 Proceedings Supplementary. Consequently, HUTCHENS appeared at the Proceedings Supplementary.

Representing Boats Express
look at Pleadings of Bangos

Next, this Honorable Court must determine if the Pinellas County Circuit Court met the fundamentals of due process listed in *Wieczoreck*.[13] Consequently, this Honorable Court will find, upon examination of the record for the present matter, HUTCHENS did attend the Proceedings Supplementary on May 30, 2006. Not Voluntar The Proceedings Supplementary was before an impartial decision-maker–the Pinellas County Circuit Court. Moreover, HUTCHENS did receive fair notice of the charges and allegations in all of the above-cited motions, filings, orders and notices via Attorney Bangos. Finally, HUTCHENS had an opportunity defend himself at the Proceedings Supplementary. As such, THACKERAY established a prima facie case for impleading HUTCHENS without violated HUTCHENS' due process rights.

C. The Trial Court Had Subject Matter Jurisdiction

The Appellant, BEI, also contends the Pinellas County Circuit Court erroneously denied BEI's Motion to Dismiss for Lack of Subject Matter Jurisdiction because THACKERAY failed to prove if the Ohio trial court served BEI's Ohio counsel with the August 10, 2001 Order. As such, according to BEI, its Ohio counsel was unable to contest the finality of that decision. Accordingly,

---

[13]The fundamentals are notice and a hearing before an impartial decision-maker where the third party can propound a defense.

BEI further argues the Pinellas County Circuit Court lacked subject matter jurisdiction. Interestingly, however, BEI supports this contention with *Florida* law as opposed to *Ohio* law.

If BEI intended to appeal the August 10, 2001 Order, the proper legal forum would have been the Ohio Appellate Court system. Further, since BEI is contesting the validity of service of an *Ohio* Order, the *Ohio* Rules of Civil and Appellate Procedure, and *Ohio* case law apply–not *Florida* law. Moreover, when this Honorable Court applies Ohio jurisprudence to the present issue, it will find Ohio jurisprudence does not provide an affirmative duty on an attorney to serve the opposing attorney with a post final judgment order, or any order for that matter, entered by an Ohio court.

BEI's January 12, 2001 Motion to Reconsider, Set Aside and/or Vacate Judgment and Amended Judgment was filed pursuant to Ohio Rules of Civil Procedure Rules 55(B), 59 and 60 (B). As such, the appeal of an Order filed pursuant to Defendant's Motion to Reconsider, Set Aside and/or Vacate Judgment and Amended Judgment is governed by Ohio Rule of Appellate Procedure Rule 4 (B)(2), which reads:

RULE 4. Appeals as of Right–When Taken

(B) Exceptions.

> The following are exceptions to the appeal time period in division (A) of this rule:
>
> (2) Civil or juvenile post-judgment motion
>
> In a civil case or juvenile proceeding, if a party files a timely motion for judgment under Civ. R. 50(B), a new trial under Civ. R. 59(B), vacating or modifying a judgment by an objection to a magistrate's decision under Civ. R. 53(E)(4)(c) or Rule 40(E)(4)(c) of the Ohio Rules of Juvenile Procedure, or findings of fact and conclusions of law under Civ. R. 52, the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is *entered.*

(Emphasis added). Accordingly, if BEI intended to contest the August 10, 2001 Ohio Order, the thirty days to file the appeal began to toll the date the Order was *entered.*

Moreover, in the Ohio case of *Wohlabaugh v. Salem Communications Corp*, 2005 WL 629017 (2005), the trial court denied the appellant's Motion for Relief from Judgment and held that the appellant presented no grounds pursuant to Ohio Rule of Civil Procedure 60 (B)[14] for vacating the trial court's summary judgment. The trial

---

[14] Ohio Rule of Civil Procedure 60(B) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the

court held that *pro hac vice* co-counsel's failure to receive the Summary Judgment Order was not grounds for vacating the Order.

The trial court also stated the appellant failed to demonstrate that local counsel, who's duty it was to preserve the judgment for appeal, was not served in accordance with Ohio Rule of Civil Procedure Rule 58.[15] Rule 58 discusses the entry

---

judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

[15] Ohio Rule of Civil Procedure 58 provides:

(A) Preparation; entry; effect. Subject to the provisions of Rule 54(B), upon a general verdict of a jury, upon a decision announced, or upon the determination of a periodic payment plan, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal. A judgment

of a final judgment and sets forth the affirmative duty of the Clerk of Court to serve the final order, not the opposing party. Further, BEI's arguments as set forth in its Brief does not contest the validity of service of the Ohio Final Judgment entered on January 27, 2000 or the Amended Final Judgment entered on June 13, 2000 as contemplated in Rule 58, but rather the service of the post final judgment Order entered by the Ohio Court on August 10, 2001, which is governed by Ohio Rule of Appellate Procedure Rule 4 (B)(2).

According to *Wohlabaugh,* it is the duty of the BEI to prove BEI's Ohio counsel, Attorney Williams, did not receive the Order. Not only has BEI failed to do so, but upon information and belief, BEI's Ohio counsel, Attorney Williams, indicated he considered the Ohio matter to be complete. Specifically, Ohio local counsel for THACKERAY, Attorney Paolucci, spoke with BEI's local counsel,

---

is effective only when entered by the clerk upon the journal.

(B) Notice of filing. When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A).

(C) Costs. Entry of the judgment shall not be delayed for the taxing of costs.

Attorney Williams, regarding the allegations made on his behalf. Attorney Williams never claimed that he had not received the Order, and in fact stated that he believed the Ohio litigation to be "over." BEI has neither filed an affidavit of Attorney Williams, alleging that he was never served with the August 10, 2001 Order, nor met its duty in any manner whatsoever, of proving BEI's local counsel never received the August 10, 2001 Order.

CONCLUSION

For the foregoing reasons, THACKERAY requests this Honorable Court affirm the Orders denying BEI's Motions to Dismiss for Lack of Subject Matter Jurisdiction, and the Order impleading HUTCHENS.

THOMPSON, GOODIS, THOMPSON
GROSECLOSE & RICHARDSON, P.A.

Kevin M. Davis

KEVIN M. DAVIS, ESQ.
FBN# 0795941
ANDREA N. ZDANIEWSKI, ESQ.
FBN# 0647330
Post Office Box 90
St. Petersburg, FL 33731
(727) 823-0540
(727) 823-0230 (Fax)
Attorneys for Appellee, MARK THACKERAY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been provided via First Class U.S. Mail to Mark J. Albrechta, Esquire, 15824 Hampton Village Drive, Tampa, Florida, 33618-1654 this 16th day of July, 2007.

THOMPSON, GOODIS, THOMPSON
GROSECLOSE & RICHARDSON, P.A.

_____

KEVIN M. DAVIS, ESQ.
FBN# 0795941
ANDREA N. ZDANIEWSKI, ESQ.
FBN# 0647330
Post Office Box 90
St. Petersburg, FL 33731
(727) 823-0540
(727) 823-0230 (Fax)
Attorneys for Appellee, MARK THACKERAY

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Answer Brief complies with the requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

THOMPSON, GOODIS, THOMPSON, GROSECLOSE & RICHARDSON, P.A.

KEVIN M. DAVIS, ESQ.
FBN# 0795941
ANDREA N. ZDANIEWSKI, ESQ.
FBN# 0647330
Post Office Box 90
St. Petersburg, FL 33731
(727) 823-0540
(727) 823-0230 (facsimile)
Attorneys for Appellee, MARK THACKERAY