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IN THE SUPREME COURT OF OHIO

GARY KIRSCH, Guardian for Jessica Jacobson Plaintiff-Appellee, vs. Ellen C. Kaforey, *et al.*, Defendants-Appellants	Supreme Court Case No. 15-1340 On Appeal from the Summit County Court of Appeals, Ninth Appellate District Court of Appeals, Case No. CA 26915

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Issue presented

> R.C. 2307.60 provides in pertinent part that "[a]nyone injured … by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law." Many other Revised Code sections expressly refer to or otherwise acknowledge the cause of action § 2307.60 creates. Contrary "interpretations" of the section are unsupportable for various reasons. Should this Court find that § 2307.60 independently authorizes a civil action for damages caused by criminal acts provided such an action is not otherwise prohibited by law?

Introduction and Facts

At issue in this case is whether crime victims in Ohio should be able to recover damages from the criminals who have injured them. Presumably recognizing that some crime victims are unable to identify specific statutes or common-law theories allowing civil redress, the General Assembly enacted R.C. 2307.60 to provide a legislative guarantee that deserving victims will never be without a remedy.

Appellee Gary Kirsch is the court-appointed guardian of Jessica Jacobson. Mr. Kirsch is able to prove that Appellants Ellen Kaforey, Cleveland Clinic Children's Hospital for Rehabilitation (the "Clinic"), and Akron Children's Hospital ("Akron") committed the crimes of kidnapping, unlawful restraint, and child enticement when, without privilege to do so, they interfered with the custody rights of Jessica's mother, refused to permit contact, and transported Jessica to Florida without her or her mother's consent. Mr. Kirsch has been denied civil redress under R.C. 2307.50 and, if unable to pursue his rights under § 2307.60, will lack a remedy altogether.

R.C. 2307.60(A)(1) provides as follows:

> 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.

As the Ninth District recognized here, this section's plain language creates a civil right of action in favor of anyone who has been injured by a criminal act. Denying Mr. Kirsch or other deserving crime victims the right to pursue the civil redress guaranteed by § 2307.60 would do violence to the section's plain language and dash the expectations it inevitably creates.

Unlike the other rights § 2307.60 creates (i.e., the right to recover costs and attorney's fees and the right to recover punitive damages), the right to the civil action *itself* is not conditioned on the authorization of *outside* rules or laws. The only condition is that the action not be specifically *excepted* by law.

Several other Revised Code sections expressly refer to civil actions brought "pursuant to division (A) of section 2307.60," or "in accordance with division (A) of section 2307.60," or use similar language recognizing § 2307.60's civil right of action. By expressly excepting certain civil actions through its use of the phrase "[n]otwithstanding division (A) of section 2307.60," another Revised Code section likewise acknowledges § 2307.60's creation of a civil action.

Numerous courts, too, apply § 2307.60 as written and permit civil recoveries for damages caused by a criminal act. Provided a claimant is able to demonstrate the "injury" and the "criminal act" the section expressly requires, these courts do not inquire after the "outside authorization" on which Appellants mistakenly insist.

Nor can § 2307.60 be regarded, as Appellants urge in defiance of the section's plain language, as "merely a codification of the common-law principle that a civil action

does not merge into a criminal prosecution." The several cases that have bought into this illusion can all be traced to a single source—an 1831 Ohio Supreme Court decision—that stands for a completely different proposition. None furnishes any *independent* support for the radical departure from the section's plain language. The fact that the General Assembly has not acted to correct various, local judicial misstatements of its handiwork (none from the Supreme Court), moreover, is hardly surprising and not significant.

Appellants also mistakenly argue that, applied as the Ninth District does, § 2307.60 usurps the State's exclusive authority to initiate criminal prosecutions. The statute does no such thing: it merely authorizes the recovery of *damages resulting from* a criminal act, and does not purport to authorize ersatz criminal prosecutions.

Nor will Appellants' "parade of horribles" materialize from application of § 2307.60's plain language. Because plaintiffs must identify, and satisfy the elements of, the crimes by which they were victimized, defendants are afforded adequate notice and opportunity to defend § 2307.60 claims. Lacking detailed provisions such as a limitations period of its own, moreover, the section does not "conflict with," and is not available to circumvent, the specific requirements of other statutes or schemes. Its value instead lies in its affording a civil remedy to the many crime victims whose injuries are not neatly addressed by more specific legislation and would otherwise go uncompensated.

None of the considerations on which Appellants rely, in sum, constitute reasons for disregarding § 2307.60's plain language, or—what amounts to the same thing—for denying compensation to deserving crime victims.

Argument

I. Under § 2307.60(A)(1)'s plain meaning, any person injured by a criminal act has a civil action unless specifically excepted by law.

A. This Court should apply § 2307.60 in accordance with its plain meaning.

Any analysis of a statute begins with its plain meaning. *In re C.T. Stoll, Gdn. Ad Litem v. Crawford Cty. Dept. of Job & Family Serv.*, 119 Ohio St. 3d 494, 2008-Ohio-4570, 895 N.E.2d 527, ¶ 12 (2008), citing R.C. 1.42 ("When reviewing statutes, we must give meaning and effect to the plain meaning of the language as written by the General Assembly."); *Apple Group, Ltd. v. Granger Twp. Bd. of Zoning Appeals*, 144 Ohio St. 3d 188, 2015-Ohio-2343, 41 N.E. 3d 1185, ¶ 13 (2015) ("We have emphasized that 'the plain meaning of a statute is always preferred' . . . Furthermore, '[i]f a review of the statute conveys a meaning that is clear, unequivocal, and definite, the court need look no further.'"), first quoting *State ex rel. Plain Dealer Publ'g Co. v. City of Cleveland*, 106 Ohio St. 3d 70, 2005-Ohio-3807, 819 N.E.2d 1120, ¶ 40, then quoting *Columbus City Sch. Dist. Bd. of Educ. v. Wilkins*, 101 Ohio St. 3d 112, 2004-Ohio-296, 802 N.E.2d 637, ¶ 26; *Wilkins* at ¶ 26 ("If a review of the statute conveys a meaning that is clear, unequivocal, and definite, the court need look no further."), citing *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973); *State ex rel. Plain Dealer Publ'g Co.* at ¶ 38 ("We need not resort to statutory construction when the statute is unambiguous. . . . Instead, 'our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.' . . . Thus, when a statute is unambiguous in its terms, courts must apply it rather than interpret it."), citing *State v. Evans*, 102 Ohio St.3d 240, 2004-Ohio-2659, 809 N.E.2d 11, ¶ 14, and quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004).

According to Justice Antonin Scalia and legal-writing guru Bryan Garner, who co-authored a book on interpreting legal texts, "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (Thomson/West 2012). Where a statute's language is clear, moreover, courts should not even consider the statute's presumed purpose: "[p]urpose sheds light only on deciding which of various *textually permissible meanings* should be adopted." *Id.* at 57 (emphasis in original).

R.C. 2307.60(A)(1) admits of only one textually permissible meaning. It provides as follws:

> 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.

In accordance with its plain meaning, this section creates a civil cause of action in favor of "anyone" who has been "injured in person or property by a criminal act" unless such an action is "specifically excepted by law." The statute, in other words, means exactly what it says.

This recognition formed the basis of the Ninth District's decision in this case: "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*." (Decision and Journal Entry (DJE) at 9; emphasis added).

As the Ninth District also recognized, § 2307.60's differently worded predecessor, R.C. 1.16, serves to reinforce this conclusion. The earlier version provided 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." It is perhaps possible (although decidedly strained) to construe this version as addressing only the *damages* available in some otherwise authorized civil action.

But it is not possible to interpret § 2307.60(A)(1) in this manner. The current statute, as the Ninth District recognized, "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 . . ..'" (DJE at 8; court's emphasis.) The "has" is unmistakable. It constitutes a guarantee, if you will, that an injured crime victim will have civil redress. What can the "has" possibly mean except that § 2307.60(A)(1) *itself* confers the civil right of action, that a crime victim need not look elsewhere for a statute or common-law claim?

The "and" in § 2307.60(A)(1) is also significant. Again, the subdivision cannot be construed as a mere damages provision. The "*and* may recover full damages" clause makes clear that a litigant's right to recover full damages *supplements* the guarantee that a civil action is available to her.

B. Good policy reasons exist for reading § 2307.60 in accordance with its plain language.

In addition to being required by law, there are very good reasons for adhering to the text of a statute. Among is many other desirable effects, the practice promotes predictability and conformity of understanding and application.

Consider a law firm that represents crime victims, as the undersigned counsel do. While researching potential causes of action for a client, an associate at the firm comes

across § 2307.60 and is pleased because no other civil statute or common-law theory appears available in the case. The client, too, reads the statute and readily understands that she "has, and may recover full damages in, a civil action." She should not have to be told that, contrary to the statute's plain meaning, no cause of action is available. And not just to her: no cause of action is *ever* available because the statute doesn't create one, but instead accomplishes some seemingly unrelated and mysterious purpose such as "codifying a common-law principle."[1] Anyone should be able to read the statute and rely on its clearly stated creation of a civil right of action for injured crime victims.

Because § 2307.60(A)(1) is clear on its face, this Court "need look no further." *Wilkins*, 101 Ohio St. 3d 112, 2004-Ohio-296, 802 N.E.2d 637, ¶ 26. It "need not resort to statutory construction [because] the statute is unambiguous. . ." but "must apply it rather than interpret it." *State ex rel. Plain Dealer Publ'g Co.*, 106 Ohio St. 3d 70, 2005-Ohio-3807, 819 N.E.2d 1120, ¶ 40.

Appellants avoid the topic of § 2307.60(A)(1)'s plain meaning altogether. Their Merit Briefs comprise *nothing but* attempts to "look further," to "resort to statutory construction," and to "interpret rather than apply" the section. Their entire effort is concerned to construe a statute that needs no construing. In the process, Appellants offer "interpretations" that bear no resemblance to the words actually used—and that, as argued in the balance of this Brief, are unsupportable for a host of other reasons.

II. While § 2307.60(A)(1) requires a person to prove "injury" resulting from "a criminal act," it does *not* require that the person identify or invoke some *other* statutory or common-law civil claim.

A. Section 2307.60(A)(1) requires no "outside authorization."

[1] This particular "interpretation" of § 2307.60 is examined in Section IV below and shown to be seriously deficient.

That § 2307.60(A)(1) independently authorizes civil actions for criminal misconduct is apparent from its first clause alone. Examining the balance of the subdivision serves to make this conclusion even more plain. At the same time it undercuts one of Appellants' principal contentions, i.e., that § 2307.60(A)(1) does not independently authorize a civil action but requires that some other (statutory or common-law) civil claim be available to the claimant.

R.C. 2307.60(A)(1) creates three distinct rights, corresponding to its three separate, conditional clauses. A person injured by a criminal act

> (1) has, and may recover full damages in, a civil action *unless specifically excepted by law*;
> (2) 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*;
> (3) and may recover punitive or exemplary damages *if authorized by section 2315.21 or another section of the Revised Code.*

(Emphasis added.) As the italicized language shows, each of § 2307.60(A)(1)'s rights is conditional. A litigant may recover his costs and attorney's fees only if authorized by a Civil Rule, by a Revised Code section, or by common law. And he may recover punitive or exemplary damages only if authorized by R.C. 2315.21[2] or by another Revised Code section. Importantly, however, the only restriction on his ability to assert, and recover full damages in, a civil action is that the action not be "specifically excepted by law."

In other words, rights (2) and (3) are contingent on the *express authorization* of some rule or statute *outside § 2307.60(A)(1) itself*. Right (1), by way of contrast, requires only that

[2] R.C. 2315.21 authorizes an award of punitive or exemplary damages under certain conditions, among them that "[t]he actions or omissions of [the] defendant demonstrate malice or aggravated or egregious fraud . . .."

the contemplated civil action not be *prohibited by law*; no outside authorization is needed. The logical difference between the "if" of (2) and (3) and the "unless" of (1) cannot be overstated.

If the General Assembly had intended to condition the availability of a civil action under § 2307.60(A)(1) on the authority of other Code sections or the common law, as Appellants (without evidence) insist it did, it would have been a simple matter for it to have said so. The General Assembly could, for example, have declared that "Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action *if authorized by another section of the Revised Code or under the common law of this state.*" Since the General Assembly obviously knew how to require outside authorization when that was its intent, the absence of any such requirement in the section's first clause is a telltale indication that no such requirement was intended.

Indeed, Appellants' position on this issue was specifically rejected by the court in *Wesaw v. City of Lancaster*, S.D.Ohio No. 2:2005cv0320, 2005 U.S. Dist. LEXIS 36691 (Dec. 15, 2005). Like Appellants, the *Wesaw* defendants mistakenly argued that § 2307.60 does not independently authorize a civil action for damages arising from a criminal act. According to the court:

> Defendants contend "the language of the statute merely provides that victims of crime may bring an action for damages and attorney fees if authorized by a specific statute or the common law." *Defendants misstate the thrust of the current statute. Under the current version of Ohio Rev. Code § 2307.60(A), a civil action arises from a criminal act that has caused damage unless such an action has been "specifically excepted by law."* Defendants have not shown that plaintiffs' claims under Ohio Rev. Code § 2921.45 are specifically excepted by law. The Court denies this branch of defendants' motion for judgment on the pleadings.

Id. at **18–19 (emphasis added).[3] The plain language of § 2307.60 (A)(1) left the *Wesaw* court no choice but to reject the defendants' attempted imposition of a requirement missing from the text. *See also* Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* 93: "[n]othing is to be added to what the text states or reasonably implies . . . That is, a matter not covered is to be treated as not covered."

There are also legislative indications that the right of action created by § 2307.60 does not depend on the availability of other civil causes of action. *See* Ohio Legislative Service Commission, *Analysis, S.B. 175*, Comment 5 ("*In addition to any tort action that may be established by Ohio common law*, section 2307.60 of the Revised Code 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 . . .") (emphasis added).

B. Civil actions not "excepted by law" are allowed to proceed under § 2307.60(A)(1) provided a claimant can demonstrate "injury" resulting from "a criminal act."

A civil action's availability under § 2307.60(A)(1), then, does not depend on outside authorization. Courts applying § 2307.60, however, regularly enforce those requirements that *are* specifically set forth in the statute. The plain language of

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[3] The Clinic disparages *Wesaw* as "an outlier in the federal jurisprudence of this State" (Clinic Br. at 8), and recommends that this Court instead rely on *Jasar Recycling, Inc. v. Major Max Management Corp.*, N.D.Ohio No. 4:08CV2830, 2010 U.S. Dist. LEXIS 5086 (Jan. 22, 2010); *Jones v. Graley*, S.D.Ohio No. 2:05-cv-773, 2008 U.S. Dist. LEXIS 12313 (Feb. 6, 2008); and *Prior v. Mukasey*, N.D.Ohio No. 3:08CV994, 2008 U.S. Dist. LEXIS 100668 (Nov. 21, 2008). The recommendation is not well taken. Neither *Jones* nor *Prior* makes any mention of § 2307.60; neither, then, can serve as a guide to the section's proper application. Instead, both cases simply rely on the principle that a civil action cannot "be predicated upon an alleged violation of a criminal statute." As argued in Section V below, § 2307.60 authorizes only the recovery of *damages resulting from* a criminal-law violation and so does not violate the principle. While the magistrate judge in *Jasar* does discuss § 2307.60, his "interpretation" is unsupportable for the reasons comprehensively explained in Section IV below.

§ 2307.60(A)(1) requires that a claimant have been "injured" as a result of "a criminal act." Many courts therefore examine the particular Revised Code sections alleged to criminalize the challenged behavior, and consider whether the claimants have indeed suffered injury as a result of that behavior. If satisfied that these requirements are met, courts allow the actions to proceed undeterred by the irrelevant considerations Appellants adduce.

The plaintiff in *Lazette v. Kulmatycki*, 949 F. Supp. 2d 748 (N.D.Ohio 2013), for example, was victimized by a computer hacker. She "assert[ed] a claim under O.R.C. 2307.60, .61, which permit a person injured by another's criminal conduct to recover against the perpetrator of the crime." *Id.* at 761. Because § 2913.04(B) "defines the crime on which plaintiff bases her claim," *id.*, her civil claim was cognizable: "The plaintiff has stated a claim under O.R.C. §§ 2307.60, .61 and § 2913.04(B)." *Id.* at 762; *see also T.P. v. Weiss*, 2013-Ohio-1402, 990 N.E.2d 1098, ¶ 33 (5th Dist.) (recognizing civil cause of action under § 2307.60 for "actions that resulted in [the defendant's] criminal conviction for sexual battery, in violation of R.C. 2907.03(A)(2)").

The plaintiff in *Tomas v. Nationwide Mut. Ins. Co.*, 79 Ohio App. 3d 624, 607 N.E.2d 944 (10th Dist.1992), similarly, "point[ed] out that the General Assembly has established crimes for destruction of evidence, including that of tampering with evidence under R.C. 2921.12." *Id.* at 632. "Arguably," according to the court, "that statute, coupled with R.C. 2307.60, does create a civil action for intentional spoliation of evidence."[4] *Id.*

[4] What was "arguable" for the court was not § 2307.60's authorization of a civil action but rather § 2921.12's creation of a tort for intentional, as opposed to negligent, spoliation of evidence.

The Eighth District Court of Appeals, in *Gonzalez v. Spofford*, 8th Dist. Cuyahoga No. 85231, 2005-0hio-3415, held that the facts the plaintiffs adduced "support[ ] the Gonzalezes' theft by deception claim [under R.C. 2913.02], which was brought as a civil claim pursuant to R.C. 2307.60. R.C. 2307.60 provides that any victim of a criminal act may recover 'full damages' in a civil action." *Id.* at ¶ 27. And the Second District Court of Appeals, in *Cartwright v. Batner*, 2014-Ohio-2995, 15 N.E.3d 401 (2d Dist.), observed that "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 . . ..'" *Id.* at ¶ 94. The court "conclude[d] that Kimberly has standing to bring an action under R.C. 2307.60 and R.C. 2307.61" for theft and misuse of a power of attorney. *Id.* at ¶ 97.

The Clinic attempts to distinguish *Gonzalez* and *Cartwright* on the ground that the courts were "not specifically presented with the issue of whether or not R.C. §2307.60 sets forth an independent cause of action." (Clinic Br. at 7.) Were he to cite them, according to the Clinic, Mr. Kirsch "would be relying on dicta."

But the plaintiffs' ability to bring their § 2307.60 claims was central to the courts' holdings in these cases, and so was hardly "dicta." Nor do the other cases Appellants cite from the same appellate districts diminish the force of these holdings. Appellants argue, for instance, that *Peters v. Mabini*, 8th Dist. Cuyahoga No. 73373, 1998 Ohio App. LEXIS 3728 (Aug. 13, 1998), remains good law in the Eighth District after *Gonzalez*. But, while citing other Ohio cases holding that § 2307.60 does not set forth an independent cause of action, *Peters* never expressly adopts the position. Instead it simply declines to "allow appellants to use R.C. 2307.60 to circumvent the applicable limitations periods of their

underlying claims," in this case the tort of battery.[5] Like many deserving crime victims, the *Gonzalez* plaintiffs apparently had no particular, suitable *civil* claim available to them. But for § 2307.60's general grant of civil redress for criminal-law violations, then, they would have lacked a remedy.

R.C. 2307.60's plain language does, however, require that a particular criminal act be identified. In *Red Ferris Chevrolet, Inc. v. Aylsworth*, 9th Dist. Wayne No. 07CA0072, 2008-Ohio-4950, for instance, it was R.C. 2913.01(K)(1), which criminalizes the passing of bad checks, that specified the requisite criminal act. The court held that, while "R.C. 2307.61 recognizes the availability of civil actions for victims of theft," "such an action must be brought pursuant to R.C. 2307.60(A), which, in turn, requires that the injury must be the result of 'a criminal act.'" *Id*. at ¶ 5. *See also Roseman Building Co. LLC v. Vision Power Systems, Inc.*, 5th Dist. Stark No. 2009CA00009, 2010-Ohio-229 ("R.C. 2307.60(A) . . . requires proof of an injury 'by a criminal act' before damages can be recovered."), citing *Red Ferris Chevrolet* at ¶ 5; *Riley v. Supervalu Holdings, Inc.*, 1st Dist. Hamilton No. C-040668, 2005-Ohio-6996 (acknowledging "that R.C. 2307.60 requires a plaintiff to prove that it was injured by a criminal act to recover damages" but noting that "R.C. 2307.61(F) [now R.C. 2307.61(G)(1)] "specifically provides that a property owner's right to recover damages exists regardless of whether the accused has pleaded guilty to or has been convicted of any criminal offense").

Under § 2307.60(A)(1)'s plain language, civil plaintiffs must also demonstrate that they have suffered *injury* as a result of the identified criminal act. The plaintiff union in

[5] As Section VI below explains, § 2307.60 does not permit a litigant to circumvent the particular requirements and limitations of more specific claims and remedies available elsewhere in the Revised Code or at common law.

Shaw v. Bretz, 3d Dist. Marion No. 9-13-31, 2014-Ohio-3672, sought to recover civil damages for the defendant's record tampering, an act criminalized by R.C. 2913.42. While the union brought its claim under § 2307.61, the *Shaw* court recognized that only § 2307.60 actually authorized the civil action: "The actual section authorizing a civil action is R.C. 2307.60 .. . . The statute allows for a 'civil action' for damages *resulting from* the crime." *Id.* at ¶ 41 (emphasis in original). The court dismissed the § 2307.60 claim, however, because the union "failed to show specific facts to support a claim that it was injured by Shaw's allegedly criminal act." *Id.* at ¶ 46. *See also Scelza v. Mikhael*, 9th Dist. Summit No. 22859, 2006-Ohio-1821, ¶ 15 (holding that "R.C. 2307.60 provides for a statutory remedy for victims of theft offenses" but "observ[ing] that the plain language of these statutes [§§ 2307.60 and 2307.61] requires the existence of damage or injury").

The Clinic confesses that "[i]t is without question that R.C. §2307.61 specifically sets forth a civil cause of action for the criminal act of theft." (Clinic Br. at 8.) But what it overlooks is that § 2307.61(A) specifically outsources that role to § 2307.60. Division (A) of § 2307.61 begins with "If a property owner brings a civil action *pursuant to division (A) of section 2307.60* …" and goes on to specify the damages that the property owner may recover. (Emphasis added.) *See also Shaw* at ¶ 41 (noting that while § 2307.61 itemizes available damages, "[t]he actual section authorizing a civil action is R.C. 2307.60 . . ."). It is unclear how the Clinic can make the concession it does about § 2307.61 and yet fail to notice that, *according to both sections*, it is actually § 2307.60 that authorizes the civil action.

In sum, various conditions must be met before a crime victim can bring a successful civil action under § 2307.60. She must prove that the defendant committed a

criminal act,[6] and that she was injured as a result. The action also must not be "specifically excepted by law." These conditions may all be found, plainly expressed, in § 2307.60. What is *not* found in § 2307.60's plain language (or anywhere else) is any requirement that the plaintiff identify some *other civil* statute or common-law source for her civil action. Once the expressly stated conditions are met, there is no *further* question of § 2307.60's ability to independently sustain the civil action.

III. Other Revised Code sections support the plain-language reading of § 2307.60(A)(1).

Several other Revised Code sections reinforce the conclusion that § 2307.60(A)(1) creates an independent civil cause of action. Some of these expressly refer to, and often elaborate the contours and limitations of, the civil action authorized by § 2307.60(A)(1). Others expressly exempt certain claims from § 2307.60's reach and thus confirm the section's general but provisional applicability.

A. Several Revised Code sections expressly designate § 2307.60 as the source of a crime victim's right of civil redress.

As mentioned above, R.C. 2307.61(A) expressly refers to the civil action authorized by § 2307.60. The section begins as follows: "If a property owner brings a civil action *pursuant to division (A) of section 2307.60 of the Revised Code* to recover damages from any person who willfully damages the owner's property or who commits a theft offense.

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[6] Appellant Akron Children's Hospital argues that, to be liable under § 2307.60, a defendant must have been convicted of the crime on which the action is based. (Akron Br. at 7–8.) That issue is not before this Court, which accepted review only of the question whether § 2307.60 creates an independent cause of action. Mr. Kirsch notes, however, that the section uses the phrase "criminal act" rather than "criminal conviction" and that, under the immediately preceding iteration of § 2307.60, evidence of a criminal conviction was not even admissible. *See also Gonzalez,* 2005-0hio-3415, ¶ 27 (noting that "a criminal conviction of the crime is not a condition precedent to civil liability").

. . ." (Emphasis added.) The division proceeds to describe the recovery to which the property owner is entitled "in the civil action." Division (B) of § 2307.61 likewise refers to "a property owner who brings a civil action *pursuant to division (A) of section 2307.60* of the Revised Code." (Emphasis added.)

Again, R.C. 2307.61(A) and (B) do not *themselves* authorize the civil actions to which they refer. Nor do they function as enabling statutes—those "other" statutes without which, according to Appellants, § 2307.60 is ineffective. To the contrary, it is these statutes that nominate *§ 2307.60* as the source of an aggrieved party's right of action.

Another example is § 2307.62, which provides that a cable-service owner or operator aggrieved by certain criminal offenses "may elect to commence a civil action for damages *in accordance with division (A) of section 2307.60* or section 2307.61 of the Revised Code or to commence a civil action under this section . . .." (Emphasis added.) Thus while a civil action is available "under this section," one is also available "in accordance with" § 2307.60. The statute does not even hint that a litigant must invoke § 2307.62 itself, or some other Revised Code section, to bring an action "in accordance with" § 2307.60. There is no reasonable way to read § 2307.62 *except* as an acknowledgement that § 2307.60 is among the statutes that create an independent right of action.

Yet another example is R.C. 2913.49, a statute that criminalizes identity fraud and, in subdivision (I), specifies penalties for the offense. Subdivision (J) of the statute provides as follows:

> In addition to the penalties described in division (I) of this section, anyone injured in person or property by a violation of division (B), (D), or (E) of this section who is the owner of the identifying information involved in that violation *has a civil action against the offender pursuant to section 2307.60* of the

> Revised Code. That person may also bring a civil action to enjoin or restrain future acts that would constitute a violation of division (B), (D), or (E) of this section. (Emphasis added.)[7]

Under § 2913.49(J) an identity-fraud victim "has" a civil action "pursuant to section 2307.60." The path from this criminal-law violation to civil redress is a direct and unconditional one; no other enabling *civil* statute or common-law claim is necessary. It cannot be suggested that § 2913.49(J) *itself* is the authority for the civil action to which it refers. If the General Assembly had intended the section to play that role, it presumably would have provided, in the section, that the owner of the identifying information "may bring a civil action against the offender" or used other authority-conferring language. Instead the section expressly designates § 2307.60 as the mechanism for civil redress.

Nor does R.C. 2307.611 suggest otherwise. That section, it is true, specifies the damages recoverable by an identity-fraud victim. But by its terms § 2307.611 is not the *source* of the victim's right of action. Referring as it does to persons who "bring[ ] a civil action pursuant to division (A) of section 2307.60," the section again confers that honor on § 2307.60.

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[7] (Emphasis added.) The Ninth District in this case also observes, at p. 10, that § 2913.49(J)'s legislative history supports the conclusion that § 2307.60 creates an independent cause of action. *See* Ohio Legislative Service Commission, *Final Analysis, Am.Sub. H.B. 488*, http://www.lsc.state.oh/analyses130/14-hb488-130.pdf (accessed Jan. 2, 2015) (citing § 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"). Curiously, Appellants Kaforey and Akron suggest that, as used in another legislative analysis, the sentence "[u]nder continuing law, anyone injured . . . by a criminal act has, and may recover full damages in, a civil action . . ." confirms that § 2307.60 is "a purely jurisdictional statute." (Kaforey Br. at 5-6; *see also* Akron Br. at 12–13.) But words like "create" and "has" actually confirm the contrary. The phrase "under continuing law," moreover, simply confirms that previous iterations of § 2307.60 and § 1.16 likewise created a civil cause of action.

B. By "expressly excepting" certain claims from § 2307.60's reach, at least one other Revised Code section confirms the section's general but provisional applicability.

As discussed above, whether a civil action is available under § 2307.60 *does* (as the statute plainly states) depend on its not being "specifically excepted by law." This suggests that, if there were an actual example of a statute *prohibiting* an action otherwise available under § 2307.60, it would lend further support to Kirsch's plain-language reading of the section.

And indeed at least one Revised Code section fills the bill. R.C. 4399.18 provides that "*[n]otwithstanding division (A) of section 2307.60* …, no 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 . . .." As the Ninth District recognized in this case, "[i]t 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.'" (DJE at 10.) *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.").

Appellants have never suggested that the criminal statutes Mr. Kirsch alleges were violated in this case—i.e., R.C. 2905.01, 2905.03, and 2905.05—provide any comparable exceptions. If those statutes were indeed violated, and if Mr. Kirsch (as guardian for

Jessica Jacobson) suffered injury as a result, then nothing should or would prevent him from pursuing a civil remedy under § 2307.60.

IV. Appellants have furnished no grounds for concluding that, despite its plain language, § 2307.60(A)(1) is merely "a codification of the common law principle that a civil action does not merge into a criminal prosecution."

Again, R.C. 2307.60 is clear on its face and bears no "interpretation." Appellants' efforts to interpret the section, then, are misconceived from the start. Worse, their final product bears no resemblance to, and indeed completely emasculates, the statute it supposedly interprets. While Appellants' contention that § 2307.60 is merely "a codification of the common law principle that a civil action does not merge into a criminal prosecution" enjoys modest case-law support in certain Ohio districts, it is ultimately unsustainable.

R.C. 2307.60 does not come with a disclaimer such as "Nothing in this section shall be construed to create a right to a civil action by one who has been injured by a criminal act," or an explanation that, despite what it appears to say, the section is merely a codification of the common-law principle that a civil action does not merge into a criminal prosecution. No warning or indication at all is given that, despite being told she *has* a civil action, a crime victim is in fact reading the section all wrong.

So why would any court conclude that a statute that appears on its face to create a civil right of action in fact does no such thing, and instead merely "codifies" some unmentioned "principle"? One explanation can be teased out of the case law.

A. The *Story v. Hammond* Story

Karl Popper, the great philosopher of science, famously proposed that "the criterion of *the scientific status of a theory is its falsifiability*."[8] He recounts how, on one occasion, the famed psychologist Alfred Adler reported to him how the case of a child he had never seen or treated nonetheless confirmed his theory of "inferiority feelings." Popper picks up the story: "Slightly shocked, I asked him how he could be so sure. 'Because of my thousandfold experience,' he replied; whereupon I could not help saying: 'And with this new case, I suppose, your experience has become thousand-and-one-fold.'"[9] Popper's point, as he went on to explain, was that "[Adler's] previous observations may not have been much sounder than this new one; that each in its turn had been interpreted in the light of 'previous experience,' and at the same time counted as additional confirmation."[10]

Precisely such analytical weakness infects many judicial interpretations of § 2307.60. The statement that § 2307.60 is "merely a codification of the common law that a civil action is not merged in a criminal prosecution," it turns out, traces back to a 1978 Sixth District case, *Schmidt v. State Farm Aerial Statistics, Inc.* 62 Ohio App.2d 48, 49, 403 N.E.2d 1026 (6th Dist.1978), which in turn cites an 1831 Ohio Supreme Court case, *Story v. Hammond*, 4 Ohio 376, 378 (1831). While *Story* may illustrate the common-law principle itself, however, it cannot possibly serve as an interpretation of § 2307.60.

After its debut in *Schmidt*, the "codification claim" resurfaced four years later in another Sixth District case, *Peterson v. Scott Constr. Co.*, 5 Ohio App. 3d 203, 451 N.E.2d

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[8] Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 46 (3d ed. Routledge 2002) (emphasis in original).

[9] *Id.*

[10] *Id.*

1236 (6th Dist.1982). *Peterson* included a quotation from *Schmidt*, replete with the *Story v. Hammond* citation. *Id.* at 204. Its opinion thus bolstered the codification claim's presumed Supreme Court pedigree.

Nearly all subsequent judicial expressions of the codification claim invoke *Story*, *Schmidt*, or *Peterson*, or cases that themselves invoke one or more of these three cases. (Those that do not so rely simply assert the thesis with no support at all.) This is true of all four cases on the basis of which the Ninth District certified a conflict to this Court.

None of the cases in this "*Story* line," however, provides any *independent* explanation or justification of the thesis. Apparently assuming that a Supreme Court pedigree is all that is or should be needed, these courts do not bother to furnish *reasons* for their dramatic departure from § 2307.60(A)(1)'s plain language. The *Story* line resembles the children's circle-game of "telephone," in which an initial message is relayed from one child to the next until, by the time it reaches the final child, it bears no resemblance to the original.

The cases Appellants cite from various Ohio appellate districts—those that form what Appellants repeatedly characterize as "longstanding precedent"—are no exception. Invariably, they either cite no authority at all or rely on one or more cases from the Story line.[11] Yet Appellants hope that, with this new case, the dozen-fold cases that make up the *Story* line will become "dozen-and-one-fold."

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[11] In no particular order, these are *Applegate v. Weadock*, 3d Dist. Auglaize No. 2-95-24, 1995 Ohio App. LEXIS 5544 (Nov. 30, 1995) (citing *Schmidt*); *McNichols v. Renniker*, 5th Dist. Tuscarawas No. 2002 AP 04 0026, 2002-Ohio-7215, ¶ 17 (citing *Schmidt, Edwards v. Madison Twnshp.*, 10th Dist. Franklin No. 97APE06-819, 1997 Ohio App. LEXIS 5397, at *18 (Nov. 25, 1997), in turn citing *Schmidt*, *Story*, *Peterson*); *Simpkins v. Grace Brethren Church of Delaware*, 2014-Ohio-3465, 16 N.E3d 687, ¶ 98 (5th Dist.) (citing *McNichols*, in turn citing *Edwards*, in turn citing *Schmidt*, *Story*, *Peterson*); *Groves v. Groves*, 10th Dist. Franklin No. 09AP-1107, 2010-Ohio-4515, ¶ 25 (citing *McNichols*, *Edwards*, *Applegate*, *Guardianship of Newcomb v. Bowling Green*, 36 Ohio App.3d 235, 241, 523 N.E.2d 354 (6th Dist.1987) (in turn citing *Schmidt*), *Peterson*, *Schmidt*); *Allen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist.

There is a problem, however. *Story* cannot possibly serve as authority for the proper interpretation of § 2307.60, or even its predecessor R.C. 1.16, for a simple reason: *Story* was decided in 1831 while R.C. 1.16 and 2307.60 were enacted in 1953 and 1985, respectively. Nor did *Story* construe any statutory precursor, or, for that matter, *any* particular Revised Code section.

What, then, could the *Schmidt* court have had in mind when it purported to cite *Story* for a proposition that, in 1831, would have been impossible even to formulate? To answer that question, it is necessary to appreciate that the proposition for which *Story* is cited is in fact a *compound* one. The statement that § 1.16 "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" embeds two distinct propositions. The first is that § 1.16 is "only a codification" of a certain common-law principle, i.e., the one that says that a civil action is not merged in a criminal prosecution. The second is that Ohio *in fact embraces* the referenced common-law principle, i.e., that *it is* the common law of this State that a civil action is not merged in a criminal prosecution (what might be called "the non-merger principle").

Franklin No. 14AP-619, 2015-Ohio-383, ¶ 10 (citing *Edwards*, *Groves*); *Peters v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-1048, 2015-Ohio-2668, ¶ 12 (citing *Edwards*, *Groves*); *Jasar Recycling, Inc. v. Major Max Management Corp.*, N.D.Ohio No. 4:08CV2830, 2010 U.S. Dist. LEXIS 5086, at *21 (Jan. 22, 2010) (magistrate judge report and recommendation citing *Peterson*, *Peters*, *Prior v. Mukasey*, N.D.Ohio 3:08CV994, 2008 U.S. Dist. LEXIS 100668, at *3, (which makes no mention of § 2307.60), *Replogle v. Montgomery County*, *Ohio,* S.D.Ohio 3:09-cv-102, 2009 U.S. Dist. LEXIS 42843, at *6 May 19, 2009), in turn citing *Edwards*); *Stockdale v. Baba*, 153 Ohio App. 3d 712, 2003-Ohio-4366, 795 N.E.2d 727, ¶ 129 (10th Dist.) (citing no authority at all); *Collins v. Nat'l City Bank*, 2d Montgomery No. 19884 2003-Ohio-6893, ¶ 46 (citing no authority at all); *Duer v. Henderson*, 2d Dist. Montgomery No. 2009 CA 15, 2009-Ohio-6815, ¶ 72 (citing *Collins*, which cited no authority at all).

The *Schmidt* court may or may not have intended the ambiguity. What is clear, though, is that the *Story* Court did not peer into the future and discern the meaning of a statute that, at the time, was not even a twinkle in the General Assembly's eye. Because *Story* can have nothing to say about the codification claim, *Schmidt* could appropriately have cited the case only for the non-merger principle. And indeed the *Story* holding does appear to be an expression—perhaps even the source—of the Ohio common-law non-merger principle.

The *Story* defendant had been criminally prosecuted for causing a public nuisance, and was then sued civilly for the damages his offense had caused a neighbor and his family to suffer. For the Court, the fact that "the defendant, having been indicted and plead guilty . . . previous to the commencement of this suit, formed no bar to this action." It thus held "that the private remedy of the plaintiff was not thereby taken away." *Story*, 4 Ohio at 376.

Again, the non-merger principle (of which the above quotation is a concise expression) is the *only* proposition for which the *Schmidt* court could appropriately have cited *Story*. But that principle is not what Appellants need here. The fact that, in Ohio, a civil action does not merge into, but can be maintained independently of, a criminal prosecution is of no use to Appellants. (In fact, if anything, the non-merger principle supports the availability of civil actions under § 2307.60 and other statutes, and should make courts even more receptive to such actions where legislatively authorized.) What Appellants need is some authoritative interpretation *of § 2307.60* (or even of its predecessor, § 1.16), one that cannot be traced to a "foundational" case that, on inspection, provides no support whatever. The interpretation must also explain why

§ 2307.60's plain meaning should not be given effect. But Appellants can offer no such interpretation.

B. The moral of *Story*

It is one thing for an appeals court to defy a statute's plain language where, for whatever reason, the Supreme Court has authorized it. It is quite another for the court to, in effect, be just one more voice in a discredited echo chamber.

Because *Schmidt* provides no basis—other than misplaced reliance on *Story*—for accepting the codification claim, it follows that *Schmidt* provides no basis *at all* for accepting the claim. And because *Peterson* and all subsequent cases similarly fail to provide independent support for the claim, but instead rely directly or indirectly on *Schmidt*, the claim receives no support at all in Ohio law. Particularly when balanced against the many weighty reasons for applying § 2307.60 in accordance with its plain language, the codification claim is a non-starter.

Appellants also look to G.C. 12379, § 1.16's predecessor, for support. That section more closely tracked the non-merger principle, but is quite different from current § 2307.60. As the Ninth District here pointed out, even if the General Assembly had intended, via G.C. 12379, to codify the common-law non-merger principle, "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*." (DJE at 11; emphasis added.) The Ninth District is simply applying what Justice Scalia and Bryan Garner refer to as "the Reenactment Canon," according to which "[i]f the legislature amends or reenacts a provision . . . , a significant change in language is presumed to entail a significant change in meaning." Antonin

Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (Thomson/West 2012).

V. R.C. 2307.60 does not invade the exclusive State franchise on criminal prosecutions.

Another supposed common-law principle that figures prominently in Appellants' Briefs is "that it is inappropriate to base a civil claim for relief on a criminal statute." (Clinic Br. at 7.) For that principle Appellants cite *Biomedical Innovations v. McLaughlin*, 103 Ohio App.3d 122, 126, 658 N.E.2d 1084 (10th Dist.1995).

In *Biomedical Innovations*, the court dismissed the plaintiff's criminal-mischief claim with the observation that "[c]riminal violations are brought not in the name of the individual party but rather by, and on behalf of, the state of Ohio or its subdivisions." *Id.*, citing *Atlantic & Great W. Ry. Co. v. Dunn*, 19 Ohio St. 162, 172, 564 N.E.2d 18 (1869). "Appellant's claim for civil damages was inappropriate," the court explained, "because it was based upon an alleged violation of a criminal statute under which criminal penalties result." *Id.*

Appellants' argument is wrongheaded for at least three reasons. First, *Biomedical Innovations* did not address § 2307.60 or its possible application to the case. There is no indication that the *Biomedical Innovations* plaintiff brought its claim under § 2307.60, or that the court was otherwise aware of the statute or of its possible application to the case. The court nowhere even mentions the section, let alone interprets it, and certainly nowhere concludes that it would have been unavailable or unhelpful to the plaintiff in framing a related, permissible theory of civil recovery.

Second, and more importantly, Appellants misunderstand the entire thrust of § 2307.60. A person who invokes § 2307.60 is *not* "basing his claim on a criminal statute";

he is basing it on a civil statute that authorizes recovery of *damages resulting* from a criminal act.

The court in *Shaw v. Bretz*, 3d Dist. Marion No. 9-13-31, 2014-Ohio-3672, focused on this distinction. Among the claims asserted by the union plaintiff in *Shaw* was one for tampering with records, an act made criminal by R.C. 2913.42. Citing *Biomedical Innovations,* the *Shaw* court first remarked that "it would not be appropriate for Local 574 'to bring claims for civil damages premised upon alleged violations of criminal statutes.'" *Id.* at ¶ 39. But that, as the court next observed, is not what the union had done. Instead, "Local 574 attempted to use R.C. 2307.61 to bring a private cause of action for damages resulting from tampering with records . . .." *Id.* at ¶ 40. This, according to the court, was "a 'tort action,' as defined by R.C. 2307.60(B)(1)(a), rather than a private cause of action for tampering with records." *Id.* "We find it necessary to explain the difference here to make clear that the trial court did not rule on a criminal cause of action." *Id.*

R.C. 2307.61, however, merely specified the damages recoverable by a theft victim and did not itself create the cause of action: "The actual section authorizing a civil action is R.C. 2307.60." *Id.* at ¶ 41. But importantly, the court added, "[n]either does R.C. 2307.60, authorize a civil claim for tampering with records. The statute allows for 'a civil action' for damages *resulting from* the crime. R.C. 2307.60." *Id.* (emphasis in original).

So § 2307.60 does not purport to authorize civil claims for criminal-law violations *per se*. The section does not *penalize* defendants and no one faces a loss of liberty. The fact that the section authorizes the recovery of damages *resulting from* criminal acts does not run afoul of the *Biomedical Innovations* principle or usurp the exclusive government franchise on criminal prosecutions.

A third and critical problem with Appellants' argument is that it proves far too much. Appellants acknowledge, indeed stress, that various other Ohio statutes authorize civil actions for violation of certain criminal statutes. (*See* the litany of examples the Clinic provides at pp. 9–10 of its Brief.) Applied as Appellants urge, however, the *Biomedical Innovations* principle ought to undermine each of these civil statutes. They differ from § 2307.60, after all, only in their level of specificity, not in their express authorization of civil redress for criminal-law violations.[12]

Reconciliation is achieved, once again, by noticing that *each one* of the cited statutes authorizes, not a civil action for a criminal-law violation *per se*, but the recovery of *damages caused by* the violation. The State's criminal-prosecution franchise is safe.

VI. The absence of legislative action in response to appellate-court decisions construing § 2307.60 proves nothing.

The Clinic thinks it significant that, "[d]espite 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." (Clinic Br. at 4.) For reasons discussed above, however, such "precedent" as exists is neither so "longstanding" nor so defensible as to cause the General Assembly to rewrite a facially unambiguous statute.

The Clinic, moreover, is forced to resort to exegetical sleight-of-hand just to state its case. It quotes *Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 72, 269 N.E.2d 121 (1971), as observing that, "in interpreting the meaning of legislative language, it is not unimportant

[12] But it is hard to imagine Appellants arguing that R.C. 2307.44, for example, merely codifies the common-law principle that a civil action for hazing is not merged into a hazing prosecution.

that the General Assembly has failed to amend the legislation subsequent to prior interpretation' *of the courts*." (Clinic Br. at 4.) The italicized language, however, does not appear in the *Seeley* opinion *at all* and is a complete fabrication. What the Supreme Court in *Seeley* actually said was that "it is not unimportant that the General Assembly has failed to amend the legislation subsequent to prior interpretation thereof *by this Court*." *Id*. at 72 (emphasis added). (The other case on which the Clinic relies, *State v. Chicon*, 61 Ohio St. 2d 181, 399 N.E.2d 1259 (1980), likewise adduces legislative inaction in the face of a string of *Supreme Court* interpretations as evidence of "legislative intent to retain existing law." *Id*. at 183.) By disingenuously substituting the qualifying phrases, the Clinic apparently hopes this Court will conclude that faithless lower-court opinions, no less than faithless Supreme Court opinions, should lead one to expect a legislative response.

But lower-court interpretations of a statute, as this matter shows as well as any other, can be "all over the map." And none is binding on any other courts save those still-lower courts in the same district. Legislation, on the other hand, has statewide application. If the General Assembly is not to become an overly reflexive body, reacting to every perceived, local judicial misconstrual of its handiwork, Appellants' proposed "legislative-inaction thesis" is, as *Seeley* makes clear, best limited to unintended *Supreme Court* interpretations. Particularly here, where for every court that succumbs to the *Story* line there is at least one other that applies § 2307.60 as written, General Assembly members (to the extent they are even aware of and consider such obscure appellate decisions addressing a decades-old statute) may have concluded that their legislation is in good judicial hands.

VII. The alleged problems and uncertainty Appellants imagine will result from applying § 2307.60 in accordance with its plain language are not permissibly considered here, and in any event are overstated or fanciful.

As mentioned at the beginning of this Brief and repeated at several points thereafter, § 2307.60 is clear and unambiguous. Courts therefore must "apply rather than interpret" the section, and have no occasion to engage in statutory construction. This is the case even if, as Appellants suppose, the General Assembly intended a different meaning, and even if the section's application is thought to produce undesirable consequences.

At issue in *State ex rel. Celebrezze v. Board of County Comm'rs*, 32 Ohio St. 3d 24, 512 N.E.2d 332 (1987), was the meaning of the word "balance" as used in R.C. 5101.161. *Id.* at 27. The appellants claimed that the General Assembly in fact intended to write "adjusted balance." But

> [s]ince we find the language of R.C. 5101.161 and its use of the word "balance" to be clear and unambiguous, *our inquiry stops here*. While the in pari materia rule of construction is an acknowledged aid in the interpretation of statutes, its use is limited to those situations where some doubt or ambiguity exists in the wording of a statute. Hough v. Dayton Mfg. Co. (1902), 66 Ohio St. 427, 434, 64 N.E. 521, 523. *Although we are sympathetic to the appellants' claim that the legislature intended to write "adjusted balance," we are bound to adhere strictly to the language of the statute.* Any incongruity between the legislature's intent and the language of R.C. 5101.161 should be resolved by the legislature, rather than the courts.

Id. at 27–28 (emphasis added).

Appellants may think they perceive, in § 2307.60, an intent merely to codify some common-law doctrine. But they cannot square that perception with the actual words used, according to which a person injured by a criminal act *has* a civil action. Courts,

being "bound to adhere strictly to the language of the statute," *id.* at 28, may not indulge Appellants' wishful speculations about the General Assembly's intent, but must instead apply the statute as written.

This is a sufficient response to the arguments that occupy the latter portions of all Appellants' Briefs. Appellants there are concerned about the alleged uncertainty and disorder that would result if § 2307.60 were applied as written. But courts may not rewrite unambiguous statutes simply to avoid certain consequences thought to be undesirable, or to vindicate some perceived legislative intent.

Nevertheless, it should by now be clear why many of the fears expressed in Appellants' Briefs are unwarranted. Appellant Kaforey worries that, if § 2307.60 is applied as written,

- A plaintiff could simply cite to R.C. § 2307.60 as a cause of action and provide no other detail, leaving a defendant with little or no notice as the basis upon which the suit stems;
- Absent notice as to the nature of the claim, other than a criminal act was allegedly committed, a defendant has no ability to properly set forth appropriate affirmative defenses or frame their defense;
- Revised Code § 2307.60 contains no elements of the cause of action and no definitive recovery scheme; and
- By basing a civil suit on a criminal action alone it is uncertain what standard of proof would apply; i.e., reasonable doubt or preponderance of the evidence.

(Kaforey Br. at 10–11.)

But these issues apparently did not concern the courts in *Lazette*, *Tomas*, *Gonzalez*, *Cartwright*, *Red Ferris Chevrolet*, *Roseman Building*, *Shaw*, *Scelza*, *Wesaw*, and *Aubin*. (*See* pp. 9, 11-14, and 18 above for case citations and details.) These courts had no difficulty applying § 2307.60 to the matters before them, and, as far as one can tell from their opinions, did not have to fend off defense complaints about "notice" or about the indefiniteness of the asserted claims. Of course, consistent with their burden to prove injury resulting from a criminal act, the plaintiffs in these cases were obliged to identify, and to satisfy the elements of, the criminal statutes on which they based their claims. They lost, moreover, if they failed to prove that their injuries proximately resulted from the identified crimes. *See, e.g., Shaw v. Bretz*, Case 3d Dist. Marion No. 9-13-31, 2014-Ohio-3672. The defendants' presumed acquaintance with these two requirements, both apparent on the face of § 2307.60, afforded them ample notice and opportunity to defend the actions.

Kaforey's perplexity about the appropriate burden of proof, finally, is easily assuaged. As the court in *Choby v. Aylsworth*, 11th Dist. Lake No. 2006-L-144, 2007-Ohio-3375, succinctly observed:

> there are numerous instances in the Ohio Revised Code where the legislature has provided a civil remedy for the violation of a criminal statute. *In none of those situations is the victim required to prove his civil action beyond a reasonable doubt.* See, R.C. 2307.70 (civil action for vandalism, desecration, or ethnic intimidation), R.C. 2307.44 (civil action for hazing), R.C. 2307.50 (civil action for interference with parental or guardianship interest in minor), R.C. 2307.52 (civil action for terminating or attempting termination of pregnancy after viability), R.C. 2307.60 (civil recovery for criminal act), and R.C. 2933.65 (civil remedy for interception of wire, oral or electronic communications).

Id. at ¶ 55 (emphasis added).

The above cases, moreover, illustrate the shortcomings of Appellants' argument that the General Assembly intended to create civil causes of action only for *certain* crimes but not others. (*See, e.g.,* Clinic Br. at 9–13.) If more specific civil claims had been asserted or available to the plaintiffs in those cases, the courts presumably would have required that their elements be met. Apparently no such claims were available to the plaintiffs. But the plaintiffs nevertheless were able to allege (and in most cases prove) that they had been injured by a criminal act, and so could take advantage of § 2307.60's more general grant of civil redress. And again, the defendants were not heard to protest—and it apparently did not occur to the courts to find—that § 2307.60 fails to create a right of action.

Also unfounded is the Clinic's concern that § 2307.60 "will expose defendants to multiple suits and potentially subject defendants to further liability in matters that were previously resolved . . .." (Clinic Br. at 1.) Familiar rules against claim-splitting are sufficient to guard against any such potential.

All Appellants think they discern conflicts between § 2307.60 and other various other civil statutes or statutory schemes. The Clinic worries, for instance, that "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" simply by "changing the caption." (Clinic Br. at 15.) As applied by the Ninth District, the statute is also "directly contrary" to Ohio's tort damages caps, according to Kaforey, "because the plaintiff is recovering for a criminal act—not a tort—[and so] can argue that damage caps set forth in R.C. § 2315.18 do not apply on their face." (Kaforey Br. at 12.)

But these concerns are fanciful. There might be a conflict if § 2307.60 actually *contained* a limitations period, and if that period were different from that set forth in a

more specific, applicable civil statute. The mere absence of an express limitations period, however, does not create a conflict. There are numerous tort actions, after all, for which no specific limitations period is prescribed. That presumably is why the General Assembly enacted R.C. 2305.09(D), a "catch-all" provision that prescribes a four-year limitations period for "[f]or an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code." No one suggests that a plaintiff, having failed to meet an undeniably applicable limitations period, should be able to resurrect his claim under § 2307.60 by "changing the caption" on his pleading.

The same consideration applies to other restrictions and provisions contained in specific legislation or implied in common law. Because silent on the matters addressed by these provisions, § 2307.60 presents no conflicts.

R.C. 1.51 provides that, ordinarily, "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both," but that, "[i]f the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." *See also Watkins v. Dep't of Youth Servs.*, 143 Ohio St. 3d 477, 2015-Ohio-1776, ¶ 19; Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* 183 (Tomson/West 2012) ("the specific provision is treated as an exception to the general rule" because "the specific provision comes closer to addressing the very problem at hand and is thus more deserving of credence").

R.C. 2307.60 does not purport to supersede the requirements of more specific legislation. It does not, for example, provide a mechanism for avoiding the detailed

statutory framework enacted for wrongful-death claims. Nor does it furnish the means to resurrect a claim that, but for expiration of the statute of limitations, could have been brought under a different statute or common-law theory. In keeping with courts' obligation, on which Appellants repeatedly insist, to harmonize statutes if possible and to construe the Revised Code "as an interrelated body of law" (Clinic Br. at 10, quoting *Summerville v. Forest Park*, 128 Ohio St. 3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 24), § 2307.60 should not be read to conflict with or usurp particular civil causes of action authorized elsewhere. *See also* Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* 252 (Tomson/West 2012) ("[s]tatutes *in pari material* are to be interpreted together, as though they were one law").

The statute nevertheless plays a vital role in the Revised Code. Ohio law criminalizes many more acts and behaviors than those for which it provides specific civil redress. For the many deserving victims of crimes that "fall through the cracks" in this way, § 2307.60 is a lifeline.[13] Its plain-language application will not produce (and indeed *has not* produced) the "parade of horribles" Appellants envision, but instead will simply ensure appropriate redress for those who would otherwise lack a legal remedy.

Conclusion

For all the reasons set forth above, this Court should answer the certified question in the affirmative, affirm the Ninth District's decision, and declare that R.C. 2307.60

[13] The undersigned counsel once represented a woman who, in a rather peculiar way, was misled and injured by an unscrupulous insurance salesperson. Although the salesperson's actions were criminal, and counsel were able to identify the violated Revised Code sections, for various technical reasons no specific civil claim applied in the circumstance. R.C. 2307.60 afforded the client her only means of civil redress.

creates an independent cause of action for injuries caused by a criminal act unless that action is specifically prohibited by law.

Respectfully submitted,

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Appendix A

2. Supremacy-of-Text Principle

The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.

> "We have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute."
>
> *United States v. Great Northern Ry.*, 287 U.S. 144, 154 (1932) (per Cardozo, J.).

When deciding an issue governed by the text of a legal instrument, the careful lawyer or judge trusts neither memory nor paraphrase but examines the very words of the instrument. As Justinian's *Digest* put it: *A verbis legis non est recedendum*[1] ("Do not depart from the words of the law").

Of course, words are given meaning by their context, and context includes the purpose of the text. The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does. The subject matter of the document (its purpose, broadly speaking) is the context that helps to give words meaning—that might cause *draft* to mean a bank note rather than a breeze. And even beyond that, it can be said more generally that the resolution of an ambiguity or vagueness that achieves a statute's purpose should be favored over the resolution that frustrates its purpose. But the textualist insists on four limitations:

First, the purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires.

Second, the purpose must be defined precisely, and not in a fashion that smuggles in the answer to the question before the decision-maker. Assume a text that requires the losing litigant to pay the winner's attorney's fees; and assume further that the interpretive question is whether expert-witness fees are included. It

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1 *Cf. Digest* 32.69 pr. (Marcellus). *Cf.* also Unif. Statute & Rule Construction Act § 19 (1995) ("*Primacy of Text.* The text of a statute or rule is the primary, essential source of its meaning.").

is clear enough that in normal usage, expert-witness fees are not included. But if the express "purpose" of the provision is said to be making the winner whole for its costs of suit, that normal usage could be overridden. To find such a purpose in the absence of a clear indication in the text is to provide the judge's answer rather than the text's answer to the question. Positing a make-the-winner-whole purpose effectively begs the question—assuming what is to be proved: that reimbursing attorney's fees means reimbursing other expenses as well.

Third, the purpose is to be described as concretely as possible, not abstractly. For example, statutes of limitations have the purpose of ensuring that claims be brought within a specified period—they are not to be considered as having the generalized purpose of "promoting justice." Every end is a means to a further end. Letting judges interpret the words of a text so as to achieve the abstract purpose of doing justice is effectively to let them decide what the statute should mean—to decide what is justice or equity—rather than to decide what the text itself says. There are many equally tempting way stations on the path to that ultimate purpose of doing justice and producing equity. For example, a statute providing a specific protection and a discrete remedy for purchasers of goods can be said to have as its purpose "protecting the consumer." That would not justify expansive consumer-friendly interpretations of provisions that are narrowly drawn. Such a highly generalized purpose is not relevant to genuine textual interpretation.

Fourth, except in the rare case of an obvious scrivener's error, purpose—even purpose as most narrowly defined—cannot be used to contradict text or to supplement it. Purpose sheds light only on deciding which of various *textually permissible meanings* should be adopted. No text pursues its purpose at all costs. Drafters make exceptions, or leave some matters uncovered, because of competing social values (in the case of legislation) or competing desires (in the case of privately drafted documents). Or to put the point differently, the limitations of a text—what a text chooses *not* to do—are as much a part of its "purpose" as its affirmative dispositions. These exceptions or limitations must be respected, and the

8. Omitted-Case Canon

Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.

> "Whatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and evisceration. [The judge] must not read in by way of creation."
>
> Felix Frankfurter,
> *Some Reflections on the Reading of Statutes,*
> 47 Colum. L. Rev. 527, 533 (1947).

The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it. The judge should not presume that every statute answers every question, the answers to be discovered through interpretation.[1] As the noted lawyer and statesman Elihu Root said of the judge: "It is not his function or within his power to enlarge or improve or change the law."[2] Nor should the judge elaborate unprovided-for exceptions to a text, as Justice Blackmun noted while a circuit judge: "[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language."[3]

Yet some authorities assert the judicial power, even the judicial responsibility, to supply words or even whole provisions that have been omitted. Some of them would have the court "reconstruct

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1 *See* Cal. Code Civ. Proc. § 1858 ("In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted . . ."); Cal. Civ. Code § 3530 ("That which does not appear to exist is to be regarded as if it did not exist."). *See also Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("Courts must take statutes as they find them. . . . They are not the law-making body. They are not responsible for omissions in legislation."); R.W.M. Dias, *Jurisprudence* 232 (4th ed. 1976) ("A judge may not add words that are not in the statute, save only by way of necessary implication.").

2 Elihu Root, *The Importance of an Independent Judiciary*, 72 Independent 704, 704 (1912). *See* Edward H. Levi, "The Nature of Judicial Reasoning," in *Law and Philosophy: A Symposium* 263, 274 (Sidney Hook ed., 1964) ("Granted the right and duty of the court to interpret the document, it has not been given the duty or the opportunity to rewrite the words.").

3 *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting).

28. General/Specific Canon

If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*).

The general/specific canon, like the irreconcilability canon (see § 29), deals with what to do when conflicting provisions simply cannot be reconciled—when the attribution of no permissible meaning can eliminate the conflict. Which provision must yield? Or must they both be disregarded? Under this canon, the specific provision is treated as an exception to the general rule.[1] Jeremy Bentham supplied the rationale: "[T]he particular provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction."[2] Or think of it this way: the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence.

The most common example of irreconcilable conflict—and the easiest to deal with—involves a general prohibition that is contradicted by a specific permission, or a general permission that is contradicted by a specific prohibition. Imagine, for example, a sign at the entrance to a park that reads: "No wheeled vehicles. Bicycles and baby carriages may be walked along the paths." The second sentence, which flatly contradicts the first, governs when a bicycle or baby carriage is in the park—a specific exception to the general prohibition. The same effect ordinarily occurs even when the contradictory provisions are separated by intervening text.

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1 *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (per Stewart, J.) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."); *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) (per Blackmun, J.) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."). *See also* Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* § 112a, at 106–07 (1882) ("[T]he general and specific in legal doctrine may mingle without antagonism, the specific being construed simply to impose restrictions and limitations on the general.").

2 Jeremy Bentham, "A Complete Code of Laws," in 3 *The Works of Jeremy Bentham* 210 (John Bowring ed., 1843).

39. Related-Statutes Canon

Statutes *in pari materia* are to be interpreted together, as though they were one law.

> "We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."
>
> *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) (per Marshall, J.).

Any word or phrase that comes before a court for interpretation is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute. It is also, however, part of an entire *corpus juris*. So, if possible, it should no more be interpreted to clash with the rest of that corpus than it should be interpreted to clash with other provisions of the same law. Hence laws dealing with the same subject—being *in pari materia* (translated as "in a like matter")—should if possible be interpreted harmoniously. As James Kent explained in 1826: "Several acts *in pari materia*, and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system."[1]

Though it is often presented as effectuating the legislative "intent," the related-statute canon is not, to tell the truth, based upon a realistic assessment of what the legislature actually meant. That would assume an implausible legislative knowledge of related legislation in the past, and an impossible legislative knowledge of related legislation yet to be enacted. The canon is, however, based upon a realistic assessment of what the legislature ought to have meant. It rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so.

"Statutes," Justice Frankfurter once wrote, "cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes."[2] Part of the statute's context is the *corpus juris* of

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1 1 James Kent, *Commentaries on American Law* 433 (1826).

2 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947).

40. Reenactment Canon

If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning.

We oppose the use of legislative history, which consists of the hearings, committee reports, and debate leading up to the enactment in question (see § 66). But quite separate from legislative history is *statutory* history—the statutes repealed or amended by the statute under consideration. These form part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all the members of the legislature when they voted. So a change in the language of a prior statute presumably connotes a change in meaning.

For example, if a statute providing for an award to the prevailing party of "attorney's fees and expert-witness fees" has been amended to award only "attorney's fees," there would be no basis for the argument (sometimes made) that attorney's fees *include* reimbursement of the attorney's expenditures for expert witnesses.

This presumption does not apply to stylistic or nonsubstantive changes. Lawyers need not rack their brains to explain a change from *in addition* or *moreover* to *and*.

Courts have been known to misapply the rule about changed language. In one case, a statute provided standing to "a person who has had actual care, control, and possession of [a] child for not less than six months preceding the filing of the petition."[1] In a dispute over this provision, one litigant contended that the six-month period had to be immediately preceding the filing of the petition; the other litigant contended that periods of care, control, and possession could be aggregated to meet the six-month requirement. The dispositive fact should have been that the predecessor statute used the phrase *immediately preceding* and an amendment dropped the word *immediately*. The aggregating argument should have prevailed. But the court was purposivist in its approach,

1 Tex. Fam. Code Ann. § 102.003(a)(9) (West 1996).

Appendix B

The most characteristic element in this situation seemed to me the incessant stream of confirmations, of observations which 'verified' the theories in question; and this point was constantly emphasized by their adherents. A Marxist could not open a newspaper without finding on every page confirming evidence for his interpretation of history; not only in the news, but also in its presentation—which revealed the class bias of the paper—and especially of course in what the paper did not say. The Freudian analysts emphasized that their theories were constantly verified by their 'clinical observations'. As for Adler, I was much impressed by a personal experience. Once, in 1919, I reported to him a case which to me did not seem particularly Adlerian, but which he found no difficulty in analysing in terms of his theory of inferiority feelings, although he had not even seen the child. Slightly shocked, I asked him how he could be so sure. 'Because of my thousandfold experience', he replied; whereupon I could not help saying: 'And with this new case, I suppose, your experience has become thousand-and-one-fold.'

What I had in mind was that his previous observations may not have been much sounder than this new one; that each in its turn had been interpreted in the light of 'previous experience', and at the same time counted as additional confirmation. What, I asked myself, did it confirm? No more than that a case could be interpreted in the light of the theory. But this meant very little, I reflected, since every conceivable case could be interpreted in the light of Adler's theory, or equally of Freud's. I may illustrate this by two very different examples of human behaviour: that of a man who pushes a child into the water with the intention of drowning it; and that of a man who sacrifices his life in an attempt to save the child. Each of these two cases can be explained with equal ease in Freudian and in Adlerian terms. According to Freud the first man suffered from repression (say, of some component of his Oedipus complex), while the second man had achieved sublimation. According to Adler the first man suffered from feelings of inferiority (producing perhaps the need to prove to himself that he dared to commit some crime), and so did the second man (whose need was to prove to himself that he dared to rescue the child). I could not think of any human behaviour which could not be interpreted in terms of either theory. It was precisely this fact—that they always fitted, that

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