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

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

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

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NOTICE OF CERTIFIED CONFLICT

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

/S/ Bret C. Perry

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CERTIFICATE OF SERVICE

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

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STATE OF OHIO)
) ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JESSICA JACOBSON

Appellant

v.

ELLEN KAFOREY, et al.

Appellees

C.A. No. 26915

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2012 09 5246

DECISION AND JOURNAL ENTRY

Dated: June 30, 2015

CANNON, Judge.

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

I.

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

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

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

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

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

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

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

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

II.

ASSIGNMENT OF ERROR IX

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

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

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

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

ASSIGNMENT OF ERROR I

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

ASSIGNMENT OF ERROR II

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

ASSIGNMENT OF ERROR III

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

ASSIGNMENT OF ERROR IV

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

ASSIGNMENT OF ERROR V

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ASSIGNMENT OF ERROR VII

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

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

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

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

{¶29} R.C. 2307.50(B) provides that:

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

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

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

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

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

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

ASSIGNMENT OF ERROR VI

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

ASSIGNMENT OF ERROR VIII

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

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

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

III.

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

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

There were reasonable grounds for this appeal.

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

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

Costs taxed equally to both parties.

TIMOTHY P. CANNON
FOR THE COURT

MOORE, J.
CONCURS.

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

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

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

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

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

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

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

APPEARANCES:

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

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

STATE OF OHIO)
) ss
COUNTY OF SUMMIT)

COURT OF APP
DANIEL M. HOR
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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JESSICA JACOBSON

Appellant

v.

ELLEN KAFOREY, et al.

Appellees

C.A. No. 26915

JOURNAL ENTRY

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

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

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

APPENDIX B

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

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

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

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

Judge Timothy P. Cannon

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

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

2010 WL 3722641

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.

Amanda GROVES, Plaintiff-Appellee,
v.
James GROVES, Defendant,
Jodelle M. D'Amico, Defendant-Appellant.

No. 09AP-1107. | Decided Sept. 23, 2010.

Synopsis

Background: Insured's wife brought action against insured's brother, and brother's attorney, alleging interference with wife's rights to insured's life insurance benefit. Following wife's voluntary dismissal of brother's attorney, brother's attorney filed motion seeking an award of attorney's fees against wife and wife's attorney. The Court of Common Pleas, Franklin County, denied brother's attorney's motion, and she appealed.

Holdings: The Court of Appeals, ,Klatt, J. held that:

[1] brother's attorney's motion for attorney's fees satisfied requirements of rule that a motion must state with particularity the grounds therefor, and set forth the relief or order sought;

[2] statute that prohibited a person from interfering with another's rights under an employee welfare benefit plan could not form a basis for insured's wife's claim against insured's brother's attorney that she had interfered or attempted to interfere with wife's rights to husband's life insurance benefit, and thus, wife and her attorney acted frivolously in asserting such a claim; and

[3] wife of insured engaged in frivolous conduct by asserting a claim of extortion against insured's brother's attorney for attempting to settle dispute as to who was entitled to husband's life insurance benefits.

Reversed and remanded.

Appeal from the Franklin County Court of Common Pleas.

Attorneys and Law Firms

James W. Jordan, for appellee.

Jodelle M. D'Amico, pro se.

Opinion

KLATT, J.

***1** {¶ 1} Defendant-appellant, Jodelle M. D'Amico ("D'Amico"), appeals from a judgment of the Franklin County Court of Common Pleas denying her motion for attorney fees under R.C. 2323 .51. For the following reasons, we reverse that judgment and remand this case to the trial court.

{¶ 2} On September 27, 2007, William Groves ("William") committed suicide after attempting to murder his estranged wife, plaintiff-appellee Amanda Groves ("Amanda"). At the time of his death, William was a participant in the Central States, Southeast and Southwest Areas Health and Welfare Fund ("Fund"), which managed the health and welfare benefits provided to William by his employer. Those benefits included a life insurance benefit, for which William had designated Amanda as the sole beneficiary.

{¶ 3} After William's death, his brother, James Groves ("James"), became the legal custodian of one of William's sons. James filed a claim for William's life insurance benefit with the Fund. The Fund denied James' claim, but allowed him to appeal the denial. In the meantime, Amanda also filed a claim for the life insurance benefit. While James' appeal was pending, the Fund refused to pay Amanda the proceeds of the life insurance benefit.

{¶ 4} James had hired an attorney, D'Amico, to assist him with certain legal issues that arose from his brother's death. In a July 25, 2008 letter to Amanda's attorney, D'Amico suggested a potential resolution of James and Amanda's dispute over the life insurance benefit. D'Amico wrote:

> [James] will cease all appeals of the denial of the insurance claim if your client agrees to divide the insurance benefits between her and the minor children. She may have half and the

> other half will be divided between William's two (2) sons.

{¶ 5} Not only did Amanda reject this settlement offer, she also filed suit against both James and D'Amico. In the only claim asserted against D'Amico, Amanda alleged:

> On or about July 25, 2008, defendants attempted to extort funds from plaintiff by offering to "... cease all appeals of the denial ..." in exchange for paying one-half of the life insurance benefit, in violation of Ohio and Federal law, all to plaintiff's damage in an amount to be determined at the trial of this case, plus punitive damages and attorney's fees.

(Complaint at ¶ 11.)

{¶ 6} D'Amico filed a Civ.R. 12(B)(6) motion to dismiss, essentially arguing that the settlement offer did not give Amanda the basis for a legal claim against D'Amico. In response, Amanda stated that she premised her claim against D'Amico on 29 U.S.C. 1141, which Amanda claimed made it unlawful for D'Amico to interfere or attempt to interfere with her right to William's life insurance benefit.

{¶ 7} The trial court never ruled on D'Amico's motion to dismiss because Amanda voluntarily dismissed her claim against D'Amico. After this dismissal, D'Amico filed a motion seeking an award of attorney fees against Amanda and her attorney pursuant to R .C. 2323.51. On October 30, 2009, the trial court issued a decision and entry denying D'Amico's motion. The trial court gave two reasons for its denial of the motion: (1) D'Amico's motion did not comply with Civ.R. 7(B), which requires a motion to "state with particularity the grounds therefor," and (2) Amanda and her attorney did not engage in frivolous conduct.

***2** {¶ 8} D'Amico now appeals from the October 30, 2009 judgment, and she assigns the following error:

> THE TRIAL COURT ERRED WHEN IT REFUSED TO FIND THAT APPELLEE ENGAGED IN FRIVOLOUS CONDUCT IN ASSERTING CLAIMS THAT WERE NOT WARRANTED UNDER EXISTING LAW, OR CANNOT BE SUPPORTED BY A GOOD FAITH ARGUMENT FOR AN EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW OR CANNOT BE SUPPORTED BY A GOOD-FAITH ARGUMENT FOR THE ESTABLISHMENT OF NEW LAW.

{¶ 9} Before addressing the merits of D'Amico's argument, we must address a procedural matter. Although the trial court denied D'Amico's motion for two reasons, D'Amico's assignment of error only challenges one of those reasons. Despite this deficiency, D'Amico argues in her brief that neither reason can withstand legal scrutiny. Amanda contends that this court should disregard D'Amico's Civ.R. 7(B) argument because D'Amico failed to include reference to it in her assignment of error.

{¶ 10} App.R. 16(A)(3) requires every appellant's brief to include "[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." Noncompliance with any Rule of Appellate Procedure is ground for an appellate court to take "such action as the court * * * deems appropriate," including refusal to consider any unassigned error. App.R. 3(A). As a general matter, appellate courts rule on assignments of error only, and will not address mere arguments. *Olentangy Condominium Assn. v. Lusk,* 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶ 25. However, failure to comply with App.R. 16(A)(3) does not always result in an appellate court's refusal to consider error argued, but not assigned. An appellate court may exercise its discretion to consider arguments not separately assigned in the interest of justice. *Id.; Discover Bank v. Heinz,* 10th Dist. No. 08AP-1001, 2009-Ohio-2850, ¶ 13; *Helms v. Koncelik,* 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶ 21; *Oladele v. Adegoke-Oladele,* 10th Dist. No. 08AP-92, 2008-Ohio-4005, ¶ 3; *In re R. L.,* 10th Dist. No. 07AP-36, 2007-Ohio-3553, ¶ 5. We do so in this case.

[1] {¶ 11} D'Amico first argues that her motion for attorney fees satisfied the requirements of Civ.R. 7(B). We agree.

{¶ 12} Pursuant to Civ.R. 7(B)(1), "[a] motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." By fulfilling this requirement, the moving party provides the non-moving party with the information necessary to formulate an appropriate response to the motion. *Campbell Oil Co. v. Shepperson,* 7th Dist. No. 05 CA 817, 2006-Ohio-1763, ¶ 14; *Dale v. Dale,* 10th Dist. No. 02AP-644, 2003-Ohio-1113, ¶ 10. Additionally, Civ.R. 7(B)(1) ensures that the trial court can comprehend the basis of the motion and deal with it fairly.

AAA Am. Constr., Inc. v. Alpha Graphic, 8th Dist. No. 84320, 2005-Ohio-2822, ¶ 10.

***3** {¶ 13} In *Tosi v. Jones* (1996), 115 Ohio App.3d 396, 685 N.E.2d 580, this court considered whether a motion for attorney fees under R.C. 2323.51 met the Civ.R. 7(B)(1) requirement. There, the defendant's motion expressly alleged that the plaintiff and third party defendant asserted claims against the defendant only to "harass and maliciously injure" him, and that the claims were "not warranted under existing law and [could not] be supported by a good faith argument for an extension, modification, or reversal of existing law ." *Id.* at 401, 685 N.E.2d 580. We found that these allegations were sufficient to put the plaintiff, the third party defendant, and the trial court on notice regarding the grounds for the defendant's request for attorney fees. Thus, we concluded that the motion complied with Civ .R. 7(B)(1). Our holding resulted from our recognition that, "Civ.R. 7(B)(1) requires a particularized statement only of the grounds for the motion; it does not require the movant to provide a list of the evidence in support of those grounds." *Id.*

{¶ 14} The situation in the case at bar is almost identical to the circumstances presented in *Tosi.* Although not lengthy, D'Amico's motion set forth the language of R.C. 2323.51 that permits a party to seek attorney fees for another party's frivolous conduct. D'Amico also quoted the statutory definition of "frivolous conduct ." D'Amico then asserted that, "[a] review of the allegations in the Complaint filed by Plaintiff and her counsel against Attorney Jodelle M. D'Amico can only conclude that they are in fact frivolous, are not warranted under existing law and cannot be supported by good faith argument." (D'Amico's motion for attorney fees at 2.) Based upon this court's holding in *Tosi,* we conclude that D'Amico's motion satisfied Civ.R. 7(B)(1).

[2] {¶ 15} We next turn to D'Amico's argument that the trial court erred in concluding that Amanda's claim against her was warranted under existing law. D'Amico contends that this conclusion resulted in the trial court erroneously finding that Amanda and her attorney did not engage in frivolous conduct. We agree.

{¶ 16} Pursuant to R.C. 2323.51(B)(1), "any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." When deciding such a motion for attorney fees, a trial court engages in a two-step process. *McCallister v. Frost,* 10th Dist. No. 07AP-884, 2008-Ohio-2457, ¶ 24; *Crockett v. Crockett,* 10th Dist. No. 02AP-482, 2003-Ohio-585, ¶ 19. First, the court must determine whether an action taken by the party against whom the motion is filed constituted frivolous conduct. *Id.* Second, if the court finds the conduct frivolous, it must determine what amount, if any, of reasonable attorney fees to award the party aggrieved by the frivolous conduct. *Id.*

{¶ 17} "Frivolous conduct" includes "[c]onduct of an * * * other party to a civil action" or of the "other party's counsel of record" that "is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law." R.C. 2323.51(A)(2)(a)(iii). Under this definition of "frivolous conduct," the test is whether no reasonable attorney would have brought the action in light of the existing law. *L & N Partnership v. Lakeside Forest Assn.,* 183 Ohio App.3d 125, 916 N.E.2d 500, 2009-Ohio-2987, ¶ 37; *Stafford v. Columbus Bonding Ctr.,* 177 Ohio App.3d 799, 896 N.E.2d 191, 2008-Ohio-3948, ¶ 6. "Sanctions are inappropriate when a legitimate legal goal is asserted that is not totally without justification under existing law." *Stafford* at ¶ 27.

***4** {¶ 18} No single standard of review applies to appeals of rulings on R.C. 2323.51 motions. *Indep. Taxicab Assn. of Columbus, Inc. v. Abate,* 10th Dist. No. 08AP-44, 2008-Ohio-4070, ¶ 13. When considering whether the trial court erred in finding the conduct frivolous or not, the type of standard an appellate court uses depends upon whether the trial court's determination resulted from factual findings or a legal analysis. The question of what constitutes frivolous conduct may call for a factual determination, e.g., whether a party engages in conduct to harass or maliciously injure another party. Review of a trial court's factual findings requires an appellate court to employ a degree of deference, and we do not disturb those findings where the record contains competent, credible evidence to support them. *Id.; McCallister* at ¶ 25. On the other hand, the question of what constitutes frivolous conduct may call for a legal determination, e.g., whether a claim is warranted under existing law or could be supported by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. *Id.* We review questions of law under the de novo standard. *Id.* See also *L & N Partnership* at ¶ 37 ("Whether a claim is warranted under existing law or can be supported by a good-faith argument for an extension, modification, or reversal of existing law is a question of law, and an appellate court is not bound by the trial court's

determination."). Finally, with respect to the second step of the trial court's process, we review the trial court's award of monetary sanctions under the abuse of discretion standard. *L & N Partnership* at ¶ 51; *Abate* at ¶ 13; *Crockett* at ¶ 19.

{¶ 19} Here, because D'Amico contends that Amanda's claim is unsupported by either existing law or a good faith argument for an extension of the law, we apply the de novo standard to review the trial court's denial of D'Amico's motion. The trial court denied D'Amico's motion because it held that 29 U.S.C. 1141 provides a basis for Amanda's claim. We disagree.

{¶ 20} Pursuant to 29 U.S.C. 1141:

> It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan * * *. Any person who willfully violates this section shall be fined $100,000 or imprisoned for not more than 10 years, or both.

The "plan" referred to in 29 U.S.C. 1141 is an employee welfare benefit plan, which includes any fund established or maintained by an employer for the purpose of providing its participants, or their beneficiaries, through the purchase of insurance or otherwise, benefits in the event of sickness, accident, disability, death, or unemployment. 29 U.S.C. 1002(1) & (3). Because Amanda is a beneficiary under such a plan, 29 U.S.C. 1141 could potentially apply to the instant case. However, Amanda cannot premise her claim against D'Amico on 29 U.S.C. 1141 for two reasons. First, 29 U.S.C. 1141 makes it unlawful to restrain, coerce, or intimidate a beneficiary with "fraud, force, violence, or threat of the use of force or violence." Here, the record contains neither evidence nor allegation that D'Amico's settlement offer was fraudulent. Also, the settlement offer constitutes neither an act nor a threat of force or violence.

***5** {¶ 21} Second, and more importantly, no private right of action exists for an alleged violation of 29 U.S.C. 1141. Every federal court that has considered the question has concluded that 29 U.S.C. 1141 is a criminal provision, and thus, it is not enforceable in a civil action. *Phillips v. Amoco Oil Co.* (C.A.11, 1986), 799 F.2d 1464, 1472 ("Section 1141 is a criminal statute that provides no private right of action but allows only for criminal prosecution by the United States Attorney General."); *West v. Butler* (C.A.6, 1980), 621 F.2d 240, 246 (holding that the plaintiffs' claim based on 29 U.S.C. 1141 failed because that section "may be enforced only in a criminal proceeding instituted by the Attorney General"); *Puga v. Williamson-Dickie Mfg. Co.* (Oct. 16, 2009), N.D.Tex. No. 4:09-CV-335-A ("[Section] 1141 contains no private right of action, but is instead a criminal provision, the enforcement of which is the exclusive prerogative of the Attorney General."); *Barbera v. Minn. Mining and Mfg. Co. Long-Term Disability Plan/Preferred Works Group* (Oct. 26, 2004), D .Minn. No. Civ. 04-1598DWFSRN (dismissing the plaintiff's 29 U.S.C. 1141 claim because that section "is a criminal statute meant to give law enforcement officials the right to prosecute individuals who coercively interfere with a beneficiary's rights under a pension plan"); *Mouly v. E.I. DuPont de Nemours & Co.* (Sept. 11, 1998), W.D.Va. No. Civ.A. 98-0020-H, fn. 5 ("Section 511 of ERISA, 29 U.S .C. § 1141[,] provides criminal sanctions for certain actions and does not allow enforcement of its provisions via private causes of action."); *Korchek v. Nichols-Homeshield* (Sept. 30, 1997), N.D.Ill. No. 95 C 0025 (granting summary judgment on a claim premised on 29 U.S.C. 1141 because that section "is a criminal provision for which there is no private cause of action"); *Brownstein v. Hewlett-Packard Co.* (Mar. 18, 1997), E.D.Pa. No. CIV. A. 95-2459 ("No private right of action exists for alleged violations of § 1141."); *Levine v. Crowntuft Mfg. Corp.* (July 24, 1991), S.D.N.Y. No. 89 Civ. 7548(MJL), fn. 2 ("29 U.S.C. § 1141, unlike § 1140, is a criminal provision of ERISA which does not provide for a private right of action."); *Goodson v. Cigna Ins. Co.* (May 20, 1988), E.D.Pa. CIV. A. No. 85-0476 (rejecting the plaintiff's 29 U.S.C. 1141 claim because that section "does not provide a *private* cause of action; it is a criminal provision whose enforcement is the exclusive prerogative of the Attorney General") (emphasis sic); *Champ v. Am. Public Health Assn.* (June 30, 1987), D.D.C. Civ. A. No. 86-1818, affirmed by (C.A.D.C.1988), 851 F.2d 1500 (table) ("Plaintiffs, however, cannot assert a private cause of action under 29 U.S.C. § 1141 and, thus, leave shall not be granted to add this claim to the complaint."); *Phillips v. Amoco Oil Co.* (N.D.Ala.1985), 614 F.Supp. 694, 724, affirmed by (C.A.11, 1986), 799 F.2d 1464 ("As every court which has addressed this question has concluded, Section 1141 provides no private right of action whatsoever, but simply allows for criminal prosecution of certain egregious forms of conduct

already prohibited by Section 1140."); *Goins v. Teamsters Loc. 639-Employers Health & Pension Trust* (D.D.C.1984), 598 F.Supp. 1151, 1155 (holding that "the plaintiffs cannot assert a private right of action under section 1141" because that section "is a criminal provision whose enforcement is the exclusive prerogative of the Attorney General").

***6** {¶ 22} The trial court recognized that 29 U.S.C. 1141 is a criminal provision. The court, however, found that basing a claim on that statute was not frivolous conduct because "[f]rivolous conduct amounts to something more than filing an action where the right of enforcement is left solely to the United States Justice Department." (Decision and entry at 4.) We disagree. As we stated above, frivolous conduct occurs when a party or her attorney asserts a claim that no reasonable attorney would assert in light of the existing law. Absent express authorization, criminal statutes do not create civil causes of action. *Williams v. Griffith,* 10th Dist. No. 09AP-28, 2009-Ohio-4045, ¶ 8; *Williams v. Lo,* 10th Dist. No. 07AP-949, 2008-Ohio-2804, ¶ 25; *Biomedical Innovations, Inc. v. McLaughlin* (1995), 103 Ohio App.3d 122, 126, 658 N.E.2d 1084. Accordingly, we conclude that no reasonable attorney would rely on 29 U.S.C. 1141 as a basis for asserting a civil cause of action, and thus, Amanda and her attorney acted frivolously in asserting such a claim.

[3] {¶ 23} Perhaps recognizing the infirmity in the trial court's reasoning, Amanda raises a new argument on appeal. Ordinarily, failure to assert an argument at the trial court level results in forfeiture of that argument, and appellate courts will decline to consider it. *State ex rel. Ohio Civ. Serv. Emp. Assn., AFSCME, Loc. 11, AFL-CIO v. State Emp. Relations Bd.,* 104 Ohio St.3d 122, 818 N.E.2d 688, 2004-Ohio-6363, ¶ 10. Nevertheless, we will consider Amanda's argument because she advanced it in an unrelated motion that was pending before the trial court when it decided D'Amico's motion for attorney fees.

{¶ 24} In her new argument, Amanda contends that R.C. 2307.60 authorizes her claim against D'Amico. Pursuant to R.C. 2307 .60(A)(1), "[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 * * *." According to Amanda, D'Amico's settlement offer constituted a threat to continue committing the felony specified in 29 U.S.C. 1141. Under Ohio law, a person perpetrates the offense of extortion if she, "with purpose to obtain any valuable thing or valuable benefit * * *, [t]hreaten[s] to commit any felony." R.C. 2905.11(A)(1). Thus, Amanda argues that D'Amico acted criminally when she made the settlement offer. Amanda claims that because D'Amico's criminal act-extortion-injured her, R.C. 2307.60 entitles her to sue D'Amico.

{¶ 25} Amanda's argument fails for two reasons. First, as we explained above, the record contains neither evidence nor allegation that D'Amico acted fraudulently or with force or violence. Thus, the settlement offer is not a threat to commit a felony, and consequently, it fails to qualify as an act of extortion. Second, R .C. 2307.60 does not create a cause of action. *McNichols v. Rennicker,* 5th Dist. No.2002 AP 04 0026, 2002-Ohio-7215, ¶ 17; *Edwards v. Madison Twp.* (Nov. 25, 1997), 10th Dist. No. 97AP-819; *Applegate v. Weadock* (Nov. 30, 1995), 3d Dist. No. 2-95-24; *Guardianship of Newcomb v. Bowling Green* (Nov. 6, 1987), 6th Dist. No. WD-87-5. R.C. 2307.60 is only a codification of the Ohio common law rule that a civil action is not merged into a criminal prosecution for the same acts that form the basis for the civil action. *Id.* A party must rely on a separate civil cause of action, existent either in the common law or through statute, to bring a civil claim based on a criminal act. *McNichols* at ¶ 17; *Edwards.*

***7** {¶ 26} Having addressed each of Amanda's arguments, we reach the bottom line: no civil cause of action for extortion exists. Amanda's attempts to fashion such a cause of action are all unavailing. Because Amanda's extortion claim against D'Amico cannot be justified under current law or any extension of the current law, we conclude that asserting the claim was frivolous conduct. Accordingly, we sustain D'Amico's assignment of error.

{¶ 27} For the foregoing reasons, we sustain the sole assignment of error, and we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for further proceedings consistent with law and this opinion.

Judgment reversed; cause remanded.

FRENCH and McGRATH, JJ., concur.

All Citations

Slip Copy, 2010 WL 3722641, 2010 -Ohio- 4515

End of Document

1997 WL 746415
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.

Ronald G. EDWARDS, Plaintiff-Appellant,
v.
MADISON TOWNSHIP et al., Defendants-Appellees.

No. 97APE06-819. | Nov. 25, 1997.

APPEAL from the Franklin County Court of Common Pleas.

Attorneys and Law Firms

Moore, Yaklevich & Mauger, W. Jeffrey Moore and Jud R. Mauger, for appellant.

Crabbe, Brown, Jones, Potts & Schmidt, and Larry James, for appellees.

OPINION

TYACK, P.J.

***1** On November 2, 1995, Ronald G. Edwards filed a complaint in the Franklin County Court of Common Pleas against Madison Township, the Madison Township Police Department ("department"), Charles R. Stevens, Chief of Police, [1] the Fraternal Order of Police, Capital City Lodge No. 9 ("FOP"), Madison Township Administrator David Brobst and Dennis White, Vicki Phillips and Robert Garvin, Madison Township trustees. The complaint set forth various claims for relief, including: breach of contract, violation of R.C. 4113.52 (whistleblower statute), violation of Sections 1983, 1985 and 1988, Title 42, U.S.Code, "violation" of R.C. 2905.12 (coercion), "violation" of R.C. 2921.31 (obstructing official business) and intentional infliction of emotional distress. The FOP was later dismissed as a party.

A jury trial commenced on April 7, 1997. At the close of Mr. Edwards' case, the defendants (hereinafter collectively referred to as "appellees") moved for a directed verdict. The trial court granted the motion as to all of Mr. Edwards' claims. A decision and judgment entry were filed on May 20, 1997.

Mr. Edwards (hereinafter "appellant") has appealed to this court, assigning one error for our consideration:

> "THE COMMON PLEAS COURT ERRED IN GRANTING A DIRECTED VERDICT TO THE APPELLEE."

When a motion for a directed verdict is made, what is being tested is a question of law-the legal sufficiency of the evidence to take the case to the jury. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68, 430 N.E.2d 935. In considering such a motion, the trial court must construe the evidence most strongly in favor of the nonmoving party and consider neither the weight of the evidence nor the credibility of witnesses. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284, 423 N.E.2d 467. The benefit of all reasonable inferences is given to the nonmoving party. *Ruta* at 68, 430 N.E.2d 935.

In order to submit the case to the jury, the plaintiff must produce some evidence as to every essential element. See *Strother* at 285, 423 N.E.2d 467. If there is substantial competent evidence to support the nonmoving party upon which evidence reasonable minds might reach different conclusions, the motion must be denied. *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119, 671 N.E.2d 252.

All of appellant's claims centered around his employment as a police officer with Madison Township. At the time of the incidents alleged in the complaint, appellant was a detective, and Charles F. Stevens was Chief of Police. In July 1994, appellant learned of an incident involving Chief Stevens and a juvenile who had been arrested. In July or August 1994, appellant, in his capacity as detective, was given "a suspected physical abuse" report from Children's Hospital. In the report, the juvenile alleged that Chief Stevens had beaten and choked him.

***2** On the day he received the report, appellant spoke with Chief Stevens about the incident and asked the Chief how he should handle it. The Chief told appellant that the incident involved merely an "attitude adjustment," that appellant should not worry about it and that he (the Chief) would take care of it. Appellant told Chief Stevens that he thought the Chief should not handle it, but the Chief told appellant it

was not appellant's problem. Appellant tape recorded this conversation.

Approximately one week later, appellant received a message from Franklin County Children Services regarding the incident with the juvenile. Chief Stevens took the message and said he would handle it. Soon thereafter, Chief Stevens told appellant that he had spoken with the juvenile's mother and everything was fine.

On September 12, 1994, appellant was injured on the job in an unrelated incident. Appellant immediately went on injury leave.

In December 1994, while still on injury leave, appellant met with Trustee Phillips regarding the juvenile incident. Appellant told her everything he knew about the matter, including the fact that he had a tape recording of his conversation with the Chief, and related his concern over whether the matter was being handled properly.

By January 1995, appellant's injury leave had run out, and he was using his sick leave. On January 6, 1995, the Chief wrote appellant a letter indicating that medical documentation was necessary to continue appellant's use of sick leave. In addition, appellant was ordered to report for light duty on January 16, 1995 if such documentation was not provided. The letter also indicated that appellant would be placed on unpaid leave status if he failed to report for duty and that appellant may be subject to disciplinary action.

On January 16, 1995, appellant had not provided medical documentation, and Chief Stevens placed appellant on leave without pay status and filed disciplinary charges against appellant.[2] Ultimately, appellant provided medical documentation in support of his continued absence from work, and appellant's pay was reinstated retroactively. In addition, the disciplinary charges against appellant were resolved, in essence, in favor of appellant.

On January 19, 1995, Chief Stevens wrote appellant a letter informing him that preliminary results of an internal investigation into appellant's job performance indicated appellant was negligent in his duties and that effective January 21, 1995, appellant was administratively reassigned to patrol operations.

On November 28, 1995, disciplinary charges were filed against appellant. Again, these charges arose out of appellant's failure to provide medical documentation as to his continued absence from work. These charges were dismissed after appellant provided the necessary documentation.

Appellant never returned to work after his September 12, 1994 injury. At some point, appellant applied for and went on permanent disability retirement.

***3** The foregoing facts essentially constitute the bases for appellant's claims. Utilizing the directed verdict standards set forth above, we must determine whether or not a directed verdict as to appellant's claims was appropriate. We will address each claim individually.

Appellant contends appellees' actions constituted breach of contract, specifically, breach of the collective bargaining agreement ("agreement") between Madison Township and the FOP. Appellant asserts he produced sufficient evidence that appellees breached the agreement. However, a directed verdict as to this claim was appropriate because the common pleas court lacked jurisdiction over this claim.

In *State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc. v. Franklin Cty. Court of Common Pleas* (1996), 76 Ohio St.3d 287, 667 N.E.2d 929, citing *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St.3d 167, 572 N.E.2d 87, paragraph two of the syllabus, the Supreme Court of Ohio stated that if a party asserts claims arising from or dependent on collective bargaining rights created by R.C. Chapter 4117, the remedies provided in such chapter are exclusive. The State Employees Relations Board ("SERB") has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117. *Franklin County Law Enforcement Assn.* at paragraph one of the syllabus.

There are two general areas in which SERB has exclusive jurisdiction over charges of unfair labor practices: (1) where one of the parties files charges with SERB alleging an unfair labor practice under R.C. 4117.11, or (2) where a complaint brought before the common pleas court alleges conduct that constitutes an unfair labor practice specifically enumerated in R.C. 4117.11, and the trial court dismisses the complaint for lack of subject-matter jurisdiction. *State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc.* at 289, 667 N.E.2d 929, citing *E. Cleveland v. E. Cleveland Firefighters Local 500, I.A.F.F.* (1994) 70 Ohio St.3d 125, 127-128, 637 N.E.2d 878.

The alleged wrongful acts of appellees in "demoting" appellant and "suspending" appellant's pay, if true, would constitute unfair labor practices under R.C. 4117.11(A)(1). Because appellant's breach of contract claim arises from and/or is dependent upon the agreement, such claim should have been brought through SERB. Accordingly, although for reasons different than the trial court's, a directed verdict as to appellant's breach of contract claim was appropriate.

Appellant also contends that he produced sufficient evidence of a Section 1983, Title 42, U.S.Code ("Section 1983") claim. Section 1983 provides a remedy to persons whose federal rights have been violated by governmental officials. *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, 116, 585 N.E.2d 407, citing *Monroe v. Pape* (1961), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492,overruled on other grounds in *Monnell v. Dept. of Social Services of City of New York* (1978), 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611. Section 1983 itself does not create constitutional rights; it creates a cause of action for the vindication of constitutional guarantees found elsewhere. *Shirokey* at 116, 585 N.E.2d 407, quoting *Braley v. City of Pontiac* (C.A.6, 1990), 906 F.2d 220, 223. Section 1983 is limited to deprivations of federal statutory and constitutional rights. *Shirokey* at 116, 585 N.E.2d 407.

***4** The elements of a Section 1983 claim are as follows: (1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 34, 550 N.E.2d 456, citing *Parratt v. Taylor* (1981), 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420. Here, appellant basis his Section 1983 claim on the alleged deprivation of two constitutional rights: procedural due process and free speech. We will address each claim separately.

Appellant contends he had his pay and/or employment suspended and was demoted without due process. We note first that there is no evidence that appellant's employment was ever suspended. Indeed, although appellant never returned to work after his September 12, 1994 injury, he continued his employment with the department using injury and sick leave. It is undisputed, however, that appellant was placed on unpaid leave status. The question we must answer is whether or not appellant produced sufficient evidence showing that this violated Section 1983.

In order to establish a procedural due process violation, it must be shown that the conduct complained of deprived plaintiff of a liberty or property interest without adequate procedural safeguards. *Roe v. Franklin Cty.* (1996), 109 Ohio App.3d 772, 779, 673 N.E.2d 172, citing *Bd. of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548. As such, it is not the deprivation itself that is actionable, it is the deprivation without due process of law. *Shirokey* at 119, 585 N.E.2d 407, quoting *Zinermon v. Burch* (1990), 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100.

Hence, to determine whether a constitutional violation has occurred, it is necessary to ask what process the state provided and whether it was constitutionally adequate. *Id.* When the claim is based on deprivation without due process of a purely economic interest, the plaintiff must show inadequacy of state remedies. *1946 St. Clair Corp.* at syllabus. No due process violation occurs when the state provides an adequate post-deprivation remedy for loss of property. *Id.* at 34, 550 N.E.2d 456.

Applying these standards to the case at bar, we conclude a directed verdict against appellant was proper. As to appellant's "demotion," appellant produced no evidence that what occurred was in fact a demotion. Appellant was administratively reassigned from investigations to patrol operations. Other than this "reassignment" on paper, appellant's status otherwise remained unchanged. Appellant complains that his hours were changed from a day shift to a night shift; however, appellant never had to work such hours because he never actually returned to work.

***5** Given the above, appellant failed to produce sufficient evidence of a deprivation of a property interest. Even if we were to assume that the administrative reassignment constituted a deprivation of a property interest, there existed an adequate procedural safeguard. Appellant could have instituted the grievance procedure pursuant to Article II, Section 4 of the agreement.[3] Appellant did not do so and, further, appellant failed to otherwise show inadequacy of state remedies for this alleged deprivation.

Appellant also contends his pay was "suspended" without due process. First, appellant failed to show that he had a property interest in any pay that was suspended. Appellant was put on unpaid leave status only after he failed to document his use of sick leave.

Article 19, Section 5 of the agreement provides that a member who uses all of his or her injury leave and is still unable to return to active duty may, with the approval of the Chief of Police, use any accumulated paid leave time to which he or she is otherwise entitled. Article 20, Section 3 provides that the Chief of Police or Board of Trustees may require evidence as to the adequacy of the reasons for any member's absence for which sick leave is requested, including verification from a licensed practitioner.

Chief Stevens requested appellant provide medical documentation substantiating appellant's continued use of sick time. When such documentation was not forthcoming, appellant was placed on unpaid leave. Appellant produced no evidence or case law showing that he had a property interest in continued pay despite his failure to document his absence from work.

Even if we concluded that appellant had a property interest in continued pay regardless of the fact that appellant was, essentially, on an unexcused leave of absence, an adequate remedy was available. Appellant was given written notice of his responsibility to provide medical documentation to justify his use of sick leave. Appellant was informed that if such was not forthcoming, he would be placed on unpaid leave status.

As already noted, appellant was placed on unpaid leave status when such documentation was not provided. However, appellant did later provide such documentation, and his use of sick leave was permitted and his pay was reinstated retroactively. Hence, appellees provided an adequate post-deprivation remedy. In addition, if appellant believed that the agreement was somehow breached with regard to appellees' conduct, he could have invoked the grievance procedure. Thus, no due process violation occurred as to any alleged deprivation of a property interest.

Appellant also contends that appellees deprived him of his First Amendment right of free speech. It is virtually impossible to glean from the record the basis for this allegation. In his brief, appellant contends that after he discussed the matter involving the Chief and the juvenile with another officer and a trustee, the Chief began engaging in retaliatory action. However, there is little if no evidence to support this allegation.

***6** Appellant had to produce some evidence showing that appellant's conduct/speech was a substantial or motivating factor in appellees' adverse action. See *Mt. Healthy City Bd. of Ed. v. Doyle* (1977), 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471. There is no evidence other than mere speculation (not even a reasonable inference) that the Chief's actions were retaliatory for appellant's exercise of his right of free speech or that such exercise of speech was a substantial or motivating factor in appellees' actions. Hence, a directed verdict as to this portion of the 1983 claim was also proper.

Appellant also brought a Section 1985, Title 42, U.S.Code ("Section 1985") action. Section 1985, in general, addresses conspiracies to deprive individuals of their civil rights or of equal protection of the law.

Appellant's discussion in his brief of the Section 1985 claim states only that appellant presented evidence that Chief Stevens acted in conjunction with Administrator Brobst and the trustees to deprive him of his due process rights. There is no cite to the record where such evidence is found, and this court cannot find evidence of a conspiracy. Hence, a directed verdict on appellant's Section 1985 claim was proper.

Appellant's next claim for relief is intentional infliction of emotional distress. In *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 453 N.E.2d 666, syllabus, the Supreme Court of Ohio held that one, who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another, is subject to liability for such emotional distress. The elements for a claim of intentional infliction of emotional distress are: (1) the defendant intended to cause emotional distress, or knew or should have known that the actions taken would result in serious emotional distress; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious. *Hanly v. Riverside Methodist Hosp.* (1991), 78 Ohio App.3d 73, 82, 603 N.E.2d 1126, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34, 463 N.E.2d 98.

Appellant failed to produce evidence on certain elements. Appellant contends that the disciplinary charges filed against him, the pay "suspensions," the "demotion" and shift change constituted conduct that was extreme and outrageous. However, and as previously discussed, appellant failed to show that appellees engaged in conduct that was illegal, unconstitutional or otherwise unjustifiable. Hence, it cannot be said nor was it proven that appellees' conduct was extreme and outrageous or that it was done with the intent to cause emotional distress. See *Hanly* at 82, 603 N.E.2d 1126, quoting

Uebelacker v. Cincom Systems, Inc. (1988), 48 Ohio App.3d 268, 277, 549 N.E.2d 1210.

***7** Failure to produce sufficient evidence as to any of the elements above makes a directed verdict as to an intentional infliction of emotional distress claim proper. Hence, a directed verdict in this case was appropriate.

Appellant next contends that he produced sufficient evidence showing "violations" of R.C. 2905.12 and 2921.31. These, of course, are criminal statutes. Appellant asserts that R.C. 2307.60 allows civil recovery for criminal acts and that he produced evidence showing these acts were committed. R.C. 2307.60, in effect at the relevant time herein, stated:

> "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. No record of a conviction, unless obtained by confession in open court, shall be used as evidence in a civil action brought pursuant to this section."

However, R.C. 2307.60 does not create a separate cause of action. Instead, R.C. 2307.60 (formerly R.C. 1.16) is merely a codification of the common law that a civil action is not merged in a criminal prosecution. *Schmidt v. Statistics, Inc.* (1978), 62 Ohio App.2d 48, 49, 403 N.E.2d 1026, citing *Story v. Hammond* (1831), 4 Ohio 376, 378; *Peterson v. Scott Constr. Co.* (1982), 5 Ohio App.3d 203, 204, 451 N.E.2d 1236. Hence, a separate cause of action must be available before this section is invoked.

Appellant has not pointed to any separate cause of action, other than the claims for relief specifically enumerated (breach of contract, intentional infliction of emotional distress, violation of the whistleblower statute, and the Section 1983 and 1985 claims), that would entitle him to recovery above and beyond that which is available to him through those specific claims. This court is unaware of any civil coercion or obstruction of official business cause of action. Hence, a directed verdict as to his R.C. 2307.60 "claim" was appropriate.

Appellant's final claim for relief was an alleged violation of R.C. 4113.52, commonly referred to as "the whistleblower statute." Appellant contends he produced sufficient evidence showing appellees' conduct was retaliatory for appellant exposing Chief Stevens' assault on the juvenile. Again, appellant failed to produce evidence that appellees' actions were retaliatory or were for any reasons other than appellant's failure to document his use of sick leave or legitimate reasons.

While this court is cognizant of the possibility of pretext in any of these types of cases, appellant had to produce more evidence to support his claim. Appellant contends one could infer retaliatory conduct from the timing of appellees' actions. However, this argument assumes that there were no legitimate reasons for appellee's conduct. Again, appellant failed to produce sufficient evidence showing such conduct was merely pretext.

***8** Hence, a directed verdict on appellant's R.C. 4113.52 claim was also appropriate.

In summary, appellant failed to produce sufficient evidence on his claims to survive a motion for a directed verdict. Accordingly, appellant's sole assignment of error is overruled.

Having overruled appellant's assignment of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

DESHLER and PETREE, JJ., concur.

All Citations

Not Reported in N.E.2d, 1997 WL 746415

Footnotes

1 Chief Stevens died during the pendency of the case below.

2 Related disciplinary charges were also filed on February 8, 1995.

3 That section reads:

> "Members who believe that they have been improperly treated, in connection with a requested or administrative permanent or temporary assignment change, may invoke the Grievance and Arbitration Procedure in accordance with this Agreement. * * * "

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2002 WL 31883700

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Tuscarawas County.

Alisa McNICHOLS, Plaintiff–Appellant,
v.
Brian RENNICKER, Defendant–Appellee.

No. 2002 AP 04 0026. | Decided Dec. 18, 2002.

Female who had personal relationship with male brought action against male, asserting claims of civil assault, civil battery, intentional infliction of emotional distress, and statutory claims for being victim of criminal acts. Male brought counterclaim that set forth claims of civil assault and false accusations resulting in lost wages and humiliation. Following a bench trial, the Court of Common Pleas, Tuscarawas County, No. 2001 CT 01 0035, issued decision stating that neither party had proven their claims. Female appealed. The Court of Appeals, Edwards, J., held that: (1) competent, credible evidence supported finding that male did not commit civil assault or civil battery; (2) statute providing that anyone injured in person or property by criminal act has civil action unless specifically excepted by law does not create a cause of action; and (3) civil cause of action does not exist for menacing by stalking or for telephone harassment.

Affirmed.

Civil Appeal from Tuscarawas County Court of Common Pleas, Case 2001 CT 01 0035.

Attorneys and Law Firms

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Hank F. Meyer, New Philadelphia, OH, for defendant-appellee.

Opinion

EDWARDS, J.

***1** {¶ 1} Plaintiff-appellant Alisa McNichols [hereinafter appellant] appeals the March 12, 2002, Judgment Entry of the Tuscarawas Court of Common Pleas. In that Judgment Entry, the trial court found that appellant had failed to prove civil claims brought against defendant-appellee Brian Rennicker [hereinafter appellee].

STATEMENT OF THE FACTS AND CASE

{¶ 2} On January 17, 2001, appellant filed a civil complaint in the Tuscarawas County Court of Common Pleas. In the complaint, appellant brought claims for civil assault, civil battery and intentional infliction of emotional distress and claims pursuant to R.C. 2307.60. Appellant's claims brought pursuant to R.C. 2307.60 were based upon allegations that appellee committed menacing by stalking and telephone harassment. Appellee filed a counterclaim claiming civil assault and false accusations resulting in lost wages and humiliation.

{¶ 3} A civil trial was held on January 27, 2002. At the trial, appellant testified that she and appellee had a personal relationship that was often times troubled. According to appellant, on March 30, 2000, appellee entered appellant's apartment without permission and an argument ensued. Appellant testified that, despite being told to leave, appellee did not leave and started throwing appellant's things around. Appellant admitted that, at that point, she hit appellee. Appellant claimed that appellee then hit her in the face and threw her to the floor. Appellant claimed that when she fell to the floor, her elbow was injured. Appellant underwent multiple surgeries and incurred medical bills.

{¶ 4} Appellant also testified that even though she told appellee not to call her, appellee began to call her after she was released from the hospital. Appellant testified that sometimes appellee would not say anything, but other times appellee would speak to appellant. Appellant testified that she asked appellee to stop calling and ultimately filed a police report.

{¶ 5} Appellant testified that she had sought and obtained a civil protection order [hereinafter CPO] against appellee in a different case. In granting the CPO, the trial court held, in relevant part, that appellee had made multiple hang up phone calls to appellant and that appellee "knowingly engaged in a pattern of conduct designed to cause [appellant] to believe that he will cause physical harm to [appellant] or cause mental distress to [appellant] ." CPO, para. 10. The trial court also found that appellant "is very fearful of [appellee] since the 3/30/00 incident. The repeated pattern

of phone calls and unwanted contacts have caused mental distress to [appellant]." *Id.* As to allegations regarding injuries to appellant's elbow, the trial court made no definite findings as to how the injury occurred, noting that the parties had differing versions of what happened. *Id.* at para. 3. Appellant entered the CPO into evidence.

{¶ 6} Appellee testified, providing a different account of events. Appellee admitted he was in appellant's apartment on the date in question. However, appellee claimed that it was appellant who hit appellee. Appellee stated that through appellant's assault of appellee, appellant caused her own injury to her elbow.

***2** {¶ 7} After the bench trial, the trial court issued a decision on March 12, 2002. The trial court found that appellant had failed to prove her claims and found that appellee had failed to prove his counterclaims.

{¶ 8} It is from the March 12, 2002, Judgment Entry that appellant appeals, raising the following assignment of error:

{¶ 9} "THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF HAD FAILED TO PROVE HER CLAIMS BY A PREPONDERANCE OF THE EVIDENCE."

[1] {¶ 10} In the sole assignment of error, appellant contends that the trial court erred when it found that appellant failed to prove her civil claims by a preponderance of the evidence. We disagree.

{¶ 11} We will first consider appellant's argument that the record supports appellant's claims for civil battery and civil assault. Appellant contends that the record demonstrates that appellee committed civil battery against appellant on March 30, 2000, when appellee caused appellant to suffer a fractured arm. Appellant contends that the record also demonstrates that appellee committed civil assault against appellant based upon appellant's testimony at trial in which she testified that appellee's aggressive and hostile conduct in appellant's home caused her to fear for her safety.

{¶ 12} In essence, appellant raises manifest weight of the evidence issues. A judgment supported by competent and credible evidence going to all the elements of the case must not be reversed, by a reviewing court as being against the manifest weight of the evidence. *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 488 N.E.2d 857.

{¶ 13} The tort of battery consists of an "intentional, unconsented-to touching." *Anderson v. St. Francis–St. George Hosp., Inc.* (1996), 77 Ohio St.3d 82, 83, 671 N.E.2d 225; See also *Love v. City of Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166. The tort of assault consists of "the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. The threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching." *Smith v. John Deere Co.* (1993), 83 Ohio App.3d 398, 406, 614 N.E.2d 1148.

{¶ 14} There is competent and credible evidence to support the trial court's conclusion that appellee was not civilly liable for civil assault and civil battery. Appellee testified that it was appellant that was caustic and abusive that day. Appellee testified that appellant kneed him in the head. Then, at a later point, as appellee left appellant's apartment, appellant threw a full pop can at appellee's head, hitting appellee in the head. Appellant's second attempt to throw the pop can at appellee resulted in pop on the floor and appellant slipping in the pop. Appellee testified that appellant injured her elbow when she slipped in the pop. Appellee denied causing appellant's injury and denied being aggressive and hostile. We find that there was competent, credible evidence upon which the trial court could rely to find that appellee had not committed civil assault or civil battery.

***3** {¶ 15} We note that appellant and appellee presented conflicting accounts of the events of March 30, 2000. The Ohio Supreme Court has held that the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact, and an appellate court may not substitute its judgment for that of the fact finder. *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277. The fact finder is free to believe all, part, or some of the testimony of each witness. *State v. Caldwell* (1992), 79 Ohio App.3d 667, 679, 607 N.E.2d 1096. The trial court apparently believed appellee's account of the events on March 30, 2000.

{¶ 16} Appellant also argues that the record supports appellant's claims for menacing by stalking [1] and telephone harassment. [2] Appellant brought these claims pursuant to R.C. 2307.60. [3] First, appellant argues that the doctrine of collateral estoppel prevents appellee from re-litigating whether appellee engaged in menacing by stalking and telephone harassment since the factual findings made in the Judgment Entry which granted appellant a CPO against

appellee included findings of menacing by stalking and telephone harassment. Second, appellant argues that even if collateral estoppel is not applied, the evidence at trial supported a finding that appellee violated the criminal statutes prohibiting menacing by stalking and telephone harassment.

[2] [3] [4] {¶ 17} We find that we do not reach the arguments raised by appellant. Appellant's civil claims were brought pursuant to R.C. 2307.60. Revised Code 2307.60 does not create a cause of action. *Peterson v. Scott Construction Co.* (1982), 5 Ohio App.3d 203, 204–205, 451 N.E.2d 1236. *Edwards v. Madison Township* (Nov. 25, 1997), Franklin App. No. 97APE06–819, 1997 WL 746415; *Applegate v. Wedock* (Nov. 30.1995), Auglaize App. No. 2–95–24, 1995 WL 705214. "[Revised Code 2307.60] 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." *Schmidt v. Statistics, Inc.* (1978), 62 Ohio App.2d 48, 49, 403 N.E.2d 1026 (citing *Story v. Hammond* (1831), 4 Ohio 376, 378; *Peterson v. Scott Constr. Co., supra*). But, a separate civil cause of action must be available to bring a civil claim based upon a criminal act. *Id.* This court is unaware of a civil cause of action of "menacing by stalking" or "telephone harassment." Since no cause of action exists, there can be no recovery for appellant. In accord, *Edwards, supra;*

{¶ 18} *Appelgate, supra.* Therefore, appellant's arguments concerning 2307.60 are meritless.

{¶ 19} Appellant's sole assignment of error is overruled.

{¶ } The judgment of the Tuscarawas Court of Common Pleas is affirmed.

Judgment affirmed.

HOFFMAN, P.J., and BOGGINS, J. concur.

All Citations

Not Reported in N.E.2d, 2002 WL 31883700, 2002 -Ohio- 7215

Footnotes

1 "(A) No person by engaging in a pattern of conduct shall knowingly cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.... (D) As used in this section: (1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents. Actions or incidents that prevent, obstruct, or delay the performance by a public official, firefighter, rescuer, emergency medical services person, or emergency facility person of any authorized act within the public official's, firefighter's, rescuer's, emergency medical services person's, or emergency facility person's official capacity may constitute a "pattern of conduct." (2) "Mental distress" means any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment." R.C. 2903.211.

2 "(A) No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunications device under the person's control, to another, if the caller does any of the following: ... (5) Knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises.

"(B) No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person." R.C. 2917.21, in relevant part.

"No person shall, while communicating with any other person over a telephone, threaten to do bodily harm or use or address to such other person any words or language of a lewd, lascivious, or indecent character, nature, or connotation for the sole purpose of annoying such other person; nor shall any person telephone any other person repeatedly or cause any person to be telephoned repeatedly for the sole purpose of harassing or molesting such other person or his family." R.C. 4931.31.

3 "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. R.C. 2307.60.

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1995 WL 705214
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Third District, Auglaize County.

William APPLEGATE Plaintiff-Appellant
v.
Michael WEADOCK, et al. Defendants-Appellees

No. 2-95-24. | Nov. 30, 1995.

Civil Appeal from Common Pleas Court.

Attorneys and Law Firms

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OPINION

HADLEY, J.

***1** Plaintiff-Appellant, William Applegate ("appellant"), appeals from the judgment of the Auglaize County Court of Common Pleas, which granted summary judgment to Defendants-Appellees, Michael Weadock and the City of St. Marys ("Weadock", "St. Marys" and/or "appellees") and dismissed appellant's complaint against appellees. Appellant also appeals from the judgment of the trial court which dismissed the claims against St. Marys regarding attorney fees and punitive damages.

Appellant was a sergeant in the St. Marys Police Department for approximately seventeen years, when, in April and May 1991, he participated in the promotional process for Chief of Police. Appellee Weadock, at the time period at issue, was the Director of Safety and Service for the City of St. Marys. Appellant placed first on the eligibility list for Chief of Police as a result of the promotional process.

After an internal investigation of appellant on allegations of police misconduct (illicit drug use and leaking information), appellant was terminated by appellee Weadock from the police department on July 17, 1991. The person placing second on the list was appointed to the Chief of Police position. Appellant appealed his termination to the St. Marys Civil Service Commission ("Commission"). On November 26, 1992, after a hearing on the matter, the commission ordered appellant to be reinstated and appointed Chief of Police of the St. Marys Police Department, and, also, to receive backpay.

Subsequently, on December 21, 1992, appellant filed the within action in the Auglaize County Common Pleas Court, seeking damages based upon a contract claim and several tort claims. Appellant timely appealed the trial court's judgments and timely asserts three assignments of error therefrom.

Assignment of Error Number One

The trial court erred in granting Defendants' Motion for Summary Judgment.

In his complaint, appellant set forth six claims for relief against appellees: breach of contract, wrongful discharge, negligent termination, R.C. 2307.60 remedy, negligent infliction of emotional distress, and intentional infliction of emotional distress. The trial court determined that appellant's motion contra appellees' motion for summary judgment attempted to create genuine issues of material fact but was supported only by "speculation, conclusions, and inferences on inferences"; and, thus, was not sufficient to overcome appellees' motion. In his brief, appellant raises six "issues for review" in the context of this assignment of error. We will address each of appellant's claims as raised in the complaint separately and whether appellant has presented evidence on the claims to sufficiently present genuine issues of material fact.

Breach of Contract

First, in regards to appellant's breach of contract claim, we do not find Ohio case law to support appellant's claim. Appellant relies upon *Shirokey v. Marth* (1992), 63 Ohio St.3d 113, to support this claim. In *Shirokey,* the Ohio

Supreme Court addressed the issue of whether the plaintiff-firefighter's failure to be promoted violated the plaintiff's substantive due process. Therein, the Ohio Supreme Court stated that although plaintiff's substantive due process rights were not invoked, the plaintiff could seek redress with a state breach of contract claim. To support this contention, the court relied upon *Charles v. Baesler* (C.A.6, 1990), 910 F.2d 1349. In *Charles,* the Sixth Circuit Court of Appeals explained that the Kentucky government entity had "inviolable contracts" with its employees. Thus, a crucial distinction emerges: there is no evidence of a contract in the matter *sub judice.* The issue of a contract, especially a collective bargaining agreement, is not mentioned in *Shirokey.* No mention of a collective bargaining agreement is made or noticed herein. In the absence of such an agreement, Ohio case law dictates that public employees in Ohio do not hold their position by contract; rather a public employee's position is held as a matter of law, or, by statute. *Fuldauer v. Cleveland* (1972), 32 Ohio St.2d 114; see, also, *Jackson v. Kurtz* (1979), 65 Ohio App.2d 152, 154 ("The claim based on contractual violation * * * has no validity. A public employee holds his position as a matter of law and not of contract.").

***2** Appellant has not presented evidence for a breach of contract claim; therefore, summary judgment was properly granted as a matter of law as to this claim.

Wrongful Discharge

For this cause of action, appellant seeks compensatory and punitive damages, in addition to the backpay which he has already received upon his reinstatement. Appellant cites as authority for this proposition, *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, and specifically, paragraph three of the syllabus, which states: "[i]n Ohio, a cause of action for wrongful discharge in violation of public policy may be brought in tort." The *Greeley* decision involved an employee-at-will, and the court noted in its decision that

> [t]oday, we *only* decide the question of a public policy exception to the *employment-at-will doctrine* based on violation of a specific statute. [Emphasis added.]

Undoubtedly, the tort for wrongful discharge in the employment-at-will context exists in Ohio. *Greeley.* However, as noted above, public employees serve by statute, and the statutes pertaining to public employees govern when and for what reasons a public employee can be terminated. E.g., R.C. 124.34. Moreover, a public employee's recourse when he alleges that he has been "wrongfully discharged" is through the procedures set forth in Chapter 124 of the Revised Code.

Appellant relies upon other authority (*Tiernan v. Cincinnati* (1915), 18 Ohio N.P. (N.S.) 145, decided by the Superior Court of Cincinnati) to establish a separate cause of action in a common pleas court for the tort of wrongful discharge. However, appellant's argument and authority simply do not provide for any further remedy against Weadock or St. Marys.

Other than the recourse provided for appellant in Chapter 124 of the Revised Code, we have found no other authority for appellant's separate cause of action in the common pleas court for the tort of wrongful discharge. As aptly noted in *Anderson v. Minter* (1972), 32 Ohio St.2d 207, at 213-214:

Where, however, the act complained of is within the scope of a defendant's duties a cause of action in tort for monetary damages does not lie. Nor can liability be predicated simply upon the characterization of such conduct as malicious. * * *

* * *

[Such a] principle applies to a case where monetary damages are sought by a civil service employee from a supervisory employee for allegedly maliciously inducing the appointing authority of the civil service employee to suspend such employee for a period of five days or less, and that no cause of action was stated in plaintiff's petition against defendant-appellant Tuttle.

The same principle applies herein. Appellant had recourse through the procedures established by Chapter 124 of the Revised Code for his "wrongful discharge" by the appointing authority. Appellant has been given an adequate remedy at law and no authority exists for any further remedy for this alleged wrong in the common pleas court.

***3** Finally, appellant relies upon R.C. 2744.09(B) as a basis for recovery herein. However, R.C. 2744.09(B) does not create a cause of action, it only provides that Chapter 2744 of the Revised Code (relating to sovereign immunity of political subdivisions) does not apply to civil actions arising out the employment relationship.

As a matter of law, the trial court's grant of summary judgment to appellees on this claim is affirmed.

Negligent Termination

Again, appellant has failed to state a cause of action. Appellant followed the procedures in Chapter 124 of the Revised Code, gained recourse (backpay and reinstatement), and has no remedy in the common pleas court for further monetary damages. Appellant has cited no authority, and we have found none, which would support appellant's proposition.

2307.60 Remedy

R.C. 2307.60 does not create a separate cause of action. A separate cause of action must be available before this section is invoked.

> This section [former R.C. 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.

Schmidt v. Statistics, Inc. (1978), 62 Ohio App.2d 48, 49. Since no separate cause of action is available, there is no recovery pursuant to R.C. 2307.60 for appellant.

Negligent Infliction of Emotional Distress

Appellant's only support in its one paragraph argument of the existence of a genuine issue of material fact is that his reactions during the period at issue were "serious" as defined in *Paugh v. Hanks* (1983), 6 Ohio St.3d 72.

In *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, an employee filed suit against her former employer. The case discussed the status of a negligent infliction of emotional distress claim in the context of an employee-employer lawsuit.

> Ohio courts do not recognize a separate tort for negligent infliction of emotional distress in the employment context. *Hatlestad v. Consol. Rail Corp.* (1991), 75 Ohio App.3d 184, 598 N.E.2d 1302; *Antalis v. Ohio Dept. of Commerce* (1990), 68 Ohio App.3d 650, 589 N.E.2d 429. Generally, recoveries in actions for this form of emotional distress have been restricted to very limited situations, namely situations involving automobile accidents. *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131, 4 OBR 376, 447 N.E.2d 109; *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 6 OBR 114, 451 N.E.2d 759. * * * Therefore, a plaintiff may only recover for emotional harm negligently inflicted by a defendant by instituting a 'traditional' claim for negligent infliction of emotion distress. *Hatlestad,* 75 Ohio App.3d at 191, 598 N.E.2d at 1306-1307. The plaintiff will then be required to show that he or she (1) was a bystander to an accident, (2) reasonably appreciated the peril thereof, and (3) suffered serious and foreseeable emotional distress as a result of his cognizance or fear of the peril. *Paugh,* paragraphs three and four of the syllabus.

***4** We follow the Tenth District Court of Appeals (*Antalis* at 654) and the Eighth District Court of Appeals (*Tschantz* at 714) in declining to expand the tort of negligent infliction of emotional distress in the employment context absent a clear expression from the Ohio Supreme Court. In so doing, we note that appellant's allegations and summary judgment material presented do not set forth evidence on all the elements for a traditional claim of negligent infliction of emotional distress; and, therefore, as a matter of law, the trial court properly granted summary judgment to appellees on this claim.

Intentional Infliction of Emotional Distress

Appellant must have presented evidence on the three elements of the tort of intentional infliction of emotional distress in order for this claim to survive appellees' motion for summary judgment. The three elements are:

> (1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress. *Phung v. Waste Mgt., Inc.* (1994), 71 Ohio St.3d 408, 410.

Appellant's one paragraph argument in his brief alleges that appellee Weadock's conduct was "outrageous." Appellant fails to set forth any evidence on the remaining two elements to support his argument that the trial court erred in granting summary judgment on this issue. The record in this case is voluminous, and in the absence of any direction or reference by appellant to the place in the record which lends support to his argument, we must conclude that the trial court properly granted appellees' motion for summary judgment as to this issue. App.R. 16(A)(7); Loc.App.R. 11(A) and (B).

Based upon the foregoing, appellant's first assignment of error is overruled.

Assignment of Error Number Two

The trial court erred in dismissing Plaintiff's prayer for attorney fees and punitive or exemplary damages against the City of St. Marys with respect to all claims.

On May 7, 1993, the trial court determined, prior to the final adjudication of appellant's claims, that appellant would not be entitled to punitive damages or attorney fees if appellant prevailed on any one of his claims raised in his complaint. This judgment entry is the focus of appellant's second assignment of error. Based upon our determination in the first assignment of error that plaintiff did not present evidence which would defeat appellees' motion for summary judgment, this alleged error is moot, and, therefore, need not be addressed by this Court. App.R. 12(A)(1)(c).

Assignment of Error Number Three

The trial court erred by ruling prior to the hearing date scheduled for summary judgment and by not considering all of the evidence presented by plaintiff in opposition for Defendants' Motion for Summary Judgment.

This assignment of error argues that the trial court prematurely decided appellees' motion for summary judgment.

***5** The record indicates that a non-oral hearing on appellees' motion for summary judgment was scheduled for December 28, 1994. The hearing was rescheduled for January 4, 1994, upon motion by appellees. The journal entry rescheduling such hearing date stated, *inter alia,*"The Court ORDERS that the Summary Judgment hearing set for December 28, 1994, be VACATED and RESCHEDULED to the *5th day of January, 1995, at 8:00 a.m.*" No further extensions or continuances of the non-oral hearing date for appellees' motion for summary judgment appear on the record.

On March 24, 1995, the trial court caused the following journal entry to be filed in this case:
The Court, since it's [sic] pre-trial conference with counsel on January 13, 1995, has had a busy schedule and finds it will require additional time to rule on the pending Motion For Summary Judgmment [sic] together with the resolution of the two recently filed defense motions, to-wit: Motion to Exclude * * * and Motion In Limine to which motions Attorney Wilson has not yet responded.

It will therefore be impracticable to meet the May, [sic] 22, 1995 trial date which is hereby vacated[;] however[,] the two above Motions will be heard on that date at 1:30 P.M. and if the Motion For Summary Judgment is not sustained a new trial date will be assigned.

IT IS THEREFORE ORDERED the trial of this cause heretofore assigned for May 22, 1995 is hereby vacated *and pending Motions will be heard on May 22, 1995 at 1:30 P.M.*[Emphasis added.]

Appellant argues that the trial judge's use of the phrase "and pending Motions will be heard on May 22, 1995 at 1:30 P.M." (underlined in quoted material) indicated that the summary judgment hearing was moved to May 22, 1995; and, therefore, appellant had until May 22, 1995, to file materials in opposition to appellees' motion for summary judgment, pursuant to Civ.R. 56(C) which so provides.

Appellant's interpretation of the trial court's March 24, 1995 is a strained one. A reading of the March 24, 1995 journal entry in its entirety indicates that the entry was obviously filed subsequent to the only hearing date scheduled for the motion for summary judgment (January 4, 1995) and does not indicate that the trial court sought to extend the hearing date on appellees' motion for summary judgment or allow additional Civ.R. 56(C) material to be filed after the only date set for summary judgment hearing.

Therefore, a reasonable reading of the trial court's March 24, 1995 journal entry indicates that the final hearing date

set for summary judgment was January 4, 1995, and any Civ.R. 56(C) material filed subsequent thereto in the court's determination of appellees' motion for summary judgment was not to be considered.

Appellant's third assignment of error is overruled.

Appellant's assignments of error are overruled and the judgment of the Auglaize County Court of Common Pleas is affirmed.

Judgment affirmed.

EVANS and SHAW, JJ., concur.

All Citations

Not Reported in N.E.2d, 1995 WL 705214

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15 N.E.3d 401
Court of Appeals of Ohio,
Second District, Montgomery County.

Kimberly A. CARTWRIGHT, Plaintiff–Appellant
v.
David S. BATNER, Trustee,
et al., Defendant–Appellee.

No. 25938. | July 3, 2014.

Synopsis

Background: Trust beneficiary filed action against trustee, who was also co-beneficiary, in his individual and trustee capacities for an accounting, breach of fiduciary duty, breach of duty to maintain records, conversion, treble damages, and an injunction. Following a bench trial, the Court of Common Pleas, Montgomery County, No. 2011–CV–3520, entered judgments rendering an accounting, awarding attorney fees, and finding it lacked jurisdiction as to certain claims. Beneficiary appealed.

Holdings: The Court of Appeals, Welbaum, J., held that:

[1] trial court acted within its discretion in determining accounting was adequate;

[2] settlor's checking account was not asset of revocable trust until it was transferred to trust;

[3] beneficiary had standing to assert claims for conversion and misuse of power of attorney;

[4] trustee breached fiduciary duty with respect to power of attorney account;

[5] trustee violated prohibition against self-dealing by living in condominium rent-free; and

[6] beneficiary had standing to bring civil action for treble damages.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

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Timothy A. Tepe, Cincinnati, OH, for Defendants–Appellees.

Opinion

WELBAUM, J.

{¶ 1} In this case, Plaintiff–Appellant, Kimberly Cartwright, appeals from judgments rendering an accounting on a revocable trust, and awarding attorney fees to Defendants–Appellees, David S. Batner, Trustee of the Lorraine M. Batner Revocable and Irrevocable Trusts, and David S. Batner, individually. [1] In support of her appeal, Kimberly contends that the trial court erred by failing to require David to itemize and account for every expenditure from the trust. Kimberly further contends that the trial court erred by not beginning the accounting in 2005, when Lorraine Batner's dementia appeared, and assets were allegedly placed into the revocable trust.

{¶ 2} In addition, Kimberly maintains that the trial court erred in dismissing her claim for treble damages under R.C. 2307.60 and R.C. 2307.61. Finally, Kimberly contends that the trial court erred in awarding David some attorney fees for defending the accounting action, and in denying her some fees for discovering David's defalcations.

{¶ 3} We conclude that the trial court did not abuse its discretion in determining that the accounting was adequate for the revocable trust for periods between June 2007 and 2009. Although David admitted to having improperly expended money from the trust, the sum he took is reasonably consistent with the tally made by Kimberly's witness after having received the accounting documents from David.

{¶ 4} The trial court did err in concluding that the claim regarding David's use of a power of attorney belonged to the estate, and that the remedy was in probate court. Kimberly was entitled to bring an action in common pleas court, which had concurrent ***405** jurisdiction over the matter. The court also erred in concluding, on the merits of this claim, that Kimberly failed to prove a misuse of the powers of attorney. There was sufficient evidence of transfers of funds to David, causing the burden to shift to David to show that his conduct was free of undue influence and fraud. David failed to present such evidence. Additionally, David

violated prohibitions against self-dealing with respect to a condominium that was part of the irrevocable trust, and should be required to reimburse the trust for the fair market rental value of the condominium from the time that he began living there.

{¶ 5} We further conclude that the trial court erred in dismissing Kimberly's claim for civil damages under R.C. 2307.60 and R.C. 2307.61. Because of the error regarding David's alleged misuse of the power of attorney and Kimberly's entitlement to bring a civil action under R.C. 2307.60 and R.C. 2307.61, the attorney fee awards must be reversed.

{¶ 6} Accordingly, the decision of the trial court will be affirmed in part, reversed in part, and remanded for further proceedings.

I. Facts and Course of Proceedings

{¶ 7} This tale of warring siblings began in 2004, when Lorraine Batner, who was then about 81 years old, was concerned about protecting her estate should she need home nursing care.[2] At the time, Lorraine had assets of approximately $319,389, and also received a substantial civil service pension and social security benefit every month. Based on these probate concerns, Lorraine consulted with Michael Millonig, an estate planning specialist. Before consulting Millonig, Lorraine had established a revocable trust in 1993, and had a prior will that was written in 2003. Lorraine was the trustee for that trust, and her children, David and Kimberly, were successor co-trustees. The 2003 will left Lorraine's property equally to David and Kimberly. Also, in 2003, David became the holder of a power of attorney for Lorraine.

{¶ 8} David made the initial contact with Millonig and attended some meetings with his mother and the attorney. Millonig was aware that Lorraine had been diagnosed with dementia and Alzheimer's. As a result, Millonig had Lorraine evaluated by a doctor to obtain a medical opinion about her competency to sign legal documents. Upon receiving the doctor's report, Millonig concluded that Lorraine was capable of doing an estate plan.

{¶ 9} Millonig decided that Lorraine could place about $150,000 in an irrevocable trust, which would protect her estate from Medicaid claims. Accordingly, he prepared the irrevocable trust documents as well as a deed transferring an unencumbered condominium that Lorraine owned into the trust. The condominium was valued at about $115,000. In addition, $35,000 was placed into the irrevocable trust. The funds for this came from Lorraine's Day Air Credit Union ("Day Air") Account No. 6200 and from Lorraine's Day Air Checking Account No. 687588 ("588"). David was named the sole trustee for the irrevocable trust.

{¶ 10} Millonig also prepared an amended and restated revocable trust document that replaced the 1993 revocable trust document. He kept the same name for the trust, which was called the Lorraine Batner Trust, 5/12/1993. Both Lorraine and David were named as co-trustees, and the plan was that the rest of Lorraine's assets would be placed in the revocable trust. Under the terms of the trusts and the new ***406** will, David was entitled to receive the first $87,400 upon Lorraine's death, based on advancements that had been made to Kimberly. After that deduction, the remaining assets in the irrevocable and revocable trusts were to be divided equally between the two siblings.

{¶ 11} David's position at trial was that the revocable trust had been funded only with ten dollars and Lorraine's household goods and furnishings prior to the time that he took over as trustee in June 2007, when his mother was placed in a nursing home. At that time, signature cards were filled out, transferring ownership of Lorraine's Day Air Checking Account No. 588 to the revocable trust. Kimberly's position was that a "Schedule A" attached to the irrevocable trust, transferred the Checking Account No. 588 and all of Lorraine's other remaining assets when the irrevocable and revocable trusts were created. Kimberly also took the position that David should have to account for these assets between 2005 and June 2007.

{¶ 12} At the bench trial, the parties disputed the extent to which Lorraine handled her own affairs between 2005 and 2007, and the extent of her competency during that time. According to David, Lorraine was fine throughout 2005, and may have even been driving into 2006. He further indicated that Lorraine handled her affairs and that he was not the only one who had access to her credit card during this time. In contrast, Kimberly stated that Lorraine had dementia in late 2004, and was acting odd and saying unusual things. As an example, Lorraine thought Kimberly was her mother at times. In addition, when President Bush was elected, Lorraine wanted to know how to dress for the inaugural ball. Kimberly stated that she had not seen her mother write a check since

July 2005, and Lorraine did not have access to her own checkbook after she moved in with Kimberly in December 2005 or January 2006. Further, after July 2005, David gave Kimberly Lorraine's credit card only three or four times, to purchase groceries.

{¶ 13} Lorraine died in August 2009. Although David was the executor of the estate, he did not open an estate in probate court. Instead, an attorney for St. Leonard's, where Lorraine had been residing, opened an estate in order to collect on $27,000 allegedly owed to the nursing home. Kimberly also filed an action in probate court in October 2010 regarding David's failure to probate the estate. In addition, she filed another action in probate court in January 2010, requesting an accounting. Between 2005 and 2009, about $337,731.94 had been deposited into Lorraine's Checking Account No. 588. However, by the time of the bench trial in January 2013, the revocable trust had a balance of about $1,000. The assets in the irrevocable trust had remained unchanged since its initiation in 2004, other than accumulated interest paid on the cash that had been included in the trust.

{¶ 14} The probate action was dismissed in May 2011, and Kimberly filed the present action on May 13, 2011, against David, individually and as trustee of Lorraine's irrevocable and revocable trusts. In this action, Kimberly asserted the following claims: (1) for an accounting, pursuant to R.C. 5808.13; (2) breach of fiduciary duty; (3) breach of a common law duty to maintain proper records and accounts; (4) conversion of trust assets to David's own benefit; (5) civil conversion of assets and triple damages under R.C. 2307.61; (6) an injunction; and (7) intentional interference with expectation of inheritance.

{¶ 15} The case was tried to the bench over two days, in late January and early February 2013. Prior to trial, Kimberly ***407** dismissed her claims for intentional interference with expectation of inheritance, and the trial proceeded on the remaining claims. Following the trial, the court issued a decision, concluding: (1) that David had not committed misconduct with respect to the irrevocable trust, and was entitled to $12,000 in fees for administering the trust; (2) that David's acts regarding the revocable trust, at the least, constituted willful misconduct, and he was required to reimburse the trust in the amount of $59,902.57. David was also not entitled to claimed compensation of $6,000 in fees for administering the revocable trust; (3) Bank fees incurred for early withdrawal of CDs were not fraud; (4) the court had insufficient information on attorney fees already paid and presently due, and would need to hold a further hearing; (5) the remedies in R.C. 2307.61 were not available to Kimberly; (6) there was a failure of proof regarding a Northern Communities account; and (7) the court lacked jurisdiction to consider misconduct from the 2005–2007 time frame, as redress for that alleged issue would be in probate court.

{¶ 16} Consistent with the decision, the trial court held a further hearing on attorney fees in July 2013. After that hearing, the trial court concluded that Kimberly was entitled to receive $12,384 in attorney fees rather than the $58,342.58 she had expended. The court reasoned that this smaller part of the fees had been earned from the beginning of her attorney's representation through March 2011, when David provided an accounting matching the one used at trial. Based on the same reasoning, the court held that David was entitled to the fees he incurred from April 2011 through June 2013, with a 40% reduction for his misconduct. Thus, of the $109,635.97 in total fees that David claimed, David would be entitled to fees of $46,390.90. The court also reduced the hourly amount charged by David's attorney, from $430 to $400. Finally, the court overruled a motion for reconsideration that Kimberly had filed after the original decision on the merits.

{¶ 17} Kimberly appeals from the decision on the merits, the denial of the motion for attorney fees, and the decision awarding attorney fees.

II. Did the Trial Court Err Regarding the Accounting?

{¶ 18} Kimberly's First Assignment of Error, quoted verbatim, states that:

> What is Required to Constitute a Proper Trust Accounting and When Must It Be Presented? Is an Attorney's Accounting at Trial Too Late?

[1] {¶ 19} Under this assignment of error, Kimberly contends that the trial court should have required David to more thoroughly detail and itemize the expenditures from the revocable trust. Kimberly also contends that the accounting was not presented until trial, and, therefore, was untimely.

[2] {¶ 20} "Accounting issues and the award of damages that may appear to be necessary fall within the sound discretion of the trial court. As a result, our review is

for abuse of discretion." *Schafer v. RMS Realty,* 138 Ohio App.3d 244, 300, 741 N.E.2d 155 (2d Dist.2000), citing *Sandusky Properties v. Aveni,* 15 Ohio St.3d 273, 274–275, 473 N.E.2d 798 (1984). "This means we will affirm unless we find the trial court's attitude 'unreasonable, arbitrary or unconscionable.' " *Id.,* quoting *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.,* 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "Decisions are unreasonable if they are not supported by a sound reasoning process." *Id.*

***408** {¶ 21} Effective January 1, 2007, the legislature amended various sections of the Revised Code, and enacted new sections for purposes of adopting an Ohio trust code. *See* Sub. H.B. 416, 2006 Ohio Laws File 128. Pursuant to that act, R.C. Chapters 5801 to 5811 may be cited as the Ohio trust code. *See* R.C. 5801.011. Under newly-enacted R.C. 5808.01, "[u]pon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with Chapters 5801. to 5811. of the Revised Code." In addition, the trustee is required to administer the trust "solely in the interests of the beneficiaries." R.C. 5808.02(A). The law as amended and enacted was specifically intended to apply retroactively to trusts created before its effective date. *See* R.C. 5811.03(A)(1). It also applies "to judicial proceedings concerning trusts commenced before the effective date of those chapters unless the court finds that application of a particular provision of those chapters would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision does not apply, and the superseded law applies." R.C. 5811.03(A)(3).

[3] {¶ 22} Even before the new act, however, the law provided that "a trusteeship is primarily and of necessity a position of trust and confidence, and that it offers an opportunity, if not a temptation, to disloyalty and self-aggrandizement. The connotation of the word and name 'trustee' carries the idea of a confidential relationship calling for scrupulous integrity and fair dealing." (Citation omitted.) *In re Binder's Estate,* 137 Ohio St. 26, 38, 27 N.E.2d 939 (1940).

{¶ 23} A beneficiary of a trust is defined, in pertinent part, as "a person that has a present or future beneficial interest in a trust, whether vested or contingent * * *." R.C. 5801.01(C). Thus, with respect to both the irrevocable and the revocable trusts, David owed Kimberly a duty to administer the trust in good faith, in accordance with her interest as a beneficiary.

{¶ 24} Regarding record-keeping, R.C. 5808.10(A) and (B) require trustees to keep "adequate records" of a trust's administration and to "keep trust property separate from the trustee's own property." This statute, however, does not define what constitutes an adequate record. Nonetheless, R.C. 5808.13(C) does address annual accounting requirements, and provides, in relevant part, that:

> A trustee of a trust that has a fiscal year ending on or after January 1, 2007, shall send to the current beneficiaries, and to other beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, the trust assets' respective market values.

{¶ 25} A current beneficiary is defined in R.C. 5801.01(F) as "a beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal." In the case before us, Kimberly became a current beneficiary of both trusts in August 2009, when Lorraine died. By statute, David was required to provide at least an annual accounting. Kimberly filed an action requesting an accounting in January 2010, but David did not provide an accounting until March 2011 that essentially matched the amounts that Kimberly's witness (her husband) testified to at ***409** trial. Kimberly contends that even this account was insufficiently detailed.

{¶ 26} In the case of *In re Marjorie A. Fearn Trust,* 5th Dist. Knox No. 11–CA–16, 2012-Ohio-1029, 2012 WL 850735, the trustee's accounting was a handwritten ledger that did not include an inventory or a running account of daily disbursements and receipts. *Id.* at ¶ 25. The court of appeals noted that "non-professional trustees are not necessarily held to the strict accounting standards of professional trustees * * *." *Id.* at ¶ 26. However, the court also held that the ledger and a supplemental accounting fell "far beneath the standard of care mandated by R.C. Chapter 5808." *Id.*

{¶ 27} At least one court has looked to R.C. 2109.303 for "guidance on how to construct an accounting." *Whitman v. Whitman,* 3d Dist. Hancock No. 5–11–20, 2012-Ohio-405, 2012 WL 367055, ¶ 42. In this regard, R.C. 2109.303(A) states that:

> Every account shall include an itemized statement of all receipts of the testamentary trustee or other fiduciary during the accounting period and of all disbursements and distributions made by the testamentary trustee or other fiduciary during the accounting period. *The itemized disbursements and distributions shall be verified by vouchers or proof* * * *. In addition, the account shall include an itemized statement of all funds, assets, and investments of the estate or trust known to or in the possession of the testamentary trustee or other fiduciary at the end of the accounting period and shall show any changes in investments since the last previous account. (Emphasis added).

{¶ 28} After reviewing the record, we conclude that David failed to provide an account until at least March 2011, in violation of his duties as a trustee. David also failed to provide itemized disbursements that were verified by receipts or proof. However, David admitted to having improperly expended money from the trust, and that sum ($46,720.68) is reasonably consistent with the tally made by Kimberly's witness after having received the accounting documents from David. As a result, we cannot say that the trial court abused its discretion in determining that the untimely accounting was adequate.

{¶ 29} Accordingly, Kimberly's First Assignment of Error is overruled.

III. The Accounting and Other Issues Pertaining to the Trusts

{¶ 30} Kimberly's Second Assignment of Error (incorrectly phrased as a question), states as follows:

> What Assets Must Be Included in a Proper Trust Accounting?

A. Content of the Revocable Trust

[4] {¶ 31} Under this assignment of error, Kimberly presents several issues. Essentially, in these issues, Kimberly contends that the trial court erred in excluding the time period of 2005 through June 7, 2007 from the accounting period for the revocable trust. June 7, 2007 is the date upon which Lorraine's Day Air Checking Account No. 588 was placed in the revocable trust. Prior to that time, David was the POA for Lorraine. Kimberly contends that David should have been required to account for approximately $277,363 of funds in the checking account between 2005 and 2007.

{¶ 32} The trial court concluded that Lorraine, as settlor of the revocable trust, was the individual responsible for transferring assets into the trust, and that David had no obligation to do so. The court further held that Kimberly lacked standing to bring a claim based on the POA against David, because the claim was subject to redress in probate court, not the common ***410** pleas court. Specifically, in the context of the POA, David was acting on behalf of his principal, Lorraine, and any claim for misconduct would belong to her estate.

{¶ 33} At trial, a witness from Day Air testified that Lorraine's checking account No. 588, was transferred into the revocable trust on June 7, 2007, when a signature card was signed transferring the account into the trust. Prior to that time, Lorraine was the owner on the account. The attorney who prepared the trusts also testified that regardless of what is listed on the schedule for assets for a trust, the settlor has to take action to transfer the asset into the trust. For example, if a bank certificate of deposit (CD) is listed as a trust asset, the settlor must go to the bank and place the CD in the trust.

{¶ 34} In contrast, Kimberly argues, citing R.C. 5804.01 and other authority, that where a settlor and trustee are the same person, a trust is created by a declaration by the owner that he or she holds the property as trustee for another, and the settlor need take no further action to fund the trust.

{¶ 35} R.C. 5804.01 provides several ways of creating a trust, including:

(A) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(B) Declaration by the owner of property that the owner holds identifiable property as trustee;

(C) Exercise of a power of appointment in favor of a trustee;

(D) A court order.

[5] {¶ 36} However, the fact that a trust instrument has been signed does not mean that all the property in the trust has been delivered. In fact, this point is made in the Official Comments to the Uniform Trust Law accompanying Uniform Trust Code 401, which is analogous to R.C. 5804.01. These comments state that "Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death." Uniform Trust Code 401 Comment (2006).

{¶ 37} Accordingly, as the settlor of the revocable trust, Lorraine had the ability to sign the revocable trust instrument and later fund and create the trust by conveying property to it. She could also fund and create the revocable trust contemporaneously (which she did by conveying household goods and $10.00), and add more property later. *See* Plaintiff's Ex. 6 and 7. In this regard, the comments to the Uniform Trust Law indicate that "[t]he property interest necessary to fund and create a trust need not be substantial." *Id.* at Uniform Trust Code 401 Comment.

{¶ 38} Kimberly is correct in maintaining that Lorraine could place property in a trust by declaring that she held the property as trustee. *See* R.C. 5804.01(B). However, the relevant points for purposes of David's liability to account for the revocable trust proceeds between 2005 and 2007 are when Checking Account No. 588 was transferred into the trust, and when David assumed responsibility for the trust. The checking account was transferred into the trust on June 7, 2007, when the signature card for Day Air Checking Account No. 588 was changed to designate the revocable trust as the account holder. Prior to that time, the checking account was not part of the trust, and Lorraine retained authority over the checking account as the owner. Admittedly, David had a POA and could write checks on Lorraine's behalf. ***411** David, therefore, could have abused his authority as a POA with respect to the checking account, but that issue differs (as the trial court recognized) from the issue of whether David was required to provide an accounting for the revocable trust between 2005 and June 2007.

{¶ 39} Kimberly also argues that Day Air Checking Account should have been part of a trust because it was originally listed as an asset on a schedule to the irrevocable trust. *See* Plaintiff's Trial Ex. 9. However, at trial, David testified that while Lorraine's attorney originally intended the assets in schedule A to be part of the irrevocable trust, Lorraine thought about it and decided she did not want to put these accounts into the trust. She wanted to simplify the trust by putting her condominium and some cash into the account. Accordingly, the trust was changed and resigned in February 2005. Lorraine's attorney, Mr. Millonig, indicated that he did not recognize Ex. 9, and that Ex. 10 (which lists the condominium and $35,000 in cash) looked correct as to what they finally decided to give to the irrevocable trust.

{¶ 40} In addition, Millonig stated that signing a document like Ex. 9 and attaching it to a trust does not mean that the trust owns the assets; instead, the settlor has to sign documents to transfer the assets, such as signing cards at the bank. While this would be the preferred approach, it appears not to be strictly necessary in situations involving revocable trusts. *See Stephenson v. Stephenson,* 163 Ohio App.3d 109, 2005-Ohio-4358, 836 N.E.2d 628, ¶ 6–18 (9th Dist.)

{¶ 41} In *Stephenson,* the court of appeals concluded that an IRA and some brokerage accounts were part of a revocable trust even though the settlor had never transferred ownership to the trust, and even though these accounts listed beneficiaries other than the trust. *Id.* at ¶ 3, 4, and 6. The court distinguished between irrevocable trusts and revocable trusts, and concluded that the requirement of clear proof that an asset has been properly delivered to the trust (as is the case with inter vivos gifts), is not required in situations involving revocable trusts, where the settlor is the trustee. *Id.* at ¶ 8–12. The court relied on a prior case, which had held that "mere declaration of [the settlor's] intent to place the assets in the trust was sufficient and effective." *Id.* at ¶ 9, citing *Hatch v. Lallo,* 9th Dist. Summit No. 20642, 2002-Ohio-1376, 2002 WL 462862, ¶ 11. In this regard, the court of appeals noted that:

The *Hatch* court explained its rationale:

> "The important question in this case is whether the decedent divested himself of the equitable interest in the property in question. If he made such a transfer of the equitable interest, the separation of equitable and legal interests that is required to support a trust is present and the decedent, as settlor-trustee, held legal title to the trust property subject to the trust."

* * * Based on this premise, the *Hatch* court identified four aspects that instructed its decision: the decedent unambiguously evidenced an intent to create the trust at the time it was executed, the decedent divested himself of an equitable interest in the asset, the decedent separated the asset from the balance of his personal property, and the beneficiary had access to the asset once it was in the trust. (Citation omitted.) *Stephenson* at ¶ 9, quoting *Hatch* at ¶ 18–19.

{¶ 42} After applying these factors to the case before it, the court of appeals concluded that the settlor had fulfilled the conditions for divestment, and that the property had been transferred to the trust. ***412** *Stephenson,* 163 Ohio App.3d 109, 2005-Ohio-4358, 836 N.E.2d 628, at ¶ 17.

{¶ 43} These concepts do not, however, support a finding that Day Air Checking Account No. 588 was transferred to a trust prior to June 7, 2007. Significantly, the only mention of transferring that asset to a trust was in connection with the irrevocable trust. However, as David and the trust attorney testified, Lorraine rejected the transfer and elected to place only the condominium and $35,000 in cash in the irrevocable trust. Day Air Checking Account No. 588 was not listed as an asset in any schedule to the revocable trust, and there is no basis for concluding that it should have been part of the revocable trust. In this regard, we note that the Revocable Living Trust Agreement states, with respect to the "Trust Estate," that:

> The Settlor has transferred and delivered to the Trustee the property described in Schedule A, which is attached hereto and made a part hereof, the receipt of which is hereby acknowledged by the Trustee. Such property and any other property transferred to and received by the Trustee to be held pursuant to this Trust shall constitute the "Trust Estate" and shall be held, administered and distributed by the Trustee as hereinafter provided. Defendant's Ex. D., p. 1, Item 1.

{¶ 44} Schedule A for that trust lists only $10. Ex. D., p. 16. Lorraine also executed a "Transfer of Property in Trust" in December 2004, but it was limited to "household goods, furniture, jewelry, personal effects, currency & coins and all other tangible property located at my [Lorriane's] residence." Plaintiff's Ex. 7, p. 1. This was not effective to transfer Day Air Checking Account No. 588, because the checking account was not a tangible property located at Lorraine's residence.

B. The POA

[6] {¶ 45} Under this assignment of error, Kimberly also contends that the trial court erred when it found that she lacked standing to bring a claim for misuse of the POA. Kimberly argues that under R.C. 2101.24(B)(1)(b), probate and common pleas courts have concurrent jurisdiction over powers of attorney. With certain limitations not applicable to this case, R.C. 2101.24(B)(1)(b) does provide both courts with concurrent jurisdiction over actions involving powers of attorney. However, the basis of the trial court's decision is that the claim belonged to Lorraine's estate and should be heard in probate court.

[7] **[8]** **[9]** {¶ 46} "Subject-matter jurisdiction refers to the statutory or constitutional authority to adjudicate a case. Lack of standing, on the other hand, challenges a party's capacity to bring an action, not the subject-matter jurisdiction of the tribunal." (Citations omitted.) *Groveport Madison Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision,* 137 Ohio St.3d 266, 2013-Ohio-4627, 998 N.E.2d 1132, ¶ 25. "Standing exists only when (1) the complaining party has suffered or has been threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, (2) the [act] in question caused the injury, and (3) the relief requested will redress the injury." (Citation omitted.) *Beaver Excavating Co. v. Testa,* 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 8.

{¶ 47} We conclude that Kimberly did have standing to assert claims against David in common pleas court with respect to

his actions as a POA. As an initial point, R.C. 1337.36(A) provides, in pertinent part, that:

> Any of the following persons may petition a court to construe a power of attorney *or review the agent's conduct and grant appropriate relief:*
>
> ***413** * * *
>
> (4) The principal's spouse, parent, or descendant;
>
> (5) An individual who would qualify as a presumptive heir of the principal;
>
> (6) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate * * *."

{¶ 48} In view of these provisions, Kimberly would be permitted to bring an action as a descendent, a presumptive heir, or a person named as a beneficiary upon Lorraine's death. R.C. 1337.41 further states that "[t]he remedies provided under sections 1337.21 to 1337.64 of the Revised Code are not exclusive and do not abrogate any right or remedy under any other provision of law of this state."

{¶ 49} In addition, R.C. 1337.37 provides that:

> An agent that violates sections 1337.21 to 1337.64 of the Revised Code is liable to the principal or the principal's successors in interest for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred and the amount required to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

{¶ 50} The above statutes became effective in March 2012, as part of the adoption of the Uniform Power of Attorney Act. *See* R.C. 1337.21 and Sub. S.B. 117, 2011 Ohio Laws File 65. However, R.C. 1337.64, also adopted as part of that act, provides that:

> (A) Except as otherwise provided in sections 1337.21 to 1337.64 of the Revised Code, on the effective date of this section, those sections apply to all of the following:
>
> (1) A power of attorney created before, on, or after the effective date of this section;
>
> (2) A judicial proceeding concerning a power of attorney commenced on or after the effective date of this section;
>
> (3) A judicial proceeding concerning a power of attorney commenced before the effective date of this section, unless the court finds that application of a provision of sections 1337.21 to 1337.64 of the Revised Code would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies.

{¶ 51} Standing is evaluated as of the commencement of suit, which in this case was in May 2011. *Groveport Madison Local Schools Bd. of Edn.*, 137 Ohio St.3d 266, 2013-Ohio-4627, 998 N.E.2d 1132, at ¶ 26. However, in view of the provision in R.C. 1337.64(A)(3), we conclude that application of R.C. 1337.36(A) would not substantially interfere with the effective conduct of the judicial proceeding, nor would it prejudice the rights of a party. We say this for two reasons: (1) Kimberly would have been able to bring an action for misuse of the power of attorney prior to the effective date of R.C. 1337.36; and (2) Kimberly would be able to file an action in probate court under R.C. 2109.50 to obtain redress against David's misuse of assets.

{¶ 52} As was noted, R.C. 2101.24 deals with the jurisdiction of probate courts. R.C. 2101.24(A)(1) provides the probate court with exclusive jurisdiction over certain matters, unless otherwise provided by law. However, actions based on powers of attorney are mentioned in the subsection of the statute that gives concurrent jurisdiction to probate and common pleas courts. In this regard, R.C. 2101.24(B)(1) states that:

> ***414** The probate court has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders, and to hear and determine actions as follows:
>
> * * *

(b) Any action that involves an inter vivos trust; a trust created pursuant to section 5815.28 of the Revised Code; a charitable trust or foundation; subject to divisions (A)(1)(u) and (z) of this section, a power of attorney, including, but not limited to, a durable power of attorney; the medical treatment of a competent adult; or a writ of habeas corpus * * *.[3]

{¶ 53} The language regarding powers of attorney was added to R.C. 2101.24(B), the concurrent jurisdiction subsection, in 1989. *See* Sub. S.B. 46, 1989 Ohio Laws File 44. The fact that jurisdiction was added for probate courts indicates that jurisdiction was already thought to exist in common pleas courts. Notably, the amendment did not give probate courts exclusive jurisdiction over such actions; only concurrent jurisdiction was provided. *Compare In re Guardianship of Lombardo,* 86 Ohio St.3d 600, 604, 716 N.E.2d 189 (1999) (noting in the context of inter vivos trusts, that "[t]he language of R.C. 2101.24 unambiguously provides the probate court with concurrent jurisdiction with the court of common pleas to address inter vivos trusts.")

{¶ 54} The fact that jurisdiction existed over actions based on powers of attorney prior to the adoption of the Uniform Powers of Attorney act would not necessarily mean that Kimberly has standing under the pre-existing law. The issue is whether Kimberly suffered an injury, due to David's alleged acts, that could be redressed.

{¶ 55} According to Lorraine Batner's will, any property that she owned at the time of her death would be added to the corpus of her trust and distributed in accordance with the terms of the trust agreement. Plaintiff's Ex. 4. The intention of the trust agreements and the will was that the estate would have no assets and the probate court would have nothing to administer. Thus, any assets that might be recovered due to David's misuse of the power of attorney would be returned to the trust, not to Lorraine's estate. In addition, on Lorraine's death, Kimberly's rights as a beneficiary under the trust vested, giving her a legal interest in the corpus of the trust.

[10] {¶ 56} Typically, beneficiaries of trusts have only equitable interests in a trust until their interest is vested. "In order for a trust to be a trust, the legal title of the res must immediately pass to the trustee, and the beneficial or equitable interest to the beneficiaries." *First Nat. Bank of Cincinnati v. Tenney,* 165 Ohio St. 513, 518, 138 N.E.2d 15 (1956). Thus, in the case before us, legal title to the revocable trust passed immediately to David, as trustee, and Kimberly possessed only an equitable interest during Lorraine's lifetime. However, the Supreme Court of Ohio has also stated that "It is the settled rule of this court to construe all devises and bequests as vesting in the devisee or legatee at the death of the testator, unless the intention of the testator to postpone the vesting to some future time is clearly indicated in the will." *Bolton's Trustees v. Ohio Nat. Bank,* 50 Ohio St. 290, 293, 33 N.E. 1115 (1893).

***415** {¶ 57} In situations where a trust beneficiary's interest does not vest until the settlor's death, because it is subject to defeasance prior to death (as here), courts have held that the beneficiary cannot maintain a cause of action based on events that occurred prior to the settlor's death. See *Peleg v. Spitz,* 8th Dist. Cuyahoga No. 89048, 2007-Ohio-6304, 2007 WL 4200611, *aff'd,* 118 Ohio St.3d 446, 2008-Ohio-3176, 889 N.E.2d 1019. In *Peleg,* the beneficiary of a trust filed an action for legal malpractice, breach of fiduciary duty, and negligence against attorneys who had represented her mother with respect to estate planning matters. *Id.* at ¶ 3. The trust was an irrevocable trust, but the settlor reserved the right to change beneficiaries. *Id.* at ¶ 4. After the settlor's death, two relatives who had been disinherited sued, and the beneficiary settled the claims. *Id.* at ¶ 7. The beneficiary then sued the attorneys, contending that their malpractice in executing the irrevocable trust provided the disinherited relatives with a strong case against her in probate court. *Id.* The beneficiary claimed standing because she had a vested interest in the irrevocable trust. *Id.* at ¶ 10.

{¶ 58} However, the court of appeals disagreed, because the beneficiary's interest was subject to defeasance before the settlor's death, and was, thus, subject to complete divestment at the time of the attorney's malpractice. The beneficiary, therefore, lacked the necessary privity with the client to sue the attorneys for malpractice. *Id.* at ¶ 10–23. Based on what it considered persuasive public policy arguments, the court of appeals invited the Supreme Court of Ohio to revisit the issue of whether intended beneficiaries of wills or trusts should have a remedy against attorneys who negligently prepare these types of documents. *Id.* at ¶ 24.

{¶ 59} Subsequently, the Supreme Court of Ohio affirmed the court of appeals based on the authority of *Shoemaker v. Gindlesberger,* 118 Ohio St.3d 226, 2008-Ohio-2012, 887 N.E.2d 1167. *See Peleg v. Spitz,* 118 Ohio St.3d 446, 2008-Ohio-3176, 889 N.E.2d 1019, ¶ 2. In *Shoemaker,* the Supreme Court of Ohio decided to adhere to a strict privity rule in

order to provide certainty in estate planning and preserve attorney loyalty to clients. *Shoemaker* at ¶ 14–19. The court did note that as a remedy, "a testator's estate or a personal representative of the estate might stand in the shoes of the testator in an action for legal malpractice in order to meet the strict privity requirement." (Citations omitted) *Id.* at ¶ 17.

{¶ 60} However, the case before us does not involve the issue of attorney loyalty, and *Shoemaker* is distinguishable on that ground. More importantly, the Supreme Court of Ohio noted that "[t]he necessity for privity may be overridden if special circumstances such as 'fraud, bad faith, collusion or other malicious conduct' are present." *Id.* at ¶ 11, quoting *Simon v. Zipperstein,* 32 Ohio St.3d 74, 76, 512 N.E.2d 636 (1987). The Supreme Court of Ohio stressed in *Shoemaker* that the plaintiffs failed to plead these matters, and this ground for suing the attorneys was, therefore, not available to them. *Id.*

{¶ 61} While the case before us does not involve legal malpractice, it does involve allegations of fraud, bad faith, and other malicious conduct, i.e., allegations of theft in connection with the POA. As a result, we conclude that Kimberly had standing to file an action based on the misuse of the power of attorney, because her interest in the trust, which vested at Lorraine's death, would have been injured by David's actions, and the remedy would be that the alleged funds would be returned to the corpus of the trust.

***416** {¶ 62} In addition, R.C. 2109.50 permits complaints by "any person interested in the estate * * * against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, personal property, or choses in action of the estate * * *." As a beneficiary, Kimberly would have been interested in the estate, and could have initiated a claim in probate court pursuant to R.C. 2109.50. *See, e.g., Hilleary v. Scherer,* 2d Dist. Miami No. 87–CA–23, 1987 WL 19204, *2 (Oct. 30, 1987) (noting that a beneficiary may invoke R.C. 2109.50 in probate court to determine whether assets have been concealed or embezzled, and may also institute an action to compel an administrator to seek out assets belonging to the estate).

{¶ 63} In *Goldberg v. Maloney,* 111 Ohio St.3d 211, 2006-Ohio-5485, 855 N.E.2d 856, the Supreme Court recognized its prior holding that "concealment actions under R.C. 2109.50 and 2109.52 could be applicable to recover certain assets wrongfully concealed, embezzled, or conveyed away *before* the creation of the estate." (Emphasis sic.) *Id.* at ¶ 33, citing *Fecteau v. Cleveland Trust Co.,* 171 Ohio St. 121, 167 N.E.2d 890 (1960). In *Goldberg,* the court also distinguished a prior case which had concluded that "a concealment action 'may not be successfully pursued where it appears from the evidence that title to such property had been transferred by the ward, *pursuant to a valid agreement,* prior to the guardianship.' " (Emphasis sic.) *Id.* at ¶ 38, quoting *In re Estate of Black,* 145 Ohio St. 405, 62 N.E.2d 90 (1945), paragraph four of the syllabus. The court observed that in contrast to *Black,* no valid agreement in *Goldberg* transferred the principal's assets.

{¶ 64} Accordingly, Kimberly had at least two potential avenues—an action for misuse of the power of attorney and conversion, properly brought in common pleas court, or a complaint for embezzlement under R.C. 2109.50. Because Kimberly could have brought claims either in common pleas court or probate court, neither the judicial proceedings nor David would be prejudiced by the application of the new statute, R.C. 1337.36, to a previously filed action. The trial court in the common pleas court is familiar with the facts and issues, having already tried the case.

{¶ 65} Based on the preceding discussion, the trial court erred in concluding that the claim regarding David's use of the power of attorney belonged to the estate, and that the remedy was in probate court. Kimberly was entitled to bring an action in common pleas court, which had concurrent jurisdiction over the matter. The trial court's error was not necessarily fatal, however, because the court went on to consider the merits of the POA claim. In this regard, the trial court held that the record did not prove that David had breached the POA fiduciary duty owed to Lorraine.

[11] {¶ 66} Kimberly contends that she did prove the amount in the Day Air Checking account from 2005 to June 2007 (about $277,363.99), by producing the account records for that period of time. See Plaintiffs' Exhibits 17, 18, and 19. Kimberly contends that she was not required to search through those records as she did for the records after that point, because her mother was living with her during that time and no expenses should have been incurred. According to Kimberly, this fact alone shifted the burden to David to justify the expenditure of that amount of money.

[12] **[13]** **[14]** {¶ 67} "A power of attorney * * * is a written instrument authorizing an agent to perform specific acts on behalf of the principal." *In re Guardianship of Simmons,* 6th Dist. Wood No. WD–02–039, 2003-

Ohio-5416, 2003 WL 22319415, ¶ 25, ***417** citing R.C. 1337.09 and *Testa v. Roberts,* 44 Ohio App.3d 161, 164, 542 N.E.2d 654 (6th Dist.1988). (Other citation omitted.) "The holder of a power of attorney has a fiduciary relationship with the principal. Such a relationship is 'one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.' " (Citations omitted.) *Simmons* at ¶ 25, quoting *Stone v. Davis,* 66 Ohio St.2d 74, 78, 419 N.E.2d 1094 (1981). "In such a relationship, the person who holds the power of attorney bears the burden of proof on the issue of the fairness of transactions between himself and the principal." *Id.,* citing *Testa* at 164, 542 N.E.2d 654.

{¶ 68} In *Simmons,* the court of appeals also stated that:

> Where there is a confidential or fiduciary relationship between a donor and donee, a transfer of money or property from donor to donee is viewed with suspicion that the donor [sic] may have exercised undue influence on the donor. Even if a POA gives an express grant of authority to an attorney-in-fact to make gifts to third persons, including the attorney-in-fact, it does not remove all obligations owed to the principal. In such cases, a presumption of undue influence arises and the burden of going forward with evidence shifts to the donee to show that his conduct was free of undue influence or fraud and that the donor acted voluntarily and with a full understanding of his act and its consequences. The donee may rebut the presumption of undue influence by a preponderance of the evidence. (Citations omitted.) *Id.* at ¶ 26.

{¶ 69} The only finding of fact the trial court made regarding the amounts expended between 2005 and June 2007 is that, unlike the period from June 2007 forward, there was no detailed accounting during this time period. Decision, Entry and Order, Doc. # 86, p. 6.

{¶ 70} Although the accounting is not as detailed, there is sufficient evidence of transfers to David that shift the burden to David to show that his conduct was free of undue influence and fraud. As a preliminary matter, David admitted to having improperly transferred funds from Lorraine's accounts for his benefit between 2007 and 2009. While this does not necessarily mean that he misappropriated funds before, it would certainly lead one to question the transactions that had occurred previously.

{¶ 71} Lorraine Batner would have been 81 in 2004, when the trusts were created, and she would have turned 82 the following summer, in 2005. At the time the trusts were created, she had amassed a fairly substantial amount of assets (about $319,389), including CDs, an IRA, and a condominium that was unencumbered by debt. Kimberly testified that she never saw her mother write a check after July 2005, and that when Lorraine lived with her (from around January 2006, until she entered a nursing home in June 2007), Lorraine did not have her checkbook. Kimberly also testified that during this time, her mother never went out shopping, could not drive, and did not know what was going on.

{¶ 72} David admitted that he helped his mother with her bills, using the POA. He stated that he did not recall when he began having her bank account statements sent to his house, but thought that it was when she went into the nursing home in 2007, because she was no longer home to receive her mail. To the contrary, however, Defendant's Ex. Z, which includes the Day Air Checking Account No. 588 statements between January 1, 2005 and June 2007, indicates that the statements were ***418** being sent to David, not Lorraine, from at least January 1, 2005 until her death. Thus, David would have been in control of the financial information, unless Lorraine, an 82–year old woman with dementia, who did not drive, went to the bank and inquired about the status of her accounts. In addition, the statements for Lorraine's Day Air Visa card were also being mailed to David's address at least from January 2005 until the date of Lorraine's death. Unless David showed Lorraine the statements (and there is no indication that he did this), only David would have known what amounts were being expended on the VISA card.

{¶ 73} Furthermore, a review of the bank statements for Day Air Checking Account No. 588 reveals questionable activity that does not square with Lorraine's circumstances. In January 2005, Lorraine was receiving a comfortable monthly income of about $4,160, which consisted of a civil service pension and a social security payment. At the

end of that month, she had $12,007 in a savings account, after a transfer of approximately $3,062 to the irrevocable trust. She also had $24,868 in a 12–month IRA linked to Account No. 588, and an ending balance in her checking account of $396.48. Among the items listed as a debit is a $735.89 electronic check payment to CUNA Mutual Group. At trial, David claimed not to recognize this check to CUNA. When confronted with a document showing a piece of property mortgaged to CUNA, David admitted purchasing the property, but still claimed not to know what CUNA was. The bank statements show additional payments of $735.89 to CUNA on March 3, 2005, and March 30 2005; and $764.51 payments in both June and July 2005. David never presented any evidence indicating that these payments were made on Lorraine's behalf, rather than his.

{¶ 74} The February 1, 2005 statement for Account 588 shows a $3,000 withdrawal from Lorraine's saving's account. The money was deposited in the checking account and a check was written on the same day for $2,500. In March 2005, the checking account shows, in addition to the two payments to CUNA, a $281.30 payment to Sam's Club and a $444.05 payment to Cingular. It would be possible, but not likely, that an 81–year old woman with dementia would incur these types of expenses.

{¶ 75} Similarly, in May 2005, $4,570 was withdrawn from savings and large checks totaling $2,982, $1,053, and $1,200 were written. The recipients of the checks is not indicated, but the activity is unusual, compared to other months that show more modest expenditures. [4] *Compare* the August 2005 statement, which shows only $720.18 in withdrawals from Checking Account No. 588—although $800 was withdrawn from the savings account that month and not deposited in checking. The point is that if the large amounts were regular expenses of Lorraine, they would have been reflected each month. The inconsistency in the pattern of expenditures again raises an inference that the amounts being expended were not on Lorraine's behalf.

{¶ 76} The June 2005 statement shows checks written to Sam's Club, for $575, to Sears for $300, and another payment of $764.51 to CUNA. July 2005, likewise, shows large expenditures. $6,000 was withdrawn from savings and deposited in checking. Electronic checks were sent to Sears ($575) and CUNA ($764.51). Other ***419** substantial checks of $2,098, $2,217, and $3,195 were also written.

{¶ 77} The remainder of the statements show the same disturbing trends. For example, by January 2006, the savings account balance had been depleted so that the account contained only $2,420.72. $21,628.08 was then deposited from some other source, and a check for $4,000 was written on January 10, 2006. In February 2006, $12,000 was transferred to checking, and six significant checks for amounts ranging from $1,000 to $3,586 were written. (Other checks were written as well.) In April 2006, $7,000 was transferred from savings to checking, and Lorraine received $4,216.79 in deposits from social security and her pension. The balance in the checking account at the beginning of May was only $734, meaning that more than $10,000 had been spent. However, the part of the statement that would list the check numbers and amounts is missing. [5] By the end of May 2006, the balance in the savings account was down to less than $2,000, with a $4,000 check having been written on May 16, 2006.

{¶ 78} The VISA statements show similar trends, with purchases that would not conceivably have been made on Lorraine's behalf. As one example (and there are many), the VISA statement for the month ending June 27, 2005, shows that $1,615.97 in expenditures were made that month, including such items as two payments totaling about $372 to Henn Marine in Fairfield, Ohio, and a payment of $410.85 to AAA Waste Water Service in Franklin, Ohio. Plaintiff's Ex. 53. Unlike Lorraine, David owned a boat. Lorraine's condominium was also not located in Franklin, Ohio.

{¶ 79} We have reviewed all the statements and will not discuss them further, other than to note, as indicated, that the pattern of expenditures would be unusual for a person in Lorraine's situation.

{¶ 80} Accordingly, the trial court erred with regard to its conclusion about David's alleged breach of duty regarding the POA account. A presumption of undue influence arose, and David failed to rebut the presumption with evidence showing that his conduct was not fraudulent. Instead of explaining the amounts that were expended, and offering proof that they were legitimate expenses on Lorraine's behalf, or at her behest, David professed ignorance even of payments made for his own mortgage.

C. The Condominium in the Irrevocable Trust

[15] {¶ 81} Kimberly's final argument under this assignment of error is that the trial court erred in failing to include the fair rental value of the condominium in the accounting. Kimberly notes that David occupied Lorraine's condominium since June 2012, and argues that he should have been charged with the fair rental value, which was stipulated to be $1,000 per month. Rather than responding to this argument, David contends that the trial court correctly refused to hold him liable for a failure to rent or sell the condominium before or after Lorraine's death. The trial court found that since David was entitled under the terms of the irrevocable trust to hold all property received, that his failure to rent the condominium before January 2010, when the restraining order came into effect, did not amount to fraud, willful misconduct, or gross negligence. Regarding the time period after January ***420** 2010, the court concluded that David was precluded from leasing or selling the condominium due to the existence of restraining orders.

{¶ 82} When discussing these matters, the trial court stated that Kimberly's only assertion regarding the irrevocable trust was that David had breached his fiduciary duty by failing to lease or sell the condominium. However, this was incorrect, as Kimberly also contended in her trial brief that David had breached his fiduciary duty by living in the condominium rent-free. *See* Plaintiff's Trial Brief, Doc. # 83, pp. 6, 9, and 23–24.

{¶ 83} As is noted in Kimberly's trial brief, the revocable trust gave the trustee authority to occupy the real property that was part of the trust, upon terms the trustee deemed proper. Defendant's Ex. D, Item VIII(s). However, the condominium was not part of the estate of the revocable trust, and the irrevocable trust, which governed the condominium, did not give the trustee such authority. Defendant's Ex. B, Item VII(a)-(r). We agree with the trial court that David did not breach his fiduciary duty by failing to rent or sell the condominium after January 2010, due to the existence of the restraining order. David's reasons for failing to rent or sell the condominium between June 2007, when his mother entered a nursing home, and January 2010 are less convincing, but we cannot conclude that the trial court abused its discretion in making this finding. David's expressed reasons were that he wanted to wait and make certain his mother could not return home, and also wanted a place for relatives to stay when they visited his mother.

{¶ 84} On the other hand, since David elected to occupy the condominium himself after June 2012, the issue remains whether he should have paid the fair market rental value for the use of the condominium. David has not addressed this matter in his brief.

[16] {¶ 85} "Implicit within the duties and powers of a trustee is the prohibition against self-dealing." *In re Marjorie A. Fearn Trust,* 5th Dist. Knox No. 11–CA–16, 2012-Ohio-1029, 2012 WL 850735, at ¶ 21, citing R.C. 5808.14(B)(2). In a related context, R.C. 2109.44(A) states that "Fiduciaries shall not buy from or sell to themselves and shall not have in their individual capacities any dealings with the estate, except as expressly authorized by the instrument creating the trust and then only with the approval of the probate court in each instance."

{¶ 86} Although David was precluded from leasing or selling the condominium after Lorraine's death, he chose to live in the condominium himself without paying rent to the trust, and also prevented Kimberly from having any access to the condominium. As a result, David violated prohibitions against self-dealing, and should be required to reimburse the trust for the fair market value of the condominium from the time that he began living there.

{¶ 87} Based on the preceding discussion, the Second Assignment of Error is sustained in part, and this matter will be remanded to the trial court for further proceedings with respect to the breach of fiduciary duty regarding the POA and the requirement that David reimburse the trust for the fair market value of rental of the condominium beginning in June 2012.

IV. Civil Damage Claim

{¶ 88} Kimberly's Third Assignment of Error states as follows:

> Did the Trial Court Commit Prejudicial Error When It Dismissed Plaintiff's R.C. § 2307.60 Civil Treble Damage Claim?

***421** **[17]** {¶ 89} Under this assignment of error, Kimberly contends that the trial court erred in dismissing her claim under R.C. 2307.60. The trial court made two conclusions in this regard. First, the court held that, assuming that Kimberly had been injured by any criminal acts of David, the remedy she sought under R.C. 2307.60 duplicated the recovery she otherwise sought. Second, the court held that R.C. 2307.61

expands upon the recovery available to property owners who file a claim under R.C. 2307.61. However, the court also held that, as a beneficiary under a trust, Kimberly would not be a property owner.

{¶ 90} Kimberly argues, however, that she is a "property owner" for purposes of the statute because estate assets vest immediately upon death in the devisees and legatees of a will. In contrast, David contends that legal title to the trust property is vested in the trustee.

{¶ 91} R.C. 2307.60(A)(1) provides that:

> 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.

{¶ 92} R.C. 2307.61(A) further states that:

> 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, as defined in section 2913.01 of the Revised Code, involving the owner's property, the property owner may recover as follows:
>
> (1) In the civil action, the property owner may elect to recover moneys as described in division (A)(1)(a) or (b) of this section:
>
> (a) Compensatory damages that may include, but are not limited to, the value of the property and liquidated damages in whichever of the following amounts applies:
>
> (i) Fifty dollars, if the value of the property was fifty dollars or less at the time it was willfully damaged or was the subject of a theft offense;
>
> (ii) One hundred dollars, if the value of the property was more than fifty dollars, but not more than one hundred dollars, at the time it was willfully damaged or was the subject of a theft offense;
>
> (iii) One hundred fifty dollars, if the value of the property was more than one hundred dollars at the time it was willfully damaged or was the subject of a theft offense.
>
> (b) Liquidated damages in whichever of the following amounts is greater:
>
> (i) Two hundred dollars;
>
> (ii) Three times the value of the property at the time it was willfully damaged or was the subject of a theft offense, irrespective of whether the property is recovered by way of replevin or otherwise, is destroyed or otherwise damaged, is modified or otherwise altered, or is resalable at its full market price.

{¶ 93} "Pursuant to R.C. 2307.60 and 2307.61, there is a civil cause of action for damages that result from a theft offense. Furthermore, R.C. 2307.61(G) specifically indicates that recovery of damages in a civil action for a theft offense does not require a criminal conviction." ***422** *CitiMortgage, Inc. v. Rudzik,* 7th Dist. Mahoning No. 13 MA 20, 2014-Ohio-1472, 2014 WL 1384596, ¶ 2.

{¶ 94} R.C. 2307.60 is a broad statute referring to "[a]nyone injured in person or property by a criminal act * * *," whereas R.C. 2307.61 refers more specifically to "[a] property owner * * *." R.C. 2307.61 also limits its reach to situations involving willful damage of property or theft, and provides additional potential remedies, including liquidated damages and an award of treble damages.

{¶ 95} We agree with the trial court that Kimberly's claim under R.C. 2307.60 would be similar to the claim brought for an accounting and breach of fiduciary duties, as Kimberly might be able to recover damages and attorney fees in either situation. However, the claims are not necessarily identical. In addition, the issue remains whether Kimberly could be considered a "property owner" under R.C. 2307.61 for purposes of the more expanded remedy in that statute. R.C. 2307.61 does not define the term "property owner," but cases that have applied the statute involve persons or entities that have an ownership interest in the property. *See, e.g., Rudzik* at ¶ 5 (claim initiated by property owners against mortgagee); *Winona Holdings, Inc. v. Duffey,* 10th Dist. Franklin No.

13AP–471, 2014-Ohio-519, 2014 WL 585969, ¶ 2 (complaint filed by assignee of car dealership that had received check from defendant that was dishonored for insufficient funds); and *Semco, Inc. v. Sims Bros., Inc.*, 3d Dist. Marion No. 9–12–62, 2013-Ohio-4109, 2013 WL 5347400, ¶ 3–4 (complaint brought by foundry against metal recycler that had purchased metal stolen from foundry).

[18] {¶ 96} Our review of Ohio case law fails to reveal a case in which a beneficiary of a trust has filed an action against a trustee under R.C. 2307.61. As we previously noted, beneficiaries of trusts have only equitable interests in a trust until their interest is vested. However, as we also noted, once Lorraine died, Kimberly obtained a legal interest in the trust property. Thus, under R.C. 2307.61, Kimberly would have been a "property owner" at that time.

{¶ 97} In view of our prior holding regarding Kimberly's ability to bring an action based on misuse of the power of attorney, we also conclude that Kimberly has standing to bring an action under R.C. 2307.60 and R.C. 2307.61. The remedy of a civil action for treble damages for "property owners" who have been deprived of property due to theft is consistent with actions for an accounting and to obtain relief pursuant to a POA. It is also consistent with the ability to bring actions based on an attorney's malicious conduct. Accordingly, we see no reason why R.C. 2307.61 would not apply to the situation before us.

{¶ 98} Based on the preceding discussion, the Third Assignment of Error is sustained.

V. Alleged Error in Granting Attorney Fees

{¶ 99} Kimberly's Fourth Assignment of Error states that:

> Did the Trial Court Commit Prejudicial Error When It: A. Granted Defendant Some Attorney's Fees For the Accounting? B. Denied Plaintiff Some Attorney Fees for Discovering the Defalcation?

[19] {¶ 100} Under this assignment of error, Kimberly contends that the trial court erred in awarding David some attorney fees, and in denying her some attorney fees. We will consider these matters together, as they are interrelated.

{¶ 101} In its initial decision, the trial court concluded that it lacked sufficient ***423** information to make a reasonable award of attorney fees for either side. The court, therefore, held another hearing. After the hearing, the court concluded that David was entitled to charge the revocable trust 60% of the fees he incurred from April 2011 through June 2013. The amount of the attorney fee award was $46,360.90. The court based this decision on David's provision of an accounting for the time period after June 2007 that essentially matched the accounting Kimberly presented at trial. In March 2011, David had also offered to settle the dispute on terms that exceeded the amount awarded at trial. Consequently, the trial court concluded that Kimberly had pursued lengthy, expensive litigation that resulted in David repaying the revocable trust an amount less than he had offered to pay before litigation ensued. However, because David's willful misconduct precipitated the litigation, the court discounted David's award by forty percent. For the same reasons, the court limited Kimberly's attorney fee award to $12,384, which represented her fees and costs up to March 2011, when David offered to settle the case.

[20] **[21]** {¶ 102} "When considering an award of attorney fees, Ohio follows the 'American Rule,' under which a prevailing party may not generally recover attorney fees." *Wilson Concrete Products, Inc. v. Baughman,* 2d Dist. Montgomery No. 20069, 2004-Ohio-4696, 2004 WL 1950291, ¶ 8, citing *Sorin v. Bd. of Edn.*, 46 Ohio St.2d 177, 179, 347 N.E.2d 527 (1976). "However, attorney fees may be allowed if: (1) a statute creates a duty; (2) an enforceable contract provision provides for an award of attorney fees; or (3) the losing party has acted in bad faith." *Wilson* at ¶ 8, citing *Nottingdale Homeowners' Assn., Inc. v. Darby,* 33 Ohio St.3d 32, 33–34, 514 N.E.2d 702 (1987), and *Sturm v. Sturm,* 63 Ohio St.3d 671, 675, 590 N.E.2d 1214 (1992).

{¶ 103} In the case before us, attorney fees were allowed by statute with respect to the administration of the revocable trust. Specifically, R.C. 5810.04 provides that:

> In a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision, the court, as justice and equity may require, may award costs, expenses, and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party's

> interest in the trust that is the subject of the controversy.

{¶ 104} Attorney fees would also be permitted regarding the claim for misuse of the power of attorney, which involves the time period prior to June 2007, if the trial court finds that David acted in bad faith. *See Schiavoni v. Roy,* 9th Dist. Medina No. 11CA0108–M, 2012-Ohio-4435, 2012 WL 4472225, ¶ 32 (which allowed attorney fees in case involving conversion, breach of fiduciary duty, unjust enrichment, and misuse of a power of attorney).

[22] {¶ 105} We review awards of attorney fees for abuse of discretion. *See, e.g., Brazelton v. Brazelton,* 2d Dist. Montgomery No. 24837, 2012-Ohio-3593, 2012 WL 3253219, ¶ 10, and *Innovative Technologies Corp. v. Advanced Mgt. Technology, Inc.,* 2d Dist. Montgomery No. 23819, 2011-Ohio-5544, 2011 WL 5137204, ¶ 131. "An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable." *Brazelton* at ¶ 10. (Citations omitted.)

{¶ 106} In view of this somewhat deferential standard, we would normally overrule Kimberly's challenge to the attorney fee awards, because the record supports ***424** the trial court's decision about David's offer to settle the accounting case in March 2011. However, because the trial court erred with respect to its conclusions regarding the alleged misuse of the power of attorney and with respect to Kimberly's entitlement to bring a civil action under R.C. 2307.60 and R.C. 2307.61, the attorney fee award must be reversed. The litigation after March 2011 involved these claims as well as the claim that David had improperly administered trust assets. As a result, if the trial court finds that David acted in bad faith with respect to the power of attorney, Kimberly may be entitled to more attorney fees, and David may be entitled to less attorney fees. This is a decision for the trial court to make in the first instance, on remand.

{¶ 107} Based on the preceding discussion, the Fourth Assignment of Error is sustained. The awards of attorney fees will be reversed, and this cause will be remanded for further proceedings.

VI. Conclusion

{¶ 108} Kimberly's First Assignment of Error having been overruled, her Second Assignment of Error having been overruled in part and sustained in part, and her Third and Fourth Assignments of Error having been sustained, the judgment of the trial court is affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

FAIN and DONOVAN, JJ., concur.

All Citations

15 N.E.3d 401, 2014 -Ohio- 2995

Footnotes

1 For purposes of convenience, Plaintiff–Appellant, Kimberly Cartwright, and Defendant–Appellee, David Batner, will be referred to by their first names.

2 To avoid confusion, we will refer to Lorraine Batner by her first name.

3 R.C. 2101.24(A)(1)(u) and (z) pertain to medical issues and do not apply to the case before us.

4 The reason some expenditures are identified is because they are listed on the statement in the form of electronic checks, while the payees of checks that were apparently written are not identified in the statements.

5 David did submit a check in his exhibits, indicating that he paid St. Leonard's $608 for his mother's care on April 10, 2006. He failed to provide evidence regarding the remaining $9,000 plus expended that month. Surely, if David had access to one check during that time, he should have had access to the remaining checks.

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