COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

ASHLEY BOCKMAN	**:**	
Plaintiff	**:**	**CASE NO. 2011 CVC 001863**
vs.	**:**	**Judge McBride**
DAVID BOCKMAN, et al.,	**:**	**DECISION/ENTRY**
Defendants	**:**	

Maxwell D. Kinman, attorney for the plaintiff Ashley Bockman, 423 Reading Road, Mason, Ohio 45040.

Paul Yelton, attorney for the defendants David and Rhonda Bockman, 424 West Plane Street, Bethel, Ohio 45106.

This cause is before the court for consideration of a motion for summary judgment filed by the defendants David Bockman and Rhonda Bockman.

A non-oral hearing was held on the motion for summary judgment on March 29, 2013, and oral arguments were heard on the motion on June 24, 2012. At the conclusion of the oral arguments, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On September 21, 2011, the plaintiff Ashley Bockman's minor children spent the night with the defendants.[1] The next day, the defendants initiated an emergency custody hearing, and emergency custody of the minor children was granted to the defendants by the court.[2] A full hearing was held on the issue of emergency custody on September 30, 2011 and, at the conclusion of that hearing, custody of the minor children was returned to the plaintiff.[3]

On October 19, 2011, the plaintiff filed her complaint in the case at bar which set forth three causes of action. Two of those causes of action were subsequently dismissed.[4] The only cause of action remaining is one for "intentional and unjustified Interference with parent-child relationship."

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled

[1] Complaint at ¶ 23.
[2] Id. at ¶¶ 24-25.
[3] Id. at ¶ 26.
[4] Plaintiff's Notice of Dismissal of Counts II and III, filed January 28, 2013.

to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[5]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[6] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[7]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[8]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[9] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be

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[5] Civ. R. 56(C);*Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.
[6] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.
[7] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.
[8] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[9] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[10]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[11] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[12]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[13] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[14] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[15]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[16] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the

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[10] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[11] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[12] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[13] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[14] Id.
[15] Id.
[16] Id.

allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[17] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[18] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[19]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[20] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[21]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[22]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[23]

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[17] Id.
[18] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[19] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[20] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[21] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[22] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[23] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[24] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[25] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[26]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of

[24] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.
[25] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[26] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.

evidence, a claim to survive a summary judgment motion must be more than merely colorable.[27]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[28]

LEGAL ANALYSIS

In the case at bar, the defendants have chosen to rely solely on the complaint to demonstrate why no genuine issue of material fact exists in this case. While it is exceedingly rare for a moving party to rely solely on the complaint in support of its summary judgment motion, Civ.R. 56(C) does allow a court to consider the pleadings when ruling on a motion for summary judgment, as noted above.

Pursuant to R.C. 2307.50:

> "(A) As used in this section:
>
> (1) 'Child stealing crime' means 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.
>
> (2) 'Minor' means a person under eighteen years of age.
>
> (3) 'Parental or guardianship interest' means that a parent of a minor is the residential parent and legal custodian of the minor and has the rights corresponding to that capacity, that a parent of a minor is the parent other than the residential parent of the minor and has a right of access to the minor,

[27] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[28] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

> that the parents of a minor have parental rights and responsibilities for the care of the minor and are the residential parents and legal custodians of the child, or that any other person has a right of custody or access to a minor as his guardian or other custodian.
>
> (B) 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. In the civil action, the plaintiffs may recover all of the following:
>
> (1) Full compensatory damages, including, but not limited to, damages for the mental suffering and anguish incurred by the plaintiffs, damages for the loss of society of the minor, and, if applicable, damages for the loss of the minor's services and damages for expenses incurred by the plaintiffs in locating or recovering the minor;
>
> (2) Punitive damages;
>
> (3) Reasonable attorney's fees;
>
> (4) Costs of bringing the civil action.
>
> (C) In a civil action brought pursuant to this section, the trier of fact may determine that the minor was the victim of a child stealing crime and that the defendant committed the crime, regardless of whether the defendant has been convicted of or pleaded guilty to a child stealing crime.
>
> (D) This section does not create a civil action for one parent against the other parent who commits a child stealing crime against the parent's own child."

It is not required that a defendant be convicted of a child-stealing crime in order for a plaintiff to maintain an action under R.C. 2307.50 "as long as the trier of fact

determines that the defendant in fact committed a child-stealing crime involving the minor."[29]

In her memorandum in opposition to the present motion, the plaintiff indicates that she is relying on R.C. 2919.23 as the "child stealing crime" statute that is relevant to the case at bar. R.C. 2919.23 provides in pertinent part as follows:

> "(A) No person, knowing the person is without privilege to do so or being reckless in that regard, shall entice, take, keep, or harbor a person identified in division (A)(1), (2), or (3) of this section from the parent, guardian, or custodian of the person identified in division (A)(1), (2), or (3) of this section:
>
> (1) A child under the age of eighteen, or a mentally or physically handicapped child under the age of twenty-one
>
> * * *
>
> (C) It is an affirmative defense to a charge of enticing or taking under division (A)(1) of this section, that the actor reasonably believed that the actor's conduct was necessary to preserve the child's health or safety. It is an affirmative defense to a charge of keeping or harboring under division (A) of this section, that the actor in good faith gave notice to law enforcement or judicial authorities within a reasonable time after the child or committed person came under the actor's shelter, protection, or influence."

In the case sub judice, the key phrase in the statute above is "without privilege to do so or being reckless in that regard." The defendants were clearly not without privilege to keep the plaintiff's minor children from September 21st to September 30th, 2011 because a court of law gave emergency custody to them. Furthermore, the defendants were not reckless in regard to having privilege to keep the children, again, because a court of law gave them permission to do so.

[29] *Giambrone v. Berger*, 57 Ohio App.3d 38, 566 N.E.2d 711 (Ohio App. 5th Dist., 1989).

A judge or magistrate considered a petition to obtain emergency custody and concluded that the petition and/or supporting testimony warranted awarding emergency custody to the defendants. The fact that, at a later hearing where both sides were represented, the court chose to return custody to the plaintiff does not make the defendants' actions of keeping the children during the time they had custody any less lawful. In essence, the plaintiff seeks here to bring a claim for interference with custody by virtue of a child-stealing crime based on the fact that the defendants filed a petition for emergency custody in a court of law. However, filing a petition for emergency custody is not enticing, taking, keeping, or harboring a minor child without privilege to do so. If such a petition is denied and the party seeking custody refuses to return the child to the parent, this could form the basis of such a claim. Conversely, a court granting emergency custody to the party and the party then keeping the children as they are lawfully permitted to do thereafter so long as the emergency custody order is in effect is not a child-stealing offense.

The court would also note that these facts do not fall under the affirmative defenses set forth in R.C. 2307.50(C). The defendants did much more than simply give notice to law enforcement or judicial authorities. Instead, the defendants in the case at bar were actually awarded legal emergency custody of the children by a court of law. As such, no affirmative defense set forth in R.C. 2307.50(C) is necessary in this case because the defendants' actions do no rise to the level of a child-stealing crime in the first place.

In the case at bar, the children spent the night with the defendants on September 20, 2011. There is no indication that this visit was without the plaintiff's permission or

approval. The next day, the defendants filed a petition for emergency custody in a court of law and were awarded emergency custody by that court. The defendants kept the children until the day of the full hearing and there is no indication they kept them once custody was returned to the plaintiff. The plaintiff's characterization of the claims in the petition as "wild" and "outrageous" aside, the court of law at the original emergency custody hearing found them to be credible.

There is no evidence in the case at bar that the defendants enticed, took, kept, or harbored the plaintiff's children without privilege to do so or being reckless in that regard, as they were granted emergency custody of the children by a court of law. As such, the plaintiff has failed to set forth a claim under R.C. 2307.50 and no genuine issue of material fact remains in the present case. The defendants are entitled to judgment as a matter of law.

CONCLUSION

The defendants' motion for summary judgment is well-taken and is hereby granted.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 9th day of July 2013 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride