

NO. 2015-1340

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE NO. CA-26915

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GARY KIRSCH, GUARDIAN FOR JESSICA JACOBSON,  
Plaintiff-Appellee,

v.

ELLEN C. KAFOREY, et al.  
Defendants-Appellants.

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**REPLY BRIEF OF DEFENDANT-APPELLANT  
AKRON CHILDREN'S HOSPITAL**

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## **REPLY BRIEF**

### **I. INTRODUCTION**

Plaintiff-Appellee raises several meritless factual and legal arguments in an attempt to convince this Court that the Ninth District's Decision should not be disturbed. Appellee's Merit Brief presents this Court with no factually or sound reason upon which this Court should uphold the erroneous Decision of the Ninth District holding that R.C. 2307.60 independently authorizes a civil action for damages caused by criminal acts.

Contrary to Appellee's position, the explicit language of R.C. 2307.60 and the longstanding legal precedents throughout all of Ohio do not independently authorize a civil action for violations of all criminal statutes. Simply put, R.C. 2307.60 is a jurisdictional statute that provides that a civil action does not merge into a criminal prosecution. Like the Ninth District did, Appellee dramatically misinterprets the express language of R.C. 2307.60 and, also, misinterprets and misapplies well-established Ohio legal precedents.

If this Court adopts the Ninth District's Decision and accepts Appellee's flawed arguments, the ramifications would be grave, *i.e.*, there would be uncertainty and inconsistency with respect to civil case management, elements of civil actions, statutes of limitations, caps on damages, etc. This Court need not look any further than Ohio's well-established precedents interpreting R.C. 2307.60 and the Dissenting Opinion in this case to reaffirm that R.C. 2307.60 merely codifies a plaintiff's right to file a civil action for damages arising out of a criminal action. Revised Code 2307.60 simply provides the statutory authority for a plaintiff to file a civil claim for which the elements must be pleaded beyond the mere allegations of the criminal activity. This Court should reject Plaintiff's factually and legally flawed arguments and then reverse the Ninth District's anomalous Decision.

## **II. LAW AND ARGUMENT**

### **PROPOSITION OF LAW NO. 1: Appellee Presents Both Factually And Legally Flawed Arguments That Do Not Adequately Address Or Support The Ninth District's Improper Authorization Pursuant To R.C. 2307.60 Of A Civil Action For Damages Caused By Criminal Acts, Unless Otherwise Prohibited By Law**

- A. Contrary To Appellee's Position, Ohio's Legislature Has Enacted Statutes Upon Which Civil Causes Of Action Can Be Pursued For Violations of Specific Criminal Statutes**
  
- A. Contrary To Plaintiff's Position, The Plain Language Of R.C. 2370.60 Does Not Independently Authorize A Civil Action For Violations Of All Criminal Statutes**

The plain language of R.C. 2307.60 and the clear intent of the legislature undoubtedly confirms that R.C. 2307.60 does not independently authorize a civil action for violations of all criminal statutes. By no means does R.C. 2307.60 state what Appellee propounds it to say. Revised Code 2307.60, in and of itself, does not state that it in a substantive civil cause of action a plaintiff can plead a civil claim for a violation of all criminal statutes. In other words, the four corners of R.C. 2307.60 explicitly provides that a plaintiff may plead a civil cause of action for a criminal act but a party must bring a separate civil action for the criminal act.

The only logical interpretation and application of R.C. 2307.60 is that it provides that anyone injured by a criminal act may recover damages in a civil action. Revised Code 2307.60 is nothing more than a codification of the common law rule that a civil action is not merged into the criminal prosecution for the criminal act but that criminal action may give rise to both a criminal prosecution and a civil action.

Appellee's claim that R.C. 2307.60 states otherwise and that any person injured by a criminal act has an independent cause of action under R.C. 2307.60 is simply a misinterpretation and misreading of the statute. In her Merit Brief, Appellee conveniently ignores the legislature's

intent that R.C. 2307.60 does create an independent cause of action where it has separately enacted specific civil statutes incorporating criminal statutes. Nothing can be clearer than the fact that legislature intended to codify separate civil actions apart from R.C. 2307.60 as a means to provide limited civil actions for specific crimes. For example:

1. R.C. 2307.61(A) – civil action for theft offenses pursuant to R.C. 2913.01;
2. R.C. 2307.611 – civil action for identity fraud pursuant to R.C. 2913.49;
3. R.C. 2307.44 – civil action for criminal hazing pursuant to R.C. 2903.31;
4. R.C. 2307.51 – civil action for human trafficking pursuant to R.C. 2905.32;
5. R.C. 2307.62 – civil action for criminal conduct of a cable television owner or operator pursuant to R.C. 2913.04;
6. R.C. 2307.65 – civil action for Medicaid fraud pursuant to R.C. 2913.401;  
and
7. R.C. 2307.70 – civil action for vandalism, desecration or ethnic intimidating pursuant to R.C. 2909.05, R.C. 2927.11 and R.C. 2927.13.

These are examples of the legislature’s clear intent to set forth the only way to pursue a civil cause of action for a particular criminal act, *i.e.*, pursue the civil cause of action that specifically identifies the applicable criminal statute that incorporates the criminal act at issue. In her Merit Brief, Appellee presents absolutely no explanation for these statutes in which the legislature indisputably intended to limit the civil causes of action that are based upon criminal acts. Additionally, Appellee offers no explanation as to why the above civil causes of action were enacted by the legislature if R.C. 2307.60 authorized civil actions based upon criminal acts. Appellee’s inability to provide an explanation confirms that the legislature, by enacting R.C. 2307.60, never intended to authorize a “catch-all” civil cause of action for all criminal acts within R.C. 2307.60.

**B. Contrary To Plaintiff's Position, The Plain Language Of R.C. 2370.60 Does Not Independently Authorize A Civil Action For Violations Of All Criminal Statutes**

The plain language of R.C. 2307.60 and the clear intent of the legislature undoubtedly confirms that R.C. 2307.60 does not independently authorize a civil action for violations of all criminal statutes. By no means does R.C. 2307.60 state what Appellee propounds it to say. Revised Code 2307.60, in and of itself, does not state that it in a substantive civil cause of action a plaintiff can plead a civil claim for a violation of all criminal statutes. In other words, the four corners of R.C. 2307.60 explicitly provides that a plaintiff may plead a civil cause of action for a criminal act but a party must bring a separate civil action for the criminal act.

The only logical interpretation and application of R.C. 2307.60 is that it provides that anyone injured by a criminal act may recover damages in a civil action. Revised Code 2307.60 is nothing more than a codification of the common law rule that a civil action is not merged into the criminal prosecution for the criminal act but that criminal action may give rise to both a criminal prosecution and a civil action.

Appellee's claim that R.C. 2307.60 states otherwise and that any person injured by a criminal act has an independent cause of action under R.C. 2307.60 is simply a misinterpretation and misreading of the statute.

**C. The Case Law Upon Which Plaintiff Relies Is Either Inapplicable or Distinguishable To This Case**

The overwhelming legal precedents in Ohio have collectively and consistently held that R.C. 2307.60 does not broadly establish an independent civil cause of action for criminal acts, *i.e.*, Second District, Third District, Fifth District, Sixth District, Eighth District, Tenth District,

and the Northern District of Ohio.<sup>1</sup> In her Merit Brief, Appellee merely contends that these Courts are all wrong and, therefore, their well-reasoned and fully analyzed holdings should simply be ignored. Instead, Appellee submits case law in support of her Merit Brief that are either outdated, inapplicable or distinguishable to this case.

The following is a summary of Appellee's misplaced and misguided reliance upon:

1. *Wesaw v. City of Lancaster*, S.D. Ohio No. 2005-CV-0320, 2005 WL 3448034 (Dec. 15, 2005): Subsequent Decisions in the Ohio Federal District Courts have consistently and explicitly held that R.C. 2307.60 does not provide for an independent cause of action for all criminal acts. *See, Jasar Recycling, Inc. v. Major Max Mgmt. Corp.*, N.D. Ohio No. 4:08CV2830, 2010 WL 395212 (Jan. 22, 2010); *Ortiz v. Kazimer*, N.D. Ohio No. 1:CV1521, 2013 Dist. LEXIS 189517 (June 5, 2013); *Replogle v. Montgomery County Ohio*, S.D. Ohio 3:09CV102, 2009 WL 1406686;
2. *Gonzalez v. Spofford*, 8th Dist. No. 85231, 2005-Ohio-3415: This case does not address the issue of whether R.C. 2307.60 creates an independent civil action and, also, when this issue was addressed by the Eighth District in *Peters v. Mabini*, 8th Dist. No. 73373, 1998 Ohio App. LEXIS 3728 (Aug. 13, 1998), it held that R.C. 2307.60 does not create a separate cause of action;
3. *Cartwright v. Batner*, 2nd Dist. No. 25938, 2014-Ohio-2995: The Second District did not address the issue of whether R.C. 2307.60 creates a separate cause of action and, also, the Second District did not overrule either *Duer v. Henderson*, 2nd Dist. No. 200- CA 15, 2009-Ohio-6815 or *Collins v. Nat'l City Bank*, 2nd Dist. No. 19884, 2003-Ohio-6893, both of which explicitly held that R.C. 2307.60 is jurisdictional and does not create an independent cause of action;
4. *Aubin v. Weadock*, 3rd Dist. No. 1-03-08, 2003-Ohio-5130: The Third District did not address the issue of whether R.C. 2307.60 creates an independent cause of action and, also, the Third District in *Shaw v. Bretz*, 3rd Dist. No. 9-13-31, 2014-Ohio-3672 subsequently recognized that R.C. 2307.60 does not create a civil action for all crimes but merely allows for civil damages resulting from a crime;
5. *Lazette v. Kulmatycki*, 949 F. Supp.2d 748 (N.D. Ohio 2013): The District Court denied a Motion to Dismiss of an action pertaining to identity theft but the Ohio legislative subsequently recognized the need to codify a

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<sup>1</sup> All of the cases from these courts need not be repeated in this Reply Brief. These Decisions and their respective holdings are set forth in Akron Children's Hospital Merit Brief at pages 8-11.

separate civil action pursuant to R.C. 2307.611 for criminal identity theft under R.C. 2913.04;

6. *T.P. v. Weis*, 5th Dist. 12 CAE03-0014, 2013-Ohio-1402: This case actually confirms that R.C. 2307.60 does not create a separate cause of action because the plaintiff asserted common law a right to damages under R.C. 2307.60 and, also, separately alleged claims for sexual assault and battery. Reference to the criminal statute of R.C. 2907.03 upon appeal was merely to address the punitive damages element of *mens rea*;
7. *Thomas v. Nationwide Mut. Inc. Co.*, 79 Ohio App.3d 624, 607 N.E.2d 944 (10th Dist. 1992): Although the Tenth District stated that one could “argue” that R.C. 2307.60 coupled with R.C. 2921.12 (tampering with evidence) could create a civil action for intentional spoliation of evidence, the Tenth District correctly stated that R.C. 2307.61 “specifically” creates such an action for willful damage of another’s property.

Clearly, the case law upon which Plaintiff relies in her Merit Brief is outdated, inapplicable and/or distinguishable to the factual and legal issues here. This Court need not look further than the overwhelming, longstanding and well-established precedents throughout **all** of Ohio that ostensibly and absolutely incorporate the legislature’s clear intent, *i.e.*, R.C. 2307.60 is a procedural statute that does not provide for an independent civil cause of action for all criminal acts.

### **III. CONCLUSION**

Appellee fails to adequately refute the fact that the Ninth District misinterpreted the plain language of R.C. 2307.60 and the legislature’s intent and, also, it misapplied Ohio’s longstanding precedents. The judicial and aberrant creation of an independent civil cause of action for all criminal statutes by the Ninth District is simply wrong. If the Ninth District’s Decision is left undisturbed, there will undoubtedly be confusion and uncertainty throughout Ohio with respect to R.C. 2307.60.

As the Dissent correctly noted, the Ninth District’s Decision will create “unwieldy case management ramifications” involving elements of civil actions based upon criminal acts, statutes

of limitations, caps on damages, etc. There can be no doubt that in enacting R.C. 2307.60, the legislature never intended this to be a “catch-all” cause of action for all criminal acts.

This Court should reject Appellee’s factually and legally flawed arguments and then reverse the Ninth District’s Decision.

Respectfully submitted,

*/s/ Gregory T. Rossi*

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