Supreme Court of Ohio Clerk of Court - Filed March 21, 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.	)	

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

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INTRODUCTION

Plaintiff-Appellee has mischaracterized R.C. §2307.60 as a legislative enactment authorizing a cause of action for violation of any criminal statute, meant to ensure that all victims of crimes have an opportunity to obtain a civil remedy from an alleged perpetrator. The deficiency in this argument is clear from the legislature's enactment of numerous code sections setting forth civil claims for violations of certain criminal statutes (*i.e.*, R.C. §2307.44, R.C. §2307.50, R.C. §2307.51, R.C. §2307.52, R.C. §2307.53, R.C. §2307.61, R.C. §2307.611, R.C. §2307.62, R.C. §2307.65, R.C. §2307.70), and the legislature's decision to not implement causes of action for violation of other criminal statutes. If this Court were to read R.C. §2307.60 as Plaintiff-Appellee has suggested, it would render these statutes largely meaningless. Rather, this Court should read R.C. §2307.60 as an authorization for civil damages resulting from criminal acts, should the civil claim for relief be premised on an independent statutory or common law claim, thus giving effect to the statutes set forth above.

Notably, Plaintiff-Appellee suggests that R.C. §2307.60 fills a void for civil litigants, without which Plaintiff-Appellee would have lacked a remedy against the Defendants, but Plaintiff-Appellee has failed to establish any such void. His position completely ignores the long-standing common law claims available in this state and the statutory claims set forth above. Plaintiff-Appellee seems to suggest that if it were not for the alleged independent civil claim for relief set forth in R.C. §2307.60, Plaintiff-Appellee herein would have no civil remedy. However, the criminal acts of kidnapping and unlawful restraint, which were asserted in the Plaintiff-Appellee's Complaint, could have and should have been brought as a common law false imprisonment claim. As such, to suggest that Plaintiff-Appellee lacked an available remedy is disingenuous. Moreover, while the legislature's intentions in enacting the numerous statutes above setting forth claims for violations of certain criminal statutes cannot be known, it is likely

that the legislature determined that the common law may not provide relief for the criminal acts set forth in these statutes, and the victims of these crimes deserve some avenue of civil relief.

The legislature's choice to single out the specific criminal acts set forth in R.C. §2307.44, *et seq.* above prevents the confusion that would result from mirrored common law and statutory claims. For example, there is no need to establish a statutory civil action for crimes of violence because such criminal acts fall into common law civil claims for assault, battery or wrongful death. Further, as stated, the instant action easily could have been asserted as a false imprisonment claim. Plaintiff-Appellee would have this Court read R.C. §2307.60 to create statutory claims where common law claims already existed, which would lead to legal gamesmanship regarding pertinent statutes of limitation, damage cap issues and the potential for duplicative litigation.

Instead, R.C. §2307.60 should be read as an authorization of civil damages for criminal acts when there is some specific civil statute or common law to support the claim, giving effect to each of the specific statutes set forth above. This reading would not dash the hopes of victims of criminal acts, as the Plaintiff-Appellee has suggested. In fact, Plaintiff-Appellee has failed to allege even one situation in which a criminal act would not be encompassed by a common law claim or specific civil statute setting forth a claim for relief based on criminal conduct. Even if Plaintiff-Appellee were able to establish some rare situation in which a criminal act was not encompassed within a common law or statutory civil cause of action, this rare situation would not establish a public policy reason to read R.C. §2307.60 as the Plaintiff-Appellee has suggested, thereby rendering R.C. §2307.44, et seq. largely meaningless.

Accordingly, this Appellant requests that this Court find that R.C. §2307.60 does not independently authorize a civil action for damages caused by criminal acts and thereby reverse

the decision of the Ninth District Court of Appeals, reinstating the Trial Court's dismissal of this Action.

1. Plaintiff-Appellee's argument regarding reference to other Revised Code sections does not support their position.

Plaintiff-Appellee took the position that a review of other Revised Code sections supports their position that R.C. §2307.60 was meant to establish an independent civil cause of action for all criminal acts, unless otherwise excepted by law. In so arguing, Plaintiff-Appellee has completely ignored the numerous enactments of the legislature establishing civil actions for violations of specific criminal statutes, which would be completely unnecessary if R.C. §2307.60 established a civil action for violation of all criminal statutes.[1] Accordingly, R.C. §2307.60 should be read as an authorization of civil damages stemming from criminal acts, but not an independent civil cause of action, thereby giving effect to the other statutes within its section, as required under Ohio law.

In order to give full effect to R.C. §2307.44, *et seq.*, as identified herein, the references to R.C. §2307.60 contained in certain code sections, such as R.C. §2307.61, should be interpreted as an authorization for civil damages stemming from criminal acts. It is true that R.C. §2307.60 authorizes civil damages based on criminal acts, but the statute does not actually create a civil cause of action as suggested by Plaintiff-Appellee, as such an interpretation would render R.C. §2307.44 and numerous other statutes meaningless. *Summerville v. Forest Park,* 128 OhioSt.3d 221, 943 N.E.2d 522, 2010-Ohio-6280. Thus, when a statute, such as R.C. §2307.61 states, "pursuant to division (A) of section 2307.60 of the Revised Code to recover damages", this reference is simply referring to the ability to obtain civil damages from criminal acts, which is

[1]This Defendant-Appellant will not address these statutes in detail herein as this argument was made in Defendant-Appellant's Merit Brief at pp. 9 – 13, and was not opposed by Plaintiff-Appellee.

authorized by R.C. §2307.60, and was previously authorized by common law under the principal that a civil action is not merged with a criminal prosecution. *Motorists Mutual Insurance Co. v. Hulett,* 3rd Dist. No. 11-03-15, 2004-Ohio-2474.

2. Plaintiff-Appellee's reliance upon *Wesaw v. City of Lancaster* and other Ohio case law, which fail to address the issue before this Court, is misplaced.

While this Court clearly is not bound by any appellate or federal court cases cited in the Merit Briefs, it should be noted that the case law cited by the Plaintiff-Appellee does not support their position for a number of reasons. First, with respect to *Wesaw*, Plaintiff-Appellee glosses over the significant federal case law subsequent to *Wesaw*, contradicting the decision in that matter.[2]

Further, Plaintiff-Appellee relies on a number of appellate cases that did not specifically address the issue before this Court, which cases generally refute the Plaintiff-Appellee's position that R.C. §2307.60 is necessary to ensure that victims of criminal acts have the ability to obtain civil relief. For instance, in *Lazette v. Kulmatcyki,* 949 F.Supp.2d 748 (N.D. Ohio 2013), the Court did not specifically address whether R.C. §2307.60 set forth an independent action and the individual in that case was able to pursue, and did pursue claims for relief under common law causes of action for invasion of privacy and intentional infliction of emotional distress. In *T.P. v. Weiss,* 5th Dist. No. 12 CAE 03 0014, 990 N.E.2d 1098, 2013-Ohio-1402, the court again did not address the specific issue before this Court, and the plaintiff was able to and did pursue commons law claims for assault and battery. Similarly, in *Tomas v. Nationwide Mut. Ins. Co.,*

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[2]*Wesaw* is an outlier in federal jurisprudence. Both *Replogle v. Montgomery County, Ohio,* S.D. Ohio 3:09-CV-102, 2009 WL 1406686, and *Jasar Recycling, Inc. v. Major Max Management Corp.,* N.D. Ohio No. 4:08CV2830, 2010 WL 395212, were decided after *Wesaw* and directly contradict *Wesaw*. Moreover, while *Jones* and *Prior* may not be directly on point they were decided after *Wesaw* and are instructive on this issue. *Jones v. Graley,* 2008 WL 343087 (S.D. Ohio 2008); *Prior v. Mukasey,* N.D. Ohio 3:08CV994, 2008 WL 5076821.

10th Dist. No. 92AP-95, 79 Ohio App.3d 624, 607 N.E.2d 944, the Court notes that it could be argued that R.C. §2307.60 creates a cause of action, but does not specifically so hold and rather finds that R.C. §2307.61 created a cause of action that could have been pursued. Further, the claim asserted in *Tomas* could also have been asserted as a spoliation of evidence claim.

A review of the other appellate cases cited by the Plaintiff-Appellee will further reveal that the plaintiffs in those actions either asserted or were able to assert common law or statutory claims, and there was no need to manufacture an independent cause of action using R.C. §2307.60. As such, even the case law relied upon by the Plaintiff-Appellee does not support their position that R.C. §2307.60 plays a vital role in ensuring that all victims of criminal acts are provided with a civil avenue for relief.

3. The language of R.C. §2307.60 does not prevent this Court from considering the various rules of statutory interpretation developed through this Court's jurisprudence.

Plaintiff-Appellee has taken the position that this Court should not look to other statutes within the Revised Code to ensure that no statute is rendered meaningless, and that the provisions be read as one interrelated body of law. Appellee has taken this position because as stated herein, and in Appellant's Merit Brief, when considering the Revised Code as one interrelated body of law, the Plaintiff-Appellee's interpretation of the statute is without merit.

Moreover, as the language of R.C. §2307.60 could be open to interpretation, it is proper for this Court to consider the rules of statutory interpretation in deciding this matter. The language of the statute refers to the ability to recover damages in a civil action for a criminal act and further refers to other sections of the revised code and the common law, all of which support Defendant-Appellant's position that R.C. §2307.60 authorizes the ability to obtain civil relief based on a criminal act, but does not set forth an independent cause of action. Plaintiff-

Appellee's argument that the plain language of this statute could not support the Defendant-Appellant's interpretation suggests that Ohio courts for the past twenty years have not been able to read the plain language of a statute. While this Court may ultimately determine that decisions rendered in cases, such as *McNichols v. Renniker,* 5th Dist. No. 2002 AP 04 0026, 2002-Ohio-2668, were incorrect, this decision should be based on reading the Ohio Revised Code as a whole and not simply accepting the Plaintiff-Appellee's misguided interpretation of R.C. §2307.60, which as set forth herein and within Defendant-Appellant's Merit Brief would have wide-ranging negative ramifications.

As the rules of statutory interpretation support the Defendant-Appellant's interpretation of R.C. §2307.60, this Court should answer the certified question in the negative, finding that R.C. §2307.60 does not set forth an independent cause of action unless otherwise excepted by law.

4. The legal gamesmanship that will result from Plaintiff-Appellee's interpretation is substantial despite their unsupported statements to the contrary.

Plaintiff-Appellee has represented to this Court that concerns regarding conflicts with applicable statutes of limitation, damage caps and potential for dual recovery are fanciful and overstated, but they have offered no support for this position. While these issues may not be pertinent to this case in particular, the Court's ruling in this action will have wide-ranging effects that without question create the opportunity for legal gamesmanship to circumvent long-standing legal principles in this state.

Conflict with respect to applicable statutes of limitations may be the most concerning aspect of the interpretation suggested by the Plaintiff-Appellee. Plaintiff-Appellee misses the mark on this issue, referencing R.C. §1.51, which deals with conflicts within the Revised Code,

which is not the issue raised by this Defendant-Appellant. Plaintiff-Appellee's interpretation does not necessarily create a conflict between statutes, which would involve implementation of the dictate set forth in R.C. §1.51, rather it creates a mechanism by which plaintiffs in civil actions will be able to circumvent long-standing statutes of limitation.

Plaintiff-Appellee has failed to address this significant issue in any way, and the issue is not limited to false imprisonment claims as set forth in Defendant-Appellant's Merit Brief. Notably, Plaintiff-Appellee references a "catch-all" provision that prescribes a four-year statute of limitations applicable to claims that have no specific statute of limitations. R.C. §2305.09. If this Court agrees with the Plaintiff-Appellee's interpretation, a claim brought under R.C. §2307.60 would fall under this four-year catch-all provision cited by the Plaintiff-Appellee or the six-year catch-all provision cited in the Defendant-Appellant's Brief. (See Defendant-Appellant's Brief at p. 15). Accordingly, a plaintiff would be able to use R.C. §2307.60 to circumvent long-standing statutes of limitations in at least the following situations:

- False Imprisonment – Subject to one-year statute of limitations under R.C. §2305.11 versus R.C. §2307.60 claim for criminal act of kidnapping which could be brought within four or six years based on R.C. §2305.09 or R.C. §2305.07

- Wrongful death – Subject to two-year statute of limitations under R.C. §2125.02 versus R.C. §2307.60 claim for criminal act of murder or manslaughter which could be brought within four or six years based on R.C. §2305.09 or R.C. §2305.07

- Damage to Personal Property – Subject to two-year statute of limitations under R.C. §2305.10 versus R.C. §2307.60 claims for criminal acts including but not limited to arson, vandalism, and criminal damaging which could be brought within four or six years based on R.C. §2305.09 or R.C. §2305.07

- Trespass – Subject to the four-year statute of limitations under R.C. §2305.09 versus R.C. §2307.60 claims for criminal act of trespass which could be brought within six years based on R.C. §2305.07.

Plaintiff-Appellee has largely ignored this concern, stating that they are not suggesting that a plaintiff who has failed to meet an applicable statute of limitations period could resurrect their claim using R.C. §2307.60. Plaintiff-Appellee has taken this position because they do not have a statute of limitations concern in this action, but if this Court rules in favor of Plaintiff-Appellee's interpretation, litigants will unquestionably take this position in cases which would otherwise be barred by a limitation period. This is a real concern should this Court create duplicate avenues for civil relief as the Plaintiff-Appellee has requested.

The duplicative avenues for relief created by Plaintiff-Appellee's interpretation further creates an issue with respect to finality of settlements, despite the Plaintiff-Appellee's dismissive reference to claim-splitting preventing any such issue. Claim-splitting rules generally involve agreements between parties to split claims between separate actions in the context of the doctrine of *res judicata*. These rules would have no relevance over a cause of action settled out of Court resulting in a release and settlement agreement. Should the release language be narrowly worded, it raises the potential for a plaintiff to file a civil claim premised on R.C. §2307.60 after settling a corresponding common law claim (*i.e.*, settle a false imprisonment claim pre-suit with a release for this claim to be followed by the plaintiff asserting a R.C. §2307.60 claim for kidnapping).

CONCLUSION

Ohio R.C. §2307.60 was not intended to set forth an independent civil cause of action for violation of any and all criminal statutes. Further, the allegation that this statute plays a vital role in the Revised Code because Ohio law criminalizes many more acts and behaviors than those for which it provides specific civil redress is simply untrue. In fact, Defendant-Appellant is hard-pressed to find any criminal act for which a victim could not seek civil relief through the pursuit

of a common law claim or specific statutory claim, and as such, the non-existent independent cause of action alleged by the Plaintiff-Appellee is unnecessary. Further, the legislature has seen fit to enact specific independent causes of action for criminal acts that may not exist in common law, which would be completely unnecessary and meaningless if R.C. §2307.60 served the function proposed by Plaintiff-Appellee.

Moreover, if this Court were to affirm the decision of the Ninth District Court of Appeals it will undoubtedly lead to legal gamesmanship regarding applicable statutes of limitation and damage caps resulting in numerous appeals for years to come. These issues and any other issues created by the duplicative claims created by the Ninth District's decision are easily resolved by interpreting R.C. §2307.60 as an authorization of civil damages for criminal acts as Ohio courts have interpreted the statute for the past 20 years. Significantly, such an interpretation would not prevent litigants, such as the Plaintiff-Appellee herein, from asserting a civil claim for relief as Ohio common law and specific statutory claims adequately protect the rights of individuals that have been victimized by crime. Finally, if the legislature determines that there is some criminal act for which no civil cause of action exists, and the legislature deems it necessary to create a civil claim for relief, the legislature will do so, as it has on numerous other occasions (*i.e.*, R.C. §2307.44, R.C. §2307.50, R.C. §2307.51, R.C. §2307.52, R.C. §2307.53, R.C. §2307.61, R.C. §2307.611, R.C. §2307.62, R.C. §2307.65, and R.C. §2307.70).

For these reasons, Defendant-Appellant Cleveland Clinic Children's Hospital for Rehabilitation requests that this Court reverse the decision of the Ninth District, restoring the dismissal entered by the Summit County Court of Common Pleas, finding that R.C. §2307.60 does not set forth an independent cause of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 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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