Supreme Court of Ohio Clerk of Court - Filed January 11, 2016 - Case No. 2015-1340

IN THE SUPREME COURT OF OHIO

GARY KIRSCH, Guardian for Jessica Jacobson	)	Supreme Court Case No. 2015-1340
Plaintiff-Appellee,	)	On Appeal from the Summit County Court of Appeals, Ninth Appellate District Case No. 26915
vs.	)	
ELLEN KAFOREY, et al.	)	
Defendants-Appellants.	)	

MERIT BRIEF OF DEFENDANT-APPELLANT CLEVELAND CLINIC CHILDREN'S HOSPITAL FOR REHABILITATION

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INTRODUCTION

At issue in this case is the application of R.C. §2307.60, a jurisdictional statute providing that a civil action does not merge into a criminal prosecution. Ohio courts have long held that R.C. §2307.60 does not establish a civil cause of action for violation of any criminal statute. Instead, a Plaintiff must assert a common law or statutory claim separate and apart from R.C. §2307.60 to pursue a claim based on a criminal act. Despite the longstanding precedent establishing the jurisdictional nature of R.C. §2307.60, the Ninth District stunningly departed from this principal, finding that R.C. §2307.60 sets forth an independent cause of action allowing civil litigants to base a cause of action for any alleged violation of a criminal statute. The Ninth District's decision, if allowed to stand, will fundamentally alter civil law in Ohio and will result in a blurring of the lines between civil and criminal law.

Plaintiff's claims against the Defendants are premised on alleged violations of criminal statutes for unlawful restraint, kidnapping, and child enticement. Although the Ohio legislature has set forth numerous civil causes of action for violations of specific criminal statutes, no civil cause of action exists for the criminal acts of unlawful restraint, kidnapping or child enticement. Nonetheless, Plaintiff premised her claim on R.C. §2307.60, despite the fact that Ohio courts have consistently held that the statute does not set forth an independent cause of action, which the trial court correctly recognized dismissing this action. The Ninth District's decision allowing this claim, if upheld, will lead to extensive litigation of claims based on criminal statutes where none previously existed, and will create uncertainty for both parties and the Court with respect to elements of a cause of action and case management, statute of limitations, and proper damages to name a few. The Ninth District's ruling will expose defendants to multiple suits and potentially subject defendants to further liability in matters that were previously resolved and this

unprecedented ruling will enable plaintiffs to circumvent long-standing statutes of limitation as well as the tort damages cap. Accordingly, it is imperative that this Court find that the current version of R.C. §2307.60 does not set forth an independent cause of action, and rather it is a codification of the common law principal that a civil action does not merge into a criminal prosecution.

I. STATEMENT OF THE FACTS AND CASE

On September 18, 2012, Plaintiff, Jessica M. Jacobson, filed this action setting forth claimed violations of R.C. §§2307.50 and 2307.60 against Defendants Ellen C. Kaforey, Akron Children's Hospital, and Cleveland Clinic Children's Hospital for Rehabilitation ("CCCHR"). (See Plaintiff's September 18, 2012 Complaint). Plaintiff relied on R.C. §2307.60 to establish civil causes of action for alleged violations of criminal statutes relating to unlawful restraint (R.C. §2905.03), kidnapping (R.C. §2905.01), and child enticement (R.C. §2905.05). Plaintiff has since argued that R.C. §2307.60 creates an independent cause of action for violation of any criminal statute, despite extensive case law to the contrary.

The Complaint alleges that between April 18, 2001 and July 6, 2001 each of the Defendants acted to restrict and prevent Plaintiff's mother, JoAnn Jacobson, from visiting with the Plaintiff while she was hospitalized and thereafter. (See Complaint at ¶10). With respect to CCCHR, Plaintiff alleged that they kept and harbored Plaintiff out of reach from and prevented Plaintiff's mother access to her with threat of physical force and absolute control over the telephone. (See Complaint at ¶20). Further, Plaintiff alleged that CCCHR induced the transport of her to the state of Florida against her will for the period May 30, 2001 to July 6, 2001, and that CCCHR released the Plaintiff to a person other than her mother, who was the only person with

legal custody of the Plaintiff. (See Complaint at ¶¶21-22). Plaintiff alleged that she endured mental suffering and anguish as a result of the Defendants' actions. (See Complaint at ¶24).

On October 30, 2012, Defendant CCCHR filed a Motion to Dismiss the Complaint, requesting that the Court dismiss the Complaint for failure to state a claim upon which relief can be granted.[1] Plaintiff filed a Reply to Defendant CCCHR's Motion to Dismiss on November 19, 2012.[2]

The Trial Court issued a Judgment Order of Dismissal on April 19, 2013 granting the Motions to Dismiss of Defendants Kaforey, Akron Children's Hospital and CCCHR in their entirety, noting as follows:

> [T]he complaint is dismissed at Plaintiff's costs. This is a final, appealable order, and there is no just cause for delay.

(See April 19, 2013 Judgment Order of Dismissal). On May 8, 2013, Plaintiff filed her Notice of Appeal to the Ninth District Court of Appeals, captioned as Case No. CA-26915.

On appeal, the Ninth District Court of Appeals affirmed the trial court's decision as it pertained to the dismissal of the Plaintiff's claims premised on R.C. §2307.50, but reversed the trial court's decision as it pertained to the claims premised on R.C. §2307.60. *Kirsch v. Kaforey,* 9th Dist. No. 26915, 2015-Ohio-2624. (See Appendix A.) Following the Ninth District's ruling, each of the Defendant-Appellee's below moved to certify a conflict between the Ninth District's ruling and that of multiple other districts. On August 6th, the Ninth District issued a ruling certifying a conflict between its decision and decisions rendered in the Third, Fifth and Tenth Appellate Districts.

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[1]Defendants Akron Children's Hospital and Ellen Kaforey filed Motions to Dismiss on October 12, 2012 and November 16, 2012, respectively.

[2]Plaintiff filed Briefs in Opposition to the Motions to Dismiss of Akron Children's Hospital and Ellen Kaforey on October 23, 2012 and November 26, 2012, respectively.

II. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1

THE CURRENT VERSION OF R.C. 2307.60 DOES NOT INDEPENDENTLY AUTHORIZE A CIVIL ACTION FOR DAMAGES CAUSED BY CRIMINAL ACTS, UNLESS OTHERWISE PROHIBITED BY LAW

A. Ohio Courts have consistently held that a violation of a criminal statute does not, in and of itself, give rise to an independent civil claim for relief and the legislature has made no attempt to abrogate these findings through new legislation.

Ohio R.C. §2307.60 was enacted on January 5, 1988. Since that time, Ohio courts have consistently found that R.C. §2307.60 does not create an independent civil cause of action, and rather is a codification of the common law principal that a civil action does not merge into a criminal prosecution. Despite the longstanding precedent setting forth that R.C. §2307.60 does not create an independent cause of action, the legislature has taken no action to amend the statute to provide such a remedy. The inaction of the legislature in light of the longstanding precedent evidences the legislature's intent with respect to R.C. §2307.60. This Court should follow the intent of the legislature and long-standing Ohio precedent and find that R.C. §2307.60 does not set forth an independent cause of action.

It is without question that the laws of Ohio may be changed at the will of the legislature unless prevented by constitutional limitations. As such, "in interpreting the meaning of legislative language, it is not unimportant that the General Assembly has failed to amend the legislation subsequent to prior interpretation" of the courts. *Seeley v. Expert, Inc.,* 26 Ohio St.2d 61, 72, 269 N.E.2d 121 (1971). In fact, "legislative inaction in the face of longstanding judicial interpretations *** evidences legislative intent to retain existing law." *State v. Chicon,* 61 Ohio St.2d 181, 183, 399 N.E.2d 1259 (1980). As such, the longstanding precedent that R.C. §2307.60 does not create an independent civil cause of action for violation of criminal statutes,

as set forth below, along with the legislature's inaction, evidences the legislature's intent with respect to R.C. §2307.60.

Ohio courts have consistently disposed of claims premised on R.C. §2307.60 since its inception in 1988. In fact, the Second, Third, Fifth, Eighth and Tenth Districts have all found that R.C. §2307.60 does not create an independent cause of action. Further, the Federal District Court for the Southern and Northern Districts of Ohio have likewise found that there is no automatic civil liability for violation of a criminal statute. Importantly, the few cases relied upon by the Appellees are distinguishable and do not disrupt Ohio's longstanding precedent that R.C. §2307.60 does not set forth an independent cause of action for violation of any criminal statute.

Second District - The Second District Court of Appeals held that "R.C. §2307.60 creates no actionable prohibition, being only a jurisdictional statute allowing the court to grant relief to persons who are injured by a criminal act. R.C. §2307.60 is not a substantive provision." *Collins v. National City Bank,* 2nd Dist. App. No. 19884, 2003-Ohio-6893. Subsequently, in 2009, the Second District further established that R.C. §2307.60 is only a jurisdictional statute, finding that it did not support a civil cause of action for violation of the crime of "Inciting to Violence" (R.C. §2917.01). *Duer v. Henderson,* 2009-Ohio-6815, ¶72.

Third District – The Third District Court of Appeals determined in 1995 that R.C. §2307.60 "does not create a separate cause of action" and is rather a codification of the common law that a civil action is not merged in a criminal prosecution that arose from the same facts. *Applegate v. Weadock,* Auglaize No. 2-95-24, 1995 WL 705214 (Nov. 30, 1995).

Fifth District - The Fifth District similarly held that "R.C. §2307.60 does not create a cause of action *** [and] is only a codification of the common law in Ohio that a civil action is not merged in a criminal prosecution which arose from the same act or acts." *McNichols v.*

Rennicker, 5th Dist. App. No. 2002 AP 04 0026, 2002-Ohio-7215. More recently, in 2014, the Fifth District determined that R.C. §2307.60 does not conflict with R.C. §2315.18 as R.C. §2307.60 does not create any substantive rights. *Simpkins v. Grace Brethren Church of Delaware,* 16 N.E.3d 687, 2014-Ohio-3465, ¶98.

Eighth District – In *Peters v. Mabini,* Cuyahoga No. 73373, 1998 WL 474175 (Aug. 13, 1998), the Eighth District Court of Appeals determined that R.C. §2307.60 did not provide for a civil cause of action for the criminal act of sexual imposition (R.C. §2907.06) and rather the plaintiff would need to pursue a claim for the tort of battery.

Tenth District - The Tenth District agreed that R.C. §2307.60 does not create a separate cause of action finding that a separate statute or common law cause of action must be available before R.C. §2307.60 may be invoked. *Edwards v. Madison Township*, 10th Dist. No. 97APE06-819, 1997 WL 746415. *See also Groves v. Groves*, 10th Dist No. 09AP-1107, 2010-Ohio-4515, ¶25 ("A party must rely on a separate civil cause of action, existent either in the common law or through statute, to bring a civil claim based on a criminal act."). Moreover, in 2015, the Tenth District determined that R.C. §2307.60 does not create an independent cause of action for the criminal act of dereliction of duty (R.C. §2921.44), finding again that R.C. §2307.60 is only a "codification of the common law that a civil action is not merged in a criminal prosecution." *Peters v. Ohio Dept. of Rehab. & Corr.,* 2015-Ohio-2668, ¶12.

Federal Court - The Northern District of Ohio has similarly found that R.C. §2307.60 does not create a separate civil cause of action. *Jasar Recycling, Inc. v. Major Max Management Corp.*, N.D. Ohio No. 4:08CV2830, 2010 WL 395212; *see also Jones v. Graley,* 2008 WL 343087 (S.D. Ohio 2008). The *Jasar* Court further found that "claims for civil damages based solely upon an alleged violation of a criminal statute are inappropriate." *Id.*

In addition to the extensive case law identified above involving R.C. §2307.60, Ohio courts have also regularly found as a general principal that it is inappropriate to base a civil claim for relief on a criminal statute. *See Biomedical Innovations v. McLaughlin,* 103 Ohio App.3d 122, 126, 658 N.E.2d 1084 (10th Dist. 1995)(holding that a civil claim based on a criminal statute was inappropriate); *Stone v. Holzberger,* 807 F.Supp. 1325, 1345 (S.D. Ohio 1992)(holding that there is "no automatic civil liability for violation of a criminal statute.").

It is anticipated that the Appellee will argue that a precedent does not exist, despite the extensive case law above, based on the following decisions: *Gonzalez v. Spofford,* 8th Dist. No. 85231, 2005 WL 1541016 (June 30, 2005); *Aubin v. Metzger,* 3rd Dist. No. 1-03-08, 2003-Ohio-5130 (Sept. 29, 2003); *Cartwright v. Batner,* 2nd Dist. No. 25938, 15 N.E.3d 401, 2014-Ohio-2995; and *Wesaw v. City of Lancaster,* S.D. Ohio No. 2005CV0320, 2005 WL 3448034 (Dec. 15, 2005). However, these decisions are distinguishable and do not overcome the precedent set forth herein and the intent of the legislature.

In *Gonzalez,* the Eighth District was not specifically presented with the issue of whether or not R.C. §2307.60 sets forth an independent cause of action, and rather Appellee would be relying on dicta in this case. Moreover, when specifically faced with the issue currently before this Court, <u>the Eighth District determined that R.C. §2307.60 does not create an independent cause of action for violation of a criminal statute.</u> *Peters, supra.* Notably, the *Gonzalez* decision does not address or overrule the finding set forth in *Peters*, and as such it remains good law. Accordingly, any reliance by the Appellee on *Gonzalez* is misplaced.

Similar to *Gonzalez,* the Court in *Aubin* was not asked to determine whether R.C. §2307.60 creates an independent cause of action or whether it is a codification of the common law principal that a civil cause of action does not merge with a criminal prosecution. *Aubin,*

supra. Moreover, *Aubin* did not overrule prior Third District case law specifically addressing this issue. *Applegate, supra.* Accordingly, the precedent set forth in *Applegate* remains the law in the Third District.

Further, any reliance of the Appellee on *Cartwright* is misplaced. The plaintiff in *Cartwright* asserted causes of action under R.C. §§2307.60 and 2307.61 based on a theft offense. It is without question that R.C. §2307.61 specifically sets forth a civil cause of action for the criminal act of theft. While the *Cartwright* court discussed the interplay between R.C. §2307.60 and R.C. §2307.61 the Court was not faced with the issue of whether R.C. §2307.60 sets forth an independent cause of action for violation of any criminal statute, and it is therefore distinguishable from this action. Moreover, *Cartwright* did not overrule the previous findings in the Second District that did address the issue at hand herein, finding that R.C. §2307.60 is only a codification of the common law that a civil action does not merge with a criminal prosecution. *See Collins, supra*; *see also Duer, supra.*

Defendant anticipates that Appellee will also rely on the matter of *Wesaw,* but this decision is an outlier in the federal jurisprudence of this State and it should not be considered given subsequent decisions. Notably, since the *Wesaw* decision, Ohio Federal District Courts have found on numerous occasions that R.C. §2307.60 does not set forth an independent cause of action. As set forth above, in both *Jasar* and *Jones,* which were both decided **after** *Wesaw*, the Northern and Southern Federal Districts in Ohio determined that R.C. §2307.60 does not set forth an independent cause of action and claims for civil damages based solely on an alleged violation of a criminal statute are inappropriate. Further, in *Replogle v. Montgomery County, Ohio,* S.D. Ohio 3:09-cv-102, 2009 WL 1406686, the Southern District likewise found that R.C. §2307.60 does not create a civil cause of action and rather is a codification of the common law

that a civil action does not merge with a criminal prosecution. Finally, in *Prior v. Mukasey,* N.D. Ohio 3:08CV994, 2008 WL 5076821, the Northern District held that a plaintiff cannot rely on a violation of a criminal statute to support a private civil cause of action. These cases set forth the clear federal jurisprudence on this issue, and *Wesaw*, which was decided prior to the decisions in the above matters, is an outlier that warrants no consideration by this Court.

The longstanding judicial interpretations of R.C. §2307.60 set forth herein establish the legislature's intent regarding said statute. Specifically, twenty years of decisions finding that R.C. §2307.60 does not create an independent cause of action for violation of any criminal statute, with no action taken by the legislature, establish that the legislature did not intend for R.C. §2307.60 to create an independent cause of action. In light of the legislature's intent and Ohio's longstanding precedent, this Court should find that R.C. §2307.60 is a mere codification of the common law principal that a civil claim is not merged with a criminal prosecution, and overrule the decision of the Ninth District Court of Appeals as it relates to R.C. §2307.60.

B. The Ohio Legislature has enacted numerous statutes setting forth civil causes of action for violation of specific criminal statutes, but no such statutes exist with respect to violations of R.C. §§2905.01, 2905.03, and 2905.05.

In addition to the legislature's inaction in the face of longstanding precedent, their intentions are also evidenced by the legislature's choice to enact specific statutes setting forth civil causes of action for certain criminal statutes and not others. In fact, the legislature has enacted the following statutes all of which set forth a civil cause of action for violation of a criminal statute: (1) Civil Liability for Hazing (R.C. §2307.44; premised on R.C. §2903.31); (2) Civil Action for Depriving Adult of Parental or Guardianship Interest in Minor (R.C. §2307.50; premised on R.C. §§2905.01, 2905.02, 2905.03 and 2919.23); (3) Civil cause of action for violation of R.C. §2905.32 (R.C. §2307.51); (4) Civil action for terminating or attempting to

terminate a human pregnancy after viability (R.C. §2307.52; premised on R.C. §2919.16); (5) Civil action for partial birth feticide (R.C. §2307.53; premised on R.C. §2919.151); (6) Damages recoverable for willful damage or theft (R.C. §2307.61; premised on R.C. §2913.01); (7) Damages recoverable in civil action for identify fraud (R.C. §2307.611; premised on R.C. §2913.49); (8) Civil action by owner or operator of cable television or communications system (R.C. §2307.62; premised on R.C. §2913.04); (9) Civil action for Medicaid eligibility fraud (R.C. §2307.65; premised on R.C. §2913.401); and (10) Civil liability for vandalism, desecration, or ethnic intimidation (R.C. §2307.70; premised on R.C. §§2909.05, 2927.11 and 2927.12).[3]

Notably, there is no civil statute that specifically sets forth a civil claim for violation of R.C. §§2905.01, 2905.03 and 2905.05, the statutes set forth in the Appellee's Complaint. The existence of the specific statutes set forth above and the lack of any civil statute authorizing a civil claim for violation of R.C. §2905.01, *et seq.* establishes the legislature's intention to limit civil actions based on criminal acts. In fact, if the legislature intended for R.C. §2307.60 to provide for a civil action for violation of every criminal statute there would be no need to enact any of the specific statutes set forth herein such as R.C. §2307.51.

In interpreting R.C. §2307.60, this Court must look not only at that statute, but each of the other statutes providing a specific civil remedy for violations of criminal statutes, as identified herein. "It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *Summerville v. Forest Park,* 128 Ohio St.3d 221, 943 N.E.2d 522, 2010-Ohio-6280, *quoting State v. Moaning,* 76 Ohio St.3d 126, 666 N.E.2d 1115 (1996). Further, "if a general provision conflicts with a

[3]This is not a complete list of all statutes setting forth specific civil causes of action for violations of specific criminal statutes.

special or local provision, they shall be construed, if possible, so that effect is given to both." R.C. §1.51.

The legislature has clearly set forth civil causes of action for certain crimes as noted herein. If R.C. §2307.60 were interpreted to provide for civil causes of action for violation of all criminal statutes, the statutes identified herein, such as R.C. §§2307.44 and 2307.52, would be rendered meaningless, and in contradiction of long standing Ohio Law. *Summerville, supra.* On the other hand, if R.C. §2307.60 is interpreted as a codification of the common law principal that a civil claim is not merged within a criminal prosecution, as courts have interpreted the statute for the past twenty years, this Court would be giving effect to R.C. §2307.60, as well as all of the specific statutes setting forth civil claims for criminal acts, as is required by the Rules of Statutory Interpretation.

It is anticipated that Appellee will argue that the reason for enacting the specific statutes identified herein, in addition to R.C. §2307.60, is to provide certain remedies that are not included within the general damages provision set forth in R.C. §2307.60. A number of the statutes providing civil claims for violations of specific criminal statutes either limit or provide for additional remedies separate and apart from the general damages set forth in R.C. §2307.60.[4] However, it is not noteworthy that a civil statute setting forth a claim for relief for violation of a criminal statute would set forth the remedy a plaintiff may seek for that cause of action. Moreover, certain civil statutes providing a civil claim for violation of a criminal statute do not set forth any remedy greater or less than the general damages referenced in R.C. §2307.60.

[4]For example, R.C. §2307.611 limits damages recoverable in a civil action for identity fraud to five thousand dollars for each violation or three times the amount of actual damages, whichever is greater.

Specifically, R.C. §2307.51 sets forth no greater or lesser remedy than that set forth in R.C. §2307.60. Ohio R.C. §2307.51 provides as follows:

> (A) A victim of a violation of section 2905.32 of the Revised Code has and may commence a civil cause of action for compensatory and punitive damages against the trafficker for harm that resulted from the violation of section 2905.32 of the Revised Code.
>
> (B) The cause of action created by this section is in addition to any other cause of action available under statutory or common law.

This Section provides no greater or lesser remedy than that of R.C. §2307.60, which also calls for compensatory and punitive damages for violations of criminal statutes. Further, R.C. §2307.51 was enacted in 2012, well after R.C. §2307.60, and would be rendered meaningless and unnecessary if R.C. §2307.60 was interpreted to provide a civil cause of action for violation of every criminal statute unless otherwise excepted by law. In order to give effect to both statutes, the Court should follow long-standing precedent interpreting R.C. §2307.60 as a codification of the common law principle that a civil cause of action does not merge with a criminal prosecution.

Similar to R.C. §2307.51, other statutes such as R.C. §§2307.52 and 2307.53 provide no greater or lesser relief than that set forth in R.C. §2307.60. Again, R.C. §§2307.52 and 2307.53 were enacted after R.C. §2307.60, and to give effect to these statutes, R.C. §2307.60 cannot be interpreted to provide a civil action for violation of any criminal statute.

It is clear that the General Assembly decided to create civil causes of action for violations of certain criminal statutes such as R.C. §2905.32, Trafficking in Persons. (R.C. §2307.51.) However, the existence of statutes such as R.C. §§2307.51, 2307.52, and 2307.53 reflect that the legislature intended to create civil causes of action for violations of certain criminal statutes and not others. Although civil statutes do not exist authorizing civil claims for relief for violations of

every criminal statute, numerous common law causes of action exist that may allow a civil claimant to file a cause of action for what may be considered a criminal act.

For example, the lack of any civil cause of action for criminal statutes related to kidnapping does not prevent a potential plaintiff from asserting a civil claim for relief. Specifically, the criminal act of kidnapping, as alleged in the Plaintiff's Complaint herein, is generally encompassed by the common law claim of false imprisonment. In light of the availability of a false imprisonment claim, a claimant need not look to a specific statute authorizing a civil claim for violation of a criminal statute. Moreover, the existence of a common law false imprisonment claim may provide the reason why the legislature has chosen to refrain from enacting a specific statute authorizing a civil cause of action for violation of R.C. §2905.01. Creating a separate statutory cause of action in light of the presence of a common law claim would create uncertainty with respect to the elements of proving a claim and would also enable claimants to circumvent certain limitations periods or damage caps, as will be set forth more fully below. As such, the legislature's decision to refrain from enacting a statute to authorize a civil claim for violation of R.C. §2905.01 may be due in part to the presence of a common law claim for false imprisonment.

With that said, the reason why the legislature chose not to set forth a specific statutory cause of action for violation of R.C. §§2905.01, 2905.03, and 2905.05 is immaterial to this matter, as the lack of such a statute on its face is fatal to the Plaintiff's claim. Plaintiff cannot rely on R.C. §2307.60 to support a claimed violation of these criminal code sections, because to do so would render more recent code sections, such as R.C. §2307.51, meaningless. Accordingly, because R.C. §2307.60 cannot be interpreted to provide a civil cause of action for

violation of any criminal statute, unless otherwise excepted by law, this Court must overrule the Ninth District interpretation of R.C. §2307.60 and reinstate the finding of the trial court.

C. Interpreting R.C. §2307.60 to set forth a civil claim for violation of all criminal statutes unless specifically excepted by law would allow plaintiffs to circumvent long-standing statutes of limitation, as well as the tort damages cap, and would lead to uncertainty of both the litigants and the court to elements of a cause of action and finality of judgments and settlements.

As set forth above, past precedent and rules of statutory interpretation call for this Court to interpret R.C. §2307.60 as a jurisdictional statute and a mere codification of the common law principle that a civil cause of action is not merged with a criminal prosecution. In addition to this reasoning, if this Court were to interpret R.C. §2307.60 to set forth a civil claim for violation of every criminal statute, unless excepted by law, it would wreak havoc on the justice system, creating uncertainty among both litigants and the court and allowing claimants to circumvent longstanding periods of limitation and damage caps.

The Appellee's position regarding interpretation of R.C. §2307.60 unquestionably creates an issue with respect to interpreting statutes of limitations with respect to like claims. For instance, the Appellee's interpretation would lead to a conflict between the statute of limitations applicable to a false imprisonment claim versus the period applicable to a claimed violation of R.C. §2905.01 for kidnapping. The General Assembly specifically set forth that the statute of limitations applicable to a false imprisonment claim is one year. (R.C. §2305.11.) However, if R.C. §2307.60 is interpreted to provide a civil claim for violation of R.C. §2905.01, plaintiffs will be allowed to circumvent the one-year statute of limitations set by the legislature.

The elements of a false imprisonment claim when compared to the criminal acts necessary to establish a violation of R.C. §2905.01 (kidnapping) are nearly identical. Specifically, the civil claim and criminal statute both require intentional confinement or restraint

of liberty of another by threat or through the use of force. (R.C. 2905.01; *see also Brooks v. Lady Foot Locker,* 9th Dist. No. 22297, 2005 Ohio 2394, ¶24.) Despite the similarities, if R.C. §2307.60 is interpreted to set forth a civil claim for violation of R.C. §2905.01, plaintiffs will be allowed to circumvent the longstanding one year statute of limitations applicable to false imprisonment claims. Notably, the legislature has not set forth any specific statute of limitations applicable to R.C. §2307.60 because this statute was not intended to set forth an independent cause of action and, as such, the period of limitations applicable to such a claim is unclear. With that said, a plaintiff could argue that the six-year statute of limitations set forth in R.C. §2305.07 would govern a claim brought pursuant to R.C. §2307.60.[5]

Accordingly, if the Ninth District decision is upheld, claimants will be able to circumvent the one-year statute of limitations applicable to false imprisonment claims by filing a R.C. §2307.60 claim for violation of R.C. §2905.01. In fact, despite the clear intention of the legislature to limit false imprisonment claims to one-year, plaintiffs will be able to file a claim with the same allegations, only changing the caption to R.C. §2307.60, six years after the events in question and five years beyond the expiration of the false imprisonment statute of limitations. Such an interpretation would allow for the prosecution of stale litigation[6], and would render the one-year statute of limitations applicable to false imprisonment claims meaningless. Ohio R.C. §2307.60 should not be interpreted to yield this absurd result. *Mishr v. Board of Zoning Appeals of Village of Poland,* 76 Ohio St.3d 238, 667 N.E.2d 365, 1996-Ohio-400. Rather, the Ninth District decision should be overturned, and R.C. §2307.60 should be interpreted as a codification

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[5]R.C. 2305.07 provides for a six-year statute of limitations with respect to a claim created by statute other than a forfeiture or penalty.

[6]The purpose of statutes of limitations is to prevent the litigation of stale claims. *Mominee v. Scherbarth,* 28 Ohio St.3d 270, 503 N.E.2d 717 (1986).

of the common law principle that a civil cause of action is not merged with a criminal prosecution.

The uncertainty created by the Ninth District's interpretation as it relates to applicable statutes of limitations also extends to the tort damage caps. The Tort Reform movement in Ohio has led to the damage caps currently set forth in R.C. §§2315.18 and 2323.43. Under these caps, the maximum amount of non-economic damages that can be recovered in a false imprisonment action is limited to the greater of two hundred fifty thousand dollars or three times economic loss to a maximum of three hundred fifty thousand dollars. (R.C. §2315.18.) However, plaintiffs will likely argue that the damages cap does not apply to a claim brought under R.C. §2307.60.

Specifically, it is anticipated that if the Ninth District decision is upheld, plaintiffs will cite to the language of R.C. §2307.60 that "full damages" are recoverable to support the position that damage caps do not apply to actions brought under R.C. §2307.60. This issue has already been addressed in *Simpkins*, where the court considered the potential conflict that existed between R.C. §§2307.60 and 2315.18. *Simpkins, supra.* The *Simpkins* court properly resolved this alleged conflict by finding that R.C. §2307.60 "does not establish a separate cause of action and is simply a codification of the Ohio common law rule that a civil action is not merged into a criminal prosecution for the same acts that form the basis for the civil action." *Id.* at ¶98.

If this Court upholds the Ninth District decision it will lead to conflict between R.C. §§2315.18 and 2307.60, and uncertainty of litigants as it relates to potential damage caps. Specifically, false imprisonment claims may no longer be subject to a non-economic damage cap of two hundred fifty thousand dollars by simply changing the caption of the action from false imprisonment to violation of R.C. §2307.60. The uncertainty created with respect to false imprisonment claims may extend to many other claims as well such as a common law claim for

assault/battery versus a R.C. §2307.60 claim for violation of R.C. §2903.13. To give effect to both R.C. §2307.60 and R.C. §2315.18, and to eliminate any potential conflict, this Court should interpret R.C. §2307.60 as a codification of the common law principle that a civil action is not merged with a criminal prosecution, overruling the Ninth District decision and reinstating the trial court's dismissal of the subject action in its entirety.

The Ninth District's decision creates further uncertainty as it relates to finality of judgments/settlements, as set forth in the dissenting opinion of Judge Moore. Specifically, the dissent noted that the majority position conflicted with prior Ohio law as it relates to the cause of action for wrongful death. In the past, R.C. §2125.01, et seq. was interpreted to set forth the "precise mechanism to sue for wrongful death" and the "exclusive means by which all statutory beneficiaries may obtain relief." *Jacobson v. Kaforey,* 39 N.E.3d 799, 2015-Ohio-2624, ¶37. However, the Ninth District's decision seems to call for a cause of action premised on Ohio's criminal statutes related to murder and manslaughter, thus creating an additional avenue for relief for plaintiffs. This additional liability created by the Ninth District Decision, which did not exist based on long-standing precedent, will likely result in duplicative litigation and lack of finality for litigants. Specifically, wrongful death claims previously litigated and settled may now be filed as R.C. §2307.60 claims to the extent that settlement/release language is not broad enough to encompass such a claim.

In addition to the lack of finality created by the Ninth District's decision, it also creates uncertainty with respect to case management and the elements of a cause of action. For example, plaintiffs may assert in their complaint a civil cause of action pursuant to R.C. §2307.60, providing no notice to the civil defendant regarding the nature of the cause of action. *Id.* Further, questions are created regarding the elements of a cause of action, potential jury

instructions and even the burden of proof. While a civil cause of action is generally governed by a preponderance of evidence, R.C. §2307.60 requires that a litigant establish that a "criminal act" has been committed. How can a civil court determine if a "criminal act" has been committed? Moreover, will civil courts use criminal jury instructions as it relates to claimed violations of criminal statutes? These are all questions that must be answered in light of the Ninth District's upheaval of the law and blurring of the lines between civil and criminal actions if this court does not reverse and vacate the decision of the Ninth District herein.

III. CONCLUSION

The Ninth District's interpretation of R.C. §2307.60 is contrary to longstanding precedent and it stands as a fundamental departure from Ohio law, which if allowed to stand, will cause far reaching implications ranging from uncertainty in the application of statutes of limitations to potential duplicative litigation. The uncertainty raised by the Ninth District's decision will result in years and years of litigation to determine the true nature of a claim brought under R.C. §2307.60 and to resolve the numerous statutory conflicts created by said decision.

In addition to the ramifications of the Ninth District decision, their interpretation is contrary to the legislative intent of the provision. The legislature's enactment of statutes, such as R.C. §2307.51, which sets forth a civil action for violation of R.C. §2905.32, and the absence of specific statutes authorizing civil actions for violation of other criminal statutes establish the legislature's intent to limit the criminal code sections on which a civil claim may be premised. Further, the legislature's inaction over the past twenty years in the face of judicial interpretations of R.C. §2307.60 set forth the legislature's intent that R.C. §2307.60 does not set forth an independent cause of action and rather is a codification of the common law rule that a civil cause of action does not merge with a criminal prosecution.

Accordingly, this Court should answer the questioned certified hereto in the negative, overruling the Ninth District decision, with Order to the Appellate Court to reinstate the dismissal of this action.

Respectfully submitted,

/S/ Bret C. Perry

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2016, a copy of the foregoing document was filed electronically pursuant to Civ. R. 5(B)(2)(f). Notice of this filing will be sent via operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, as well as via e-mail, only, pursuant to pursuant to Civ. R. 5(B)(2)(f):

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/S/ Bret C. Perry

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APPENDIX

Opinion of the Ninth District Court of Appeals Appx001
Gary Kirsch v. Ellen Kaforey, et al. (June 30, 2015)

Notice of Certified Conflict Appx018
Gary Kirsch v. Ellen Kaforey, et al. (August 14, 2015)

Journal Entry of the Ninth District Court of Appeals Appx023
Gary Kirsch v. Ellen Kaforey, et al. (August 6, 2015)

Judgment Entry of the Summit County Common Pleas Court Appx025
Jessica Jacobson v. Ellen Kaforey, et al. (April 19, 2013)

R.C. 2307.60 ..... Appx030

[Cite as *Jacobson v. Kaforey*, 2015-Ohio-2624.]

STATE OF OHIO COUNTY OF SUMMIT	))ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
JESSICA JACOBSON Appellant v. ELLEN KAFOREY, et al. Appellees		C.A. No. 26915 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2012 09 5246

DECISION AND JOURNAL ENTRY

Dated: June 30, 2015

CANNON, Judge.

{¶1} Appellant Gary Kirsch, as the guardian of Plaintiff Jessica Jacobson, appeals the entry of the Summit County Court of Common Pleas dismissing Ms. Jacobson's complaint. For the reasons set forth below, we affirm in part and reverse in part.

I.

{¶2} In September 2012, Ms. Jacobson, pro se, filed a four-count complaint naming Akron Children's Hospital, Cleveland Clinic Children's Hospital for Rehabilitation ("Cleveland Clinic"), and Ellen Kaforey (collectively "Defendants"), as Defendants. Count one alleged the Defendants interfered with a parental or guardianship interest in violation of R.C. 2307.50 and counts two through four were filed pursuant to R.C. 2307.60, seeking civil damages for criminal acts. A visiting judge was ultimately assigned to the case.

{¶3} The allegations in the complaint involve the period of time from April 18, 2001, through July 6, 2001, when Ms. Jacobson was still a minor (date of birth: December 3, 1993).

Ms. Jacobson alleged that Ms. Kaforey misrepresented herself as Ms. Jacobson's guardian and kept Ms. Jacobson from having contact with her mother while Ms. Jacobson was under the care of Akron Children's Hospital and the Cleveland Clinic. Additionally, she maintained that Akron Children's Hospital and the Cleveland Clinic knew or should have known that Ms. Kaforey did not have the right to interfere with Ms. Jacobson's relationship with her mother and that the institutions kept Ms. Jacobson from her mother.

{¶4} The Defendants each separately filed a motion to dismiss pursuant to Civ.R. 12(B)(6), arguing that Ms. Jacobson lacked standing to file a claim pursuant to R.C. 2307.50 and that the remainder of the claims were subject to dismissal because R.C. 2307.60 does not authorize a civil action for damages resulting from the violation of criminal statutes.

{¶5} Amidst the briefing on the motions to dismiss, Ms. Jacobson filed a motion seeking leave to brief the court on constitutional issues, which was denied by a judge other than the visiting judge. Ms. Jacobson filed a motion to vacate the denial asserting the signing judge had a conflict of interest and the entry was void. Additionally, Mr. Kirsch filed several documents, including a motion to intervene or to be substituted as Ms. Jacobson's next friend, and a motion seeking a hearing to consider the imposition of Civ.R. 11 sanctions against Ms. Kaforey's counsel.

{¶6} Thereafter, the trial court issued an entry granting the motions to dismiss. The trial court concluded that Ms. Jacobson could not state a claim under R.C. 2307.50 as she was not a parent, guardian, or legal custodian. Additionally, while citing R.C. 2307.50 instead of R.C. 2307.60, the trial court concluded that the statute did not provide a basis for civil damages for the alleged violations of criminal statutes. The trial court implicitly denied Ms. Jacobson's

motion to vacate the entry denying her leave to brief constitutional issues as moot. It expressly denied Mr. Kirsch's motion for sanctions as moot.

{¶7} Ms. Jacobson appealed pro se, raising nine assignments of error for our review. After Ms. Jacobson filed her brief, Mr. Kirsch filed a motion to substitute himself for Ms. Jacobson as her guardian, which this Court granted. Prior to oral argument, counsel filed a notice of appearance to represent Ms. Jacobson's interests. Some of the assignments of error have been consolidated and some will be discussed out of sequence to facilitate our review.

II.

ASSIGNMENT OF ERROR IX

> IN IT[S] ORDER OF CIV.R. 12(B)(6) DISMISSAL, THE COURT ERRED WHEN IT GAVE ZERO CONSIDERATION AND WEIGHT TO ARGUMENT AND SUPPORT SET FORTH IN PLAINTIFF'S BRIEFS, AND SHOWED BLIND FAITH IN DEFENSE ARGUMENT, DEMONSTRATING A BIASED UNWILLINGNESS TO EVEN ATTEMPT TO CONSTRUE THE COMPLAINT LIBERALLY AND TO RESOLVE DOUBTS IN FAVOR OF GIVING, RATHER THAN DENYING, PLAINTIFF AN OPPORTUNITY TO LITIGATE.

{¶8} Mr. Kirsch asserts in his ninth assignment of error that the trial court erred in its dismissal entry because it did not give any consideration to Ms. Jacobson's arguments. We do not agree.

{¶9} It appears that Mr. Kirsch believes that the trial court had to discuss Ms. Jacobson's arguments and provide reasons for not agreeing with them. Mr. Kirsch has not pointed to any authority that would support this proposition. *See* App.R. 16(A)(7). Further, nothing in the trial court's entry evidences that it failed to consider Ms. Jacobson's arguments. The trial court issued a four-page entry which discussed the history of the case as well as why it found that Ms. Jacobson's claims failed as a matter of law. Whether that determination was

legally correct is not at issue in this assignment of error. In light of Mr. Kirsch's limited argument, his ninth assignment of error is overruled.

ASSIGNMENT OF ERROR I

IN IT[S] ORDER OF CIV.R. 12(B)(6) DISMISSAL, THE TRIAL COURT IMPROPERLY DISMISSED MS. JACOBSON'S CLAIMS (2), (3), AND (4) PER CIV.R. 12(B)(6) WHEN THE COURT DISMISSED THOSE CLAIMS AS RC §2307.50 CLAIMS RATHER THAN RC §2307.60 CLAIMS AS PLED.

ASSIGNMENT OF ERROR II

IN IT[S] ORDER OF CIV.R. 12(B)(6) DISMISSAL, IT WAS ERROR FOR THE COURT TO AMBUSH MS. JACOBSON WITH A JUDGMENT AND FINAL ORDER THAT SYNTHESIZED NEW ARGUMENT NEVER ARGUED BY DEFENSE AND NEVER PRESENTED TO MS. JACOBSON FOR A MEANINGFUL OPPORTUNITY TO OPPOSE.

ASSIGNMENT OF ERROR III

IN IT[S] ORDER OF CIV.R. 12(B)(6) DISMISSAL, THE COURT ERRED IN RELYING ON FALSE AUTHORITY INCORRECTLY STATED TO BE DECISIONS RENDERED BY THE OHIO NINTH DISTRICT COURT OF APPEALS TO DISMISS THE CASE.

ASSIGNMENT OF ERROR IV

IN IT[S] ORDER OF CIV.R. 12(B)(6) DISMISSAL, EVEN IF THE COURT HAD INTENDED TO DISMISS CLAIMS (2), (3), AND (4) INVOKING THE AUTHORITY OF RC §2307.60, THE TRIAL COURT'S ASSERTIONS THAT CIVIL CLAIMS ARE UNAVAILABLE FOR DAMAGES ARISING FROM OFFENSIVE ACTS THAT ARE ALSO CRIMINAL ACTS IS INCORRECT AND WITHOUT BASIS IN LAW.

ASSIGNMENT OF ERROR V

IN IT[S] ORDER OF CIV.R. 12(B)(6) DISMISSAL, EVEN IF THE COURT HAD INTENDED TO DISMISS CLAIMS (2), (3), AND (4) AS PURSUANT TO RC §2307.60, THE AUTHORITIES GIVEN BY THE COURT IN SUPPORT OF DISMISSING CLAIMS (2), (3), AND (4) ARE FRAUDULENT MIS-CHARACTERIZATIONS OF CASE LAW THAT DO NOT SUPPORT THE JUDGMENT.

{¶10} Mr. Kirsch's first five assignments of error all relate to the trial court's dismissal of Ms. Jacobson's claims brought pursuant to R.C. 2307.60 (i.e. counts two, three, and four) and

as such will be addressed together. Mr. Kirsch asserts that the trial court improperly characterized Ms. Jacobson's claims as being brought pursuant to R.C. 2307.50 instead of R.C. 2307.60 and, thus, the trial court erred in dismissing those claims. Mr. Kirsch maintains that even if the trial court's citation to R.C. 2307.50 was a typographical error, it was still erroneous to dismiss the claims because R.C. 2307.60 authorizes a civil action for the claims in counts two through four.

{¶11} We review a trial court order granting a motion to dismiss pursuant to Civ.R. 12(B)(6) de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. "In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint." *Id.* "'To prevail on a Civ.R. 12(B)(6) motion to dismiss, it must appear on the face of the complaint that the plaintiff cannot prove any set of facts that would entitle him to recover.'" *U.S. Bank v. Schubert,* 9th Dist. Lorain No. 13CA010462, 2014-Ohio-3868, ¶ 22, quoting *Raub v. Garwood,* 9th Dist. Summit No. 22210, 2005-Ohio-1279, ¶4.

{¶12} Ms. Jacobson brought her second, third, and fourth claims pursuant to R.C. 2307.60 and therein alleged that the Defendants engaged in three different criminal acts that entitled her to recover damages. R.C. 2307.60(A)(1) states that

> [a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code.

{¶13} Ms. Jacobson's second claim alleged that the Defendants committed a criminal act by violating R.C. 2905.03, the statute addressing unlawful restraint. Her third claim asserted that Ms. Kaforey and the Cleveland Clinic committed a criminal act by violating R.C. 2905.01(B)(2) and R.C. 2905.01(5) (sic), which address the crime of kidnapping. Finally, Ms.

Jacobson's fourth claim alleged that Ms. Kaforey and the Cleveland Clinic committed a criminal act by violating R.C. 2905.05, the statute prohibiting child enticement.

{¶14} Civ.R. 8(A) provides that a pleading that sets forth a claim for relief shall provide "1) a short and plain statement of the claim showing that the party is entitled to relief, and 2) a demand for judgment for the relief to which the party claims to be entitled." This court has confirmed that notice pleading requires "only a short, plain statement of the claim." (Internal quotations and citation omitted.) *Miller v. Bennett*, 9th Dist. Lorain No. 13CA010336, 2014-Ohio-2460, ¶ 7.

{¶15} In addition to the specific criminal code sections Ms. Jacobson claimed were violated, each count was accompanied by claims of specific conduct. For example, in count two, it is alleged, among other things, that Defendants "without privilege and knowing they were without privilege acted to restrain [Ms. Jacobson] from the liberty of being able to freely see, hold, talk to, or otherwise enjoy the comfort, love, and solace of [her] mother * * *." In count three, it is alleged that the Cleveland Clinic and Ms. Kaforey acted to "cause and induce the removal of [Ms. Jacobson] * * * from her hospital room in Ohio to the state of Florida without mother's permission for the primary or sole purpose of giving Summit County CSB enough time to fabricate false charges against [her] mother * * * even though CSB announced * * * to [Ms.] Kaforey and others that CSB had no just cause to seek any form of custody * * *" and that "* * * [Ms.] Kaforey demanded that CSB fabricate charges to induce Juvenile Court to issue temporary custodial orders regardless of absence of just cause."

{¶16} Finally, in count four, it is alleged that "[Ms.] Kaforey acted, with the complicit aid of [the Cleveland Clinic], without privilege, to coax, entice, lure, induce, order, or otherwise influence or cause [Ms. Jacobson] * * * to enter onto an aircraft destined for Florida without the

express legal permission of [mother], the sole uncontested parent and legal custodian of [Ms. Jacobson]. * * * At the time [Ms.] Kaforey acted to coax, entice, lure, induce, order, or otherwise influence or cause [Ms. Jacobson] to enter the aircraft, [Ms.] Kaforey was not acting within the scope of any lawful duties that would authorize such action."

{¶17} As stated above, for purposes of our review under Civ.R. 12(B)(6), the allegations that the specified crimes were committed, together with the specific allegations contained in those counts must be considered to be true. *See Perrysburg Twp.*, 103 Ohio St.3d 79, 2004-Ohio-4362, at ¶ 5. We determine that, given the citation to specific offenses and the detail alleged with respect to each count in the complaint, the Defendants were put on fair notice of the nature of the claims and are, therefore, capable of preparing a defense to them. The fact that discovery or other information may disprove the allegations later is, at this point, essentially not relevant.

{¶18} The Defendants each asserted that counts two through four failed to state a claim for which relief could be granted because R.C. 2307.60 does not authorize a civil action for pursuing a violation of a criminal statute. The trial court in its entry agreed that a civil action could not be predicated upon a violation of a criminal statute but cited to R.C. 2307.50 instead of R.C. 2307.60.

{¶19} Given the content of the trial court's entry, we will proceed under the assumption that the trial court's reference to R.C. 2307.50 in the paragraph addressing the second through fourth counts of the complaint was only a typographical error. *See Schubert,* 2014-Ohio-3868, at ¶ 10, quoting *State v. Greulich,* 61 Ohio App.3d 22, 24-25 (9th Dist.1988) (noting a nunc pro tunc entry can be used "to supply information which existed but was not recorded, to correct mathematical calculations, and to correct typographical or clerical errors[]").

{¶20} Mr. Kirsch addresses the merits of the trial court's ruling and the Defendants' arguments in his fourth assignment of error. The Defendants contended that R.C. 2307.60 does not create a civil cause of action for damages for a violation of a criminal statute. The trial court agreed with this argument, and there is law that would support that conclusion. *See, e.g., Schmidt v. State Aerial Farm Statistics, Inc.,* 62 Ohio App.2d 48, 49 (6th Dist.1978) (addressing R.C. 2307.60's predecessor, R.C. 1.16); *see also Peterson v. Scott Constr. Co.,* 5 Ohio App.3d 203, 204-205 (6th Dist.1982). In *Peterson,* the Sixth District held that the predecessor to R.C. 2307.60, R.C. 1.16, did not create a cause of action. *See Peterson* at paragraph one of the syllabus.[1] Instead, the court held that R.C. 1.16 provided "that a recognized civil cause of action is not merged in a criminal prosecution which arose from the same act or acts." *Id.* The version of R.C. 1.16 at issue in both *Peterson* and *Schmidt* stated that "[a]ny one injured in person or property by a criminal act may recover full damages in a civil action, unless specifically excepted by law." *See Peterson* at 204; *Schmidt* at 49. The language that appears in the current version of R.C. 2307.60(A)(1) is even more specific. It states that "Anyone injured in person or property by a criminal act *has, and* may recover full damages in, a civil action * * *." (Emphasis added). Appellate courts have continued to rely on *Peterson* and *Schmidt* as authority for the proposition that R.C. 2307.60 does not create a separate cause of action. *See Applegate v. Weadock,* 3d Dist. Auglaize No. 2-95-24, 1995 WL 705214, *3 (Nov. 30, 1995); *Edwards v. Madison Twp.*, 10th Dist. Franklin No. 97APE06-819, 1997 WL 746415, *7 (Nov. 25, 1997);

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[1] Both *Peterson* and *Schmidt* cite to *Story v. Hammond,* 4 Ohio 376, 378 (1831) for the proposition that former R.C. 1.16 was a codification of the common law that a civil action does not merge into a criminal prosecution. *See Peterson* at 204; *Schmidt* at 49. However, *Story* does not actually mention any particular section of the code in its discussion.

Lykins v. Miami Valley Hosp., 2d Dist. Montgomery No. 00-CV-2404, 2001 WL 35673996, *1-*2 (Nov. 20, 2001); *McNichols v. Rennicker,* 5th Dist. Tuscarawas No. 2002 AP 04 0026, 2002-Ohio-7215, ¶ 17. Instead, in order to proceed under R.C. 2307.60, "[a] party must rely on a separate civil cause of action, existent either in the common law or through statute * * *." *Groves v. Groves,* 10th Dist. Franklin No. 09AP-1107, 2010-Ohio-4515, ¶ 25; *McNichols* at ¶ 17.

{¶21} We hold that the current version of R.C. 2307.60 independently authorizes a civil action for damages from violations of criminal acts. That is exactly what the plain language of the statute authorizes. *See* R.C. 2307.60(A)(1) ("Anyone injured in person or property by a criminal act *has, and* may recover full damages in, a civil action *unless specifically excepted by law* * * *.") (Emphasis added.). The plain language indicates that a civil action for damages caused by criminal acts is available unless otherwise prohibited by law. *See Wesaw v. Lancaster,* S.D.Ohio No. 22005CV0320, 2005 WL 3448034, *7 (Dec. 15, 2005); *see also Gonzalez v. Spofford*, 8th Dist. Cuyahoga 85231, 2005-Ohio-3415, ¶ 27; *Cartwright v. Batner*, 2d. Dist. Montgomery No. 25938, 2014-Ohio-2995, ¶ 94 ("R.C. 2307.60 is a broad statute referring to '[a]nyone injured in person or property by a criminal act * * *,' whereas R.C. 2307.61 refers more specifically to '[a] property owner * * *.' R.C. 2307.61 also limits its reach to situations involving willful damage of property or theft, and provides additional potential remedies, including liquidated damages and an award of treble damages.").

{¶22} We note that there is at least one statutory provision that does provide such an exception. In what is referred to as the "dram shop" statute, R.C. 4399.18 states: "Notwithstanding division (A) of section 2307.60 of the Revised Code and except as otherwise provided in this section, no person, and no executor or administrator of the person, who suffers

personal injury, death, or property damage as a result of the actions of an intoxicated person has a cause of action against any liquor permit holder or an employee of a liquor permit holder * * *." It seems apparent that if R.C. 2307.60 did not authorize damages in a civil action for injuries sustained as a result of criminal conduct, there would be no need for the prelude to this section that states: "Notwithstanding division (A) of section 2307.60 * * *." *See also Aubin v. Metzger,* 3d Dist. Allen No. 1-03-08, 2003-Ohio-5130, ¶ 14 ("R.C. 2307.60 gives anyone injured by criminal actions a right to fully recover their damages in a civil action. The legislature limited this right with the enactment of R.C. 4399.18 in an attempt to codify the existing common law policy regarding the liability of others for the actions of intoxicated persons."). The Defendants in this matter have pointed to nothing that would indicate similar exceptions exist for acts violating R.C. 2905.03, 2905.01, or 2905.05.

{¶23} There are other statutes that reference civil actions pursuant to R.C. 2307.60. *See, e.g.,* R.C. 2307.61, 2307.62, 2913.49(J). In addition, the legislative history of R.C. 2913.49(J), supports the conclusion that R.C. 2307.60(A) itself does authorize a general civil cause of action for damages from criminal acts. *See* Ohio Legislative Service Commission, *Final Analysis, Am.Sub. H.B. 488,* http://www.lsc.state.oh.us/analyses130/14-hb488-130.pdf (accessed Jan. 2, 2015) (citing to R.C. 2307.60 and noting that "[c]ontinuing law creates a general cause of action for injury to person or property by a criminal act, but does not include a cause of action expressly for identity fraud[]").

{¶24} Further, the language in the current version of R.C. 2307.60 differs from the language of G.C. 12379, which is the predecessor to former R.C. 1.16, the statute which was repealed and reenacted as R.C. 2307.60. Whereas G.C. 12379 provided that, "[n]othing contained in the penal laws shall prevent any one injured in person or property, by a criminal act

from recovering full damages, unless specifically excepted by law[,]" R.C. 2307.60(A)(1) provides that, "[a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law * * *." Assuming that it was the intent of the General Assembly via the enactment of G.C. 12379 to codify the doctrine that a civil cause of action does not merge into a criminal prosecution, it is difficult to say that, given the differences in the language used, such was the intent of the enactment of R.C. 2307.60. Where G.C. 12379 purports to not prohibit civil actions, R.C. 2307.60 expressly authorizes them. *Compare* G.C. 12379 *with* R.C. 2307.60.

{¶25} Given all of the foregoing, including the limited argument made by the Defendants,[2] we cannot say that the Defendants have established that Ms. Jacobson has failed to state a claim pursuant Civ.R. 12(B)(6). Accordingly, the trial court erred in dismissing Ms. Jacobson's second, third, and fourth claims for relief on the basis that she cannot use R.C. 2307.60 to state a cause of action for damages arising from the specifically enumerated criminal acts.

{¶26} We sustain Mr. Kirsch's fourth assignment of error and overrule the first, second, third, and fifth assignments of error as moot.

ASSIGNMENT OF ERROR VII

IN IT[S] ORDER OF CIV.R. 12(B)(6) DISMISSAL, THE TRIAL COURT MISCONSTRUES THE LANGUAGE OF RC §2307.50 BY LOOKING OUTSIDE THE FOUR CORNERS OF THE STATUTE TO STEERING NARRATIVE THEN ERRED IN DISMISSING CLAIM-(1) FOR LACK OF STANDING.

---

[2] Because Defendants have provided no other argument that Ms. Jacobson's claims two, three, and four fail to state a claim upon which relief can be granted, this is the only issue currently before this Court. We take no position on whether Ms. Jacobson's claims fail on some other grounds.

{¶27} Mr. Kirsch asserts in his seventh assignment of error that the trial court erred in concluding that Ms. Jacobson could not state a claim pursuant to R.C. 2307.50. We do not agree.

{¶28} Ms. Jacobson alleged in the first count of her complaint that the Defendants violated R.C. 2307.50 by preventing her mother from visiting or talking to her without privilege to do so.

{¶29} R.C. 2307.50(B) provides that:

> Except as provided in division (D) of this section, if a minor is the victim of a child stealing crime and if, as a result of that crime, the minor's parents, parent who is the residential parent and legal custodian, parent who is not the residential parent and legal custodian, guardian, or other custodian is deprived of a parental or guardianship interest in the minor, the parents, parent who is the residential parent and legal custodian, parent who is not the residential parent and legal custodian, guardian, or other custodian may maintain a civil action against the offender to recover damages for interference with the parental or guardianship interest.

A child stealing crime is defined as "a violation of sections 2905.01, 2905.02, 2905.03, and 2919.23 of the Revised Code or section 2905.04 of the Revised Code as it existed prior to the effective date of this amendment." R.C. 2307.50(A)(1).

{¶30} The trial court concluded that the plain language of the statute does not authorize the victim of the child stealing crime to file a claim pursuant to R.C. 2307.50. We agree.

{¶31} The statute specifically lists the individuals that may file an action pursuant to R.C. 2307.50. These include: "the parents, parent who is the residential parent and legal custodian, parent who is not the residential parent and legal custodian, guardian, or other custodian * * *." Thus, even assuming that the Defendants committed a child stealing crime, Ms. Jacobson is not the proper party to bring an action under R.C. 2307.50. Her complaint does not allege that she is any of the individuals authorized to bring an action pursuant to R.C.

2307.50. Even viewing the allegations in a light most favorable to her, the allegations at best assert that she was the victim of a child stealing crime. Thus, any relief available to Ms. Jacobson would lie outside of R.C. 2307.50.

{¶32} Mr. Kirsch's seventh assignment of error is overruled.

ASSIGNMENT OF ERROR VI

THE COURT ERRED IN NOT HOLDING THE CIV.R. 11 HEARING TO ADDRESS FRAUDULENT CITATION OF AUTHORITY WHEN THOSE SAME AUTHORITIES WERE RELIED ON BY THE COURT AS SUPPORT IN RENDERING ITS DECISION.

ASSIGNMENT OF ERROR VIII

THE COURT ERRED IN NOT VACATING THE ORDER DENYING LEAVE TO BRIEF CONSTITUTIONAL ISSUES SIGNED BY A DISQUALIFIED JUDGE NOT ASSIGNED TO THE CASE, "FOR" A DISQUALIFIED JUDGE WHO RECUSED HERSELF WHEN THE COMPLAINT WAS FILED.

{¶33} Mr. Kirsch asserts in his sixth assignment of error that the trial court erred in failing to hold a hearing on his motion for sanctions. He asserts in his eighth assignment of error that the trial court erred in not vacating the order denying Ms. Jacobson's motion for leave to brief constitutional issues.

{¶34} After dismissing the four counts of Ms. Jacobson's complaint, the trial court concluded that Mr. Kirsch's motion to intervene as the next friend of Ms. Jacobson, Mr. Kirsch's motion for sanctions, and any other pending motions were moot. Given that we have reversed the trial court's dismissal of Ms. Jacobson's second, third, and fourth claims, the foregoing motions would no longer be moot. Accordingly, it would be premature for this Court to address these issues at this time and we decline to review them.

III.

{¶35} In light of the foregoing, we sustain Mr. Kirsch's fourth assignment of error, decline to address the sixth and eighth assignments of error, and overrule the remaining assignments of error. The matter is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

TIMOTHY P. CANNON
FOR THE COURT

MOORE, J.
CONCURS.

CARR, P. J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶36} I respectfully dissent from the majority's resolution of the first, second, third, fourth, and fifth assignments of error,[3] because I do not agree that R.C. 2307.60 creates an independent cause of action. Instead, I agree with our sister districts referenced in the majority opinion that R.C. 2307.60 merely codifies a plaintiff's right to file a civil action for damages arising out of a criminal act, irrespective of any criminal proceedings. In other words, the pursuit by the State of criminal proceedings does not foreclose the injured plaintiff's right to seek civil damages. R.C. 2307.60, however, is not the claim or cause of action that gives rise to damages. Rather, it merely provides the statutory authority to file discrete civil claims, the elements of which must be pleaded beyond the mere allegation of criminal activity. *See Groves v. Groves*, 10th Dist. Franklin No. 09AP-1107, 2010-Ohio-4515, ¶ 25 ("A party must rely on a separate civil cause of action, existent either in the common law or through statute, to bring a civil claim based on a criminal act.").

{¶37} I am concerned with the majority's creation of a separate cause of action based solely on the statute, because I foresee unwieldy case management ramifications. R.C. 2307.60 provides no notice to a civil defendant regarding the nature of the cause of action against which he must defend. I question how a plaintiff will attempt to prove his case and how the trial court will craft jury instructions to reflect elements of a claim which has not been identified. Moreover, interpreting the statute to permit an independent cause of action may run afoul of other statutory schemes for relief. For example, the legislature has created a precise mechanism to sue for wrongful death. *See* R.C. 2125.01, *et seq.* That statutory scheme provides the

[3] I agree that these assignments of error should be consolidated as they are intertwined and implicate similar issues.

exclusive means by which all statutory beneficiaries may obtain relief. *See Love v. Nationwide Mut. Ins. Co.*, 104 Ohio App.3d 804, 810 (10th Dist.1995) (holding that, in the absence of fraud, a properly executed and approved settlement binds all beneficiaries and bars any further wrongful death claims), citing *Tennant v. State Farm Mut. Ins. Co.*, 81 Ohio App.3d 20, 24 (9th Dist.1991). The majority's holding in the instant case, however, may create another avenue by which a plaintiff may seek damages for wrongful death. The result is uncertainty and a lack of finality for litigants, particularly defendants who remain exposed to additional liability despite having settled a discrete wrongful death suit. I do not believe that the legislature, in enacting R.C. 2307.60, intended to dispel with the requirements that a plaintiff put a defendant on notice of the elements of the claims against him or to subject a defendant to the threat of ongoing and duplicative litigation.

{¶38} In this case, Mr. Kirsch did not allege any discrete civil causes of action. Instead, he merely invoked R.C. 2307.60 in alleging that Ms. Jacobson was entitled to damages because of the criminal acts of the various defendants. In the absence of the allegation of separate civil common law or statutory causes of action, I believe that the trial court properly granted the defendants' motions to dismiss for failure to state a claim upon which relief may be granted pursuant to Civ.R. 12(B)(6). Accordingly, I would overrule the first through the fifth assignments of error and affirm the trial court's dismissal of counts two, three, and four in the complaint.

{¶39} Given my resolution of the first five assignments of error, I would substantively address the sixth and eighth assignments of error. Moreover, I concur in the majority's disposition of the seventh and ninth assignments of error.

APPEARANCES:

GARY T. MANTKOWSKI, Attorney at Law, for Appellant.

BRET C. PERRY and BRIAN F. LANGE, Attorneys at Law, for Appellee.

NOTICE OF CERTIFIED CONFLICT FROM A COURT OF APPEALS
IN THE SUPREME COURT OF OHIO

Gary Kirsch, *Guardian for Jessica Jacobson*	:	
Plaintiff-Appellee,	:	On Appeal from Ninth Appellate District, Summit County, Ohio
vs.	:	
Ellen Kaforey, et al.	:	Court of Appeals Case No. CA-26915
Defendants-Appellants.	:	

NOTICE OF CERTIFIED CONFLICT OF DEFENDANT-APPELLANT CLEVELAND CLINIC CHILDREN'S HOSPITAL FOR REHABILITATION

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Counsel for Defendant-Appellant
Akron Children's Hospital

NOTICE OF CERTIFIED CONFLICT

Defendant/Appellant, Cleveland Clinic Children's Hospital for Rehabilitation, hereby gives Notice of a Certified Conflict to the Supreme Court of Ohio from the Judgment of the Ninth Appellate District, Summit County, journalized in Court of Appeals Case No. CA-26915 on June 30, 2015. (Attached hereto as Appendix A.) A Motion to Certify a Conflict was filed with the Ninth Appellate District, and the Ninth Appellate District issued an Order certifying a conflict on August 6, 2015. (Attached hereto as Appendix B.). The Journal Entry Certifying a Conflict sets forth that the Opinion of the Ninth Appellate District of June 30, 2015 conflicts with the following judgments: *Groves v. Groves, 10th Dist. Franklin No.* 09AP-1107, 2010-Ohio-4515 (Attached hereto as Appendix C); *Edwards v. Madison Twp.,* 10th Dist. Franklin No. 97APE06-819, 1997 WL 746415 (Nov. 25, 1997) (Attached hereto as Appendix D); *McNichols v. Rennicker,* 5th Dist. Tuscarawas No. 2002 AP 04 0026, 2002-Ohio-7215 (Attached hereto as Appendix E); *Applegate v. Weadock,* 3rd Dist. Auglaize No. 2-95-24, 1995 WL 705214 (Nov. 30, 1995) (Attached hereto as Appendix F), and; *Cartwright v. Batner,* 2d. Dist. Montgomery No. 25938, 2014-Ohio-2995 (Attached hereto as Appendix G). Defendant/Appellant, Cleveland Clinic Children's Hospital for Rehabilitation, hereby requests that this Court Certify a Conflict pursuant to the August 6, 2015 Journal Entry of the Ninth Appellate District.

/S/ Bret C. Perry

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CERTIFICATE OF SERVICE

A copy of the *Notice of Appeal* has been served via electronic mail pursuant to App.R. 13(C)(6) on August 14th, 2015 upon:

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STATE OF OHIO

COUNTY OF SUMMIT

COURT OF APPEALS
DANIEL M. HORRIGAN
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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JESSICA JACOBSON

Appellant

v.

ELLEN KAFOREY, et al.

Appellees

C.A. No. 26915

JOURNAL ENTRY

Appellees Cleveland Clinic Children's Hospital for Rehabilitation, Ellen Kaforey, and Akron Children's Hospital ("Appellees") have moved this Court to certify a conflict under App.R. 25 between this Court's June 30, 2015 decision holding that the current version of R.C. 2307.60 independently authorizes a civil action for damages from violations of criminal acts and the following cases: *Groves v. Groves,* 10th Dist. Franklin No. 09AP-1107, 2010-Ohio-4515, *Edwards v. Madison Twp.,* 10th Dist. Franklin No. 97APE06-819, 1997 WL 746415 (Nov. 25, 1997); *McNichols v. Rennicker,* 5th Dist. Tuscarawas No. 2002 AP 04 0026, 2002-Ohio-7215; *Applegate v. Weadock,* 3rd Dist. Auglaize No. 2-95-24, 1995 WL 705214 (Nov. 30, 1995); *Peterson v. Scott Constr. Co.,* 5 Ohio App.3d 203 (6th Dist.1982); and *Schmidt v. State Aerial Farm Statistics, Inc.*, 62 Ohio App.2d 48 (6th Dist.1978).[1]

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment * * * is in conflict with the judgment pronounced upon the same question by any other court of

APPENDIX B

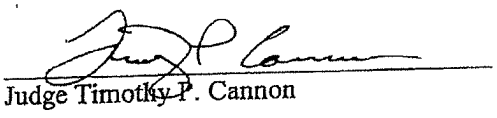
[1] We note that the Cleveland Clinic Children's Hospital for Rehabilitation and Ms. Kaforey do not list *Edwards* or *Schmidt* as conflict cases.

appeals in the state[.]" "[T]he alleged conflict must be on a rule of law – not facts." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596 (1993).

Upon review, we conclude that a conflict exists between this Court's judgment and the judgments in *Groves v. Groves,* 10th Dist. Franklin No. 09AP-1107, 2010-Ohio-4515, *Edwards v. Madison Twp.,* 10th Dist. Franklin No. 97APE06-819, 1997 WL 746415 (Nov. 25, 1997), *McNichols v. Rennicker,* 5th Dist. Tuscarawas No. 2002 AP 04 0026, 2002-Ohio-7215, and *Applegate v. Weadock,* 3rd Dist. Auglaize No. 2-95-24, 1995 WL 705214 (Nov. 30, 1995).

Further, given that there is also language in other recent cases that could be read to suggest that the current version of R.C. 2307.60 independently authorizes a civil action for damages caused by criminal acts, *see, e.g., Cartwright v. Batner*, 2d. Dist. Montgomery No. 25938, 2014-Ohio-2995, ¶ 88-97, we conclude [t]he conflict in these cases should be resolved. Accordingly, we certify the following question:

> Does the current version of R.C. 2307.60 independently authorize a civil action for damages caused by criminal acts, unless otherwise prohibited by law?



Judge Timothy P. Cannon

Concur:
Carr, P.J.
Moore, J.

(Cannon, J., of the Eleventh District Court of Appeals, sitting by assignment.)

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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

JESSICA M. JACOBSON	)	CASE NO. CV 2012 09 5246
	)	
Plaintiff	)	JUDGE KELLY
	)	(Sitting by Assignment)
-vs-	)	
	)	
ELLEN C. KAFOREY, et al.	)	**JUDGMENT ORDER OF**
	)	**DISMISSAL**
Defendants	)	

- - -

Plaintiff Jessica M. Jacobson brought the subject civil action against Defendants Ellen C. Kaforey, Akron Children's Hospital and Cleveland Clinic Children's Hospital for Rehabilitation to recover alleged damages for interference with parental and guardianship interest (R.C. 2919.23) and damages for criminal acts; unlawful restraint (2905.03), kidnapping (2905.01(B)(2)) and criminal child enticement (2905.05).

A review of Plaintiff's complaint shows that this case arose out of disputed conservatorship and custody proceedings in 2001 and the hospitalization of Jessica M. Jacobson from April 18, 2001 through July 6, 2001. Plaintiff Jessica Jacobson was the subject minor child. (DOB: December 3, 1993). Defendant Ellen Kaforey was the court appointed conservator for the minor child and Defendant hospitals were institutions in which the minor child was admitted. The gist of the civil complaint against Defendant Kaforey for damages is that Kaforey knowingly exceeded her

authority as conservator and knowingly interfered with the parental rights of Jessica and her mother. The hospitals are joined as defendants for their alleged roles in keeping the minor child and her mother apart against their will and without authority. Jessica's parent is not a party to this lawsuit and the complaint notes that her mother, JoAnn Jacobson-Kirsch, had filed a separate civil action, CV 2011-03-1655, in this court.

Defendants have each filed motions to dismiss pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. Defendants contend that Plaintiff does not have standing to bring a claim for interference with parental or guardianship rights as alleged in Count I, and Defendants further contend that Counts II, III and IV are based on claimed violations of criminal statutes and as such should be dismissed.

In addition to the pending motions to dismiss, there are currently pending a number of additional procedural motions and Plaintiff has filed an amended complaint, to which Defendants have responded with motions to strike.

The judges of Summit County recused themselves and the current retired visiting judge was assigned by the Ohio Supreme Court effective January 15, 2013.

MOTION TO DISMISS

A motion to dismiss under Civ.R. 12(B)(6) is a procedural motion that tests the sufficiency of the complaint *State Ex. Rel. Hanson v. Guernsey Cty. Bd. of Commissioners* (1992) 65 Ohio State 3d, 545, 547. In considering a motion to dismiss, a court must accept the non-moving party's factual allegations as true and make every

reasonable inference in favor of the non-moving party. *Byrd v. Faber* (1991), 57 Ohio St. 3d. 56, 60.

FINDINGS OF FACT & CONCLUSIONS OF LAW

After careful review, this court concludes that the claims must be dismissed as pursuant to ORCR 12(B)(6) for failure to state a claim upon which relief can be granted.

The four count complaint is based on two theories of recovery. Count I alleges that Jessica Jacobson, then a minor child, had parental or guardianship rights that were violated when she was prevented from seeing her mother in the hospital during the period April 18, 2001 to July 6, 2001 and that the actions of the Defendant Conservator (Kaforey) and the hospitals damaged her.

Counts II, III and IV allege that certain actions of Kaforey and the hospitals constituted criminal actions prohibited by law and thereby Plaintiff is entitled to receive civil damages pursuant to ORC 2307.50 for alleged injuries by virtue of certain criminal acts.

The complaint clearly indicates that Jessica was herself not a parent nor was she her own guardian and no facts are provable that would dispute that. The statute under which Plaintiff seeks recovery is R.C. 2307.50 which states as follows:

> If a minor is the victim of a child stealing crime and if, as a result of that crime, the minor's parents, parent who is the residential parent and legal custodian, parent, who is not the residential parent and legal custodian, guardian, or other custodian is deprived of a parental guardianship interest in the minor, **the parents, parent who is the residential parent and legal custodian, parent who is not the residential parent and legal custodian, guardian, or other custodian may maintain a civil action** against the offender to recover damages for interference with the parental or guardianship interest. (emphasis added)

The cause of action granted by the statute accrues to a parent, legal custodian, guardian or other custodian. As such, this court concludes that a minor child, victim does not have an independent right to parental damages under this section. Count I for damages to be awarded a victim child based on a violation of their parent's or guardian's rights is not viable and must be dismissed.

As to Count II, III, and IV, Ohio courts have established that civil actions for damages may not be predicated upon alleged violation of a criminal statute *Jones v. Graley* 2008 WL 343087 #8 (S.D. Ohio 2006, 2008) citations omitted. In the precursor case to the current one, brought by Plaintiff's mother, JoAnn Jacobson-Kirsch, the trial court found and it was upheld by the Ninth District Court of Appeals (See *Jacobson-Kirsch v. Kaforey* 2012 Ohio 3553, 2012 Ohio App. Lexis 3138) that allegations of unlawful restraint, criminal kidnapping and criminal child stealing could not support a civil action pursuant to ORC 2307.50. If the parent has no right to maintain an action for these same claims, then it follows that the child also has no right. These counts must be dismissed.

The pending procedural motions for leave by various parties to file briefs or replies are granted and such briefs are part of the court record.

The Defendant's motion to strike the amended complaint is granted in that the amended complaint raises no new grounds and is out of rule. Even if the amended complaint were proper, the ruling of this court would have disposed of it upon the same grounds.

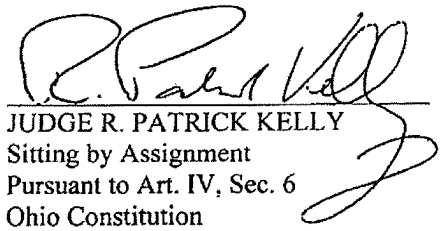
The motion of Gary Kirsch to intervene as next friend is denied as moot.

The *pro se* motion of Joan Jacobson-Kirsch for joinder is denied both as moot and as improperly filed.

All other pending motions, including motions for sanctions, not specifically delineated here are denied as moot.

Accordingly, the motion to dismiss is granted as to Defendants Kaforey, Akron Children's Hospital and Cleveland Clinic Children's Hospital for Rehabilitation, and the complaint is dismissed at Plaintiff's costs. This is a final, appealable order, and there is no just cause for delay.

IT IS SO ORDERED.



JUDGE R. PATRICK KELLY
Sitting by Assignment
Pursuant to Art. IV, Sec. 6
Ohio Constitution

cc: Attorney Gregory T. Rossi / Attorney Emily R. Yoder
Attorney Anna Tillis
Attorney Brett Perry
Plaintiff Jessica M. Jacobson

lcb
12-5246d

2307.60 Civil action for damages for criminal act.

(A)

(1) Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under the common law of this state, and may recover punitive or exemplary damages if authorized by section 2315.21 or another section of the Revised Code.

(2) A final judgment of a trial court that has not been reversed on appeal or otherwise set aside, nullified, or vacated, entered after a trial or upon a plea of guilty, but not upon a plea of no contest or the equivalent plea from another jurisdiction, that adjudges an offender guilty of an offense of violence punishable by death or imprisonment in excess of one year, when entered as evidence in any subsequent civil proceeding based on the criminal act, shall preclude the offender from denying in the subsequent civil proceeding any fact essential to sustaining that judgment, unless the offender can demonstrate that extraordinary circumstances prevented the offender from having a full and fair opportunity to litigate the issue in the criminal proceeding or other extraordinary circumstances justify affording the offender an opportunity to relitigate the issue. The offender may introduce evidence of the offender's pending appeal of the final judgment of the trial court, if applicable, and the court may consider that evidence in determining the liability of the offender.

(B)

(1) As used in division (B) of this section:

(a) "Tort action" means a civil action for damages for injury, death, or loss to person or property other than a civil action for damages for a breach of contract or another agreement between persons. "Tort action" includes, but is not limited to, a product liability claim, as defined in section 2307.71 of the Revised Code, and an asbestos claim, as defined in section 2307.91 of the Revised Code, an action for wrongful death under Chapter 2125. of the Revised Code, and an action based on derivative claims for relief.

(b) "Residence" has the same meaning as in section 2901.05 of the Revised Code.

(2) Recovery on a claim for relief in a tort action is barred to any person or the person's legal representative if any of the following apply:

(a) The person has been convicted of or has pleaded guilty to a felony, or to a misdemeanor that is an offense of violence, arising out of criminal conduct that was a proximate cause of the injury or loss for which relief is claimed in the tort action.

(b) The person engaged in conduct that, if prosecuted, would constitute a felony, a misdemeanor that is an offense of violence, an attempt to commit a felony, or an attempt to commit a misdemeanor that is an offense of violence and that conduct was a proximate cause of the injury or loss for which relief is claimed in the tort action, regardless of whether the person has been convicted of or pleaded guilty to or has been charged with committing the felony, the misdemeanor, or the attempt to commit the felony or misdemeanor.

(c) The person suffered the injury or loss for which relief is claimed in the tort action as a proximate result of the victim of conduct that, if prosecuted, would constitute a felony, a misdemeanor that is an offense of violence, an attempt to commit a felony, or an attempt to commit a misdemeanor that is an offense of violence acting against the person in self-defense, defense of another, or defense of the victim's residence, regardless of whether the person has been convicted of or pleaded guilty to or has been charged with committing the felony, the misdemeanor, or the attempt to commit the felony or misdemeanor. Division (B)(2)(c) of this section does not apply if the person who suffered the injury or loss, at the time of the victim's act of self-defense, defense of another, or defense of residence, was an innocent bystander who had no connection with the underlying conduct that prompted the victim's exercise of self-defense, defense of another, or defense of residence.

(3) Recovery against a victim of conduct that, if prosecuted, would constitute a felony, a misdemeanor that is an offense of violence, an attempt to commit a felony, or an attempt to commit a misdemeanor that is an offense of violence, on a claim for relief in a tort action is barred to any person or the person's legal representative if conduct the person engaged in against that victim was a proximate cause of the injury or loss for which relief is claimed in the tort action and that conduct, if prosecuted, would constitute a felony, a misdemeanor that is an offense of violence, an attempt to commit a felony, or an attempt to commit a misdemeanor that is an offense of violence, regardless of whether the person has been convicted of or pleaded guilty to or has been charged with committing the felony, the misdemeanor, or the attempt to commit the felony or misdemeanor.

(4) Divisions (B)(1) to (3) of this section do not apply to civil claims based upon alleged intentionally tortious conduct, alleged violations of the United States Constitution, or alleged violations of statutes of the United States pertaining to civil rights. For purposes of division (B)(4) of this section, a person's act of self-defense, defense of another, or defense of the person's residence does not constitute intentionally tortious conduct.

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