

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH.

EARNIE ROSS, et al., :
 :
 Plaintiffs : **CASE NO. 2013 CVH 01874**
 :
 vs. : **Judge McBride**
 :
CHAD WENDEL, et al. : **DECISION/ENTRY**
 :
 Defendants :

Rittgers & Rittgers, Attorneys and Law, Eric P. Allen, counsel for the plaintiffs Earnie Ross, Kristine Ross, Hunter Ross, a minor by and through his parent and next friend, and Mason Ross, a minor by and through his parent and next friend, 12 East Warren Street, Lebanon, Ohio 45036.

David P. Bolek, counsel for the defendants Steve Seitz and Kathleen Seitz, P.O. Box 145496, Cincinnati, Ohio 45250-5496.

Finney Law Firm, LLC, Justin C. Walker, counsel for defendant Wesley Seitz, 4270 Ivy Pointe Blvd., Suite 225, Cincinnati, Ohio 45245.

This cause is before the court for consideration of a motion for partial summary judgment filed by the plaintiffs Earnie Ross, Kristine Ross, Hunter Ross, a minor by and through his parent and next friend, and Mason Ross, a minor by and through his parent and next friend, and for consideration of the following motions filed by the defendants Steve Seitz and Kathleen Seitz: 1) motion for partial summary judgment, 2) motion to

strike portions of the affidavit of Lee Ottaway, 3) motion to strike the affidavit of Allison Kelly, and 4) motion to strike the independent medical evaluation report of Dr. Thomas Sullivan.

The court scheduled and held oral argument on all of the motions on March 27, 2015. After arguing the motion to strike Dr. Sullivan's report, the plaintiffs' counsel requested additional time to further brief the issue and/or file case law relevant to that issue, and the court granted each side an additional week to submit memoranda and case law. After that week expired, the motions were taken under advisement on the next business day, which was April 6, 2015.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

On December 23, 2012, the defendant Wesley Seitz, who was a minor at the time, was in the basement of the home he shared with his parents, defendants Steve and Kathleen Seitz, and was talking with his friend Chad Wendel.¹ Wendel testified that Wesley was upset and pacing and said "I want to get him back soon."²

¹ Deposition of Wesley Seitz at pgs. 56 and 65; and Deposition of Chad Wendel at pg. 24.

² Wendel Depo. at pgs. 24-25.

Wesley testified that he was angry with Earnie Ross because he "kept coming down, harassing [him]," and yelling at Wesley several times from his truck.³ Wesley got the idea that evening to burn Earnie Ross's truck.⁴

According to Chad Wendel's testimony, Wesley then used Google Maps to see how far they would have to walk to the Ross house from the road.⁵ Wesley and Wendel waited until it was dark outside and told Steve Seitz that they were going to get a movie, and Steve permitted them to do so, despite Wesley being grounded at the time.⁶ Wendel recalls that Steve told them to come back to the house after they rented the movie.⁷

On his way out to the car, Wesley picked up a "shop rag," lighter, and bottles of oil and gasoline from the garage.⁸ Both Wesley and Wendel also put on hunting masks once they got in the car.⁹

Wendel and Wesley then drove to the Redbox located at the Goshen Kroger store and rented a movie, and Wesley testified that they also went to the McDonald's next door to the Kroger and purchased some food.¹⁰ On the way back, they parked the car on the road near the Ross residence and walked up to the residence which was located at 5300 Rapp Lane, Batavia, Ohio.¹¹

Once at the house, Wesley poured oil or gasoline in one of the trucks and threw the rag on it, Chad Wendel poured oil or gasoline in another truck, and they each lit the

³ Wesley Seitz Depo. at pgs. 56-61.

⁴ Id. at pg. 56.

⁵ Wendel Depo. at pg. 47.

⁶ Id. at pg. 24 and Deposition of Steven Seitz at pg. 151 and 153.

⁷ Id. at pg. 30.

⁸ Wesley Seitz Depo. at pgs. 65-67 and 87-88.

⁹ Wendel Depo. at pg. 28.

¹⁰ Id. at pg. 30; and Wesley Seitz Depo. at pgs. 66-67 and 88.

¹¹ Id. at pg. 32; and Deposition of Kristine Ross at pg. 6.

trucks on fire.¹² Wesley Seitz admitted during his deposition that he trespassed upon the Ross property on December 23, 2012, committed arson upon Earnie Ross's truck, and vandalized his property.¹³

At the time of the arson, Earnie Ross and Kristine Ross were in the living room of their home with their two children.¹⁴ Earnie saw that his truck was on fire and he opened the door to look outside and Kristine followed him.¹⁵

There were three vehicles parked next to each other in the driveway at the time and there was a big fire coming out of the older truck.¹⁶ Kristine called 911 and Earnie proceeded to put water on the fire in an unsuccessful attempt to abate it.¹⁷

Flames could be seen coming out of the back door from the second, newer truck.¹⁸ Earnie moved the newer truck away from the larger fire and he and Kristine were able to put out the fire in the back seat.¹⁹

Earnie recalls that he was coughing and gagging and that his contacts were very cloudy from the smoke.²⁰ Earnie then saw smoke coming off of Kristine's vehicle, which had been parked between the two trucks that were on fire.²¹

Although the heat was very intense in Kristine's vehicle, Earnie was able to move it to the other side of the driveway.²² Kristine eventually went back inside the house

¹² Id. at pgs. 32-33; and Wesley Seitz Depo. at pgs. 56 and 65-66.

¹³ Wesley Seitz Depo. at pg. 55.

¹⁴ Deposition of Earnie Ross at pg. 15; and Kristine Ross Depo. at pg. 13.

¹⁵ Id. at pg. 16; and Kristine Ross Depo. at pg. 14.

¹⁶ Kristine Ross Depo. at pgs. 14-15.

¹⁷ Id. at pgs. 15 and 21; and Earnie Ross Depo. at pg. 17.

¹⁸ Id. at pg. 16; and, Earnie Ross Depo. at pg. 17.

¹⁹ Id. at pgs. 16-17; and Earnie Ross Depo. at pg. 18.

²⁰ Earnie Ross Depo. at pg. 19.

²¹ Id.; and, Kristine Ross Depo. at pg. 16.

²² Id. at pgs. 19-20; and Kristine Ross Depo. at pg. 16.

because there were some explosions inside the older truck, including shotgun shells going off.²³

Prior to this arson incident, Wesley was responsible for poaching at least twelve deer in 2012 in violation of the hunting laws of the state of Ohio.²⁴ Wesley had a curfew but would sneak out of the house to go hunting without his parents' knowledge.²⁵ Chad Wendel estimated the number of deer Wesley poached to be over fifty, and he recalled that Wesley would cut off the heads of the deer as trophies.²⁶

On one occasion, Wesley poached a large buck and his parents discovered what he had done.²⁷ Wesley was grounded for at least two weeks and was admonished by his father that he could not continue poaching deer and he was not permitted to keep the head of the poached buck.²⁸

The combination of the gun safe was also changed but may have been given to Wesley again after several weeks.²⁹ Steve Seitz also allowed Wesley to use his deer tag for the poached deer because he was "trying to cover" for Wesley.³⁰

Earnie Ross provided the Ohio Department of Natural Resources with information about deer poaching that was occurring in the area.³¹ On the day before Thanksgiving 2012, Wesley Seitz snuck out of his parents' house at night and was caught attempting to poach a deer with several of his friends.³² Wesley was caught by

²³ Id. at pg. 18.

²⁴ Wesley Seitz Depo. at pg. 26.

²⁵ Wesley Seitz Depo. at pgs. 35-36; Kathleen Seitz Depo. at pg. 69; and, Steven Seitz Depo. at pg. 139.

²⁶ Wendel Depo. at pgs. 49-51.

²⁷ Id. at pg. 40; Kathleen Seitz Depo. at pgs. 94-95 ; and Steven Seitz Depo. at pg. 145.

²⁸ Id. at pgs. 36 and 41;and Kathleen Seitz Depo. at pg. 95.

²⁹ Id. at pg. 42; Kathleen Seitz Depo. at pgs. 70 and 96; Steven Seitz Depo. at pg. 142; and Chad Wendel Depo. at pgs. 60-62.

³⁰ Id. at pgs. 36 and 42.

³¹ Earnie Ross Depo. at pgs. 51-55 and 93.

³² Wesley Seitz Depo. at pg. 44-46.

officials with the Ohio Department of Natural Resources, who escorted Wesley home and asked for permission to search his property.³³ In the Seitz's barn, the ODNR officials found a poached deer which Wesley testified he did not kill but knew was poached by his friend and allowed to be stored in his family's barn.³⁴

After this incident, Wesley was grounded, meaning he could not go hunting or go anywhere with his friends, until he was arrested on the arson and poaching charges in March 2013.³⁵ Wesley told Chad Wendel that Earnie Ross called the game warden and that is why he got caught.³⁶

Wesley, who was under the age of eighteen, also purchased a firearm at a flea market between the time of the poaching incident and the arson.³⁷ His parents became aware of the gun purchase prior to the arson.³⁸ While Kathleen Seitz testified that Wesley bought this gun for protection from Earnie Ross, Wesley himself testified that he bought the gun simply because "it was a good deal."³⁹

Kristine Ross testified that neither she nor her children sought treatment for any emotional or psychological issues related to the arson.⁴⁰ Earnie Ross testified that after the fire he had difficulty sleeping and was prescribed Ambien, which he still currently takes.⁴¹ Earnie stated that he was also having anger issues and that he felt that his Attention Deficit Disorder symptoms were coming back.⁴² At the time of his deposition, Earnie testified that he had recently seen Dr. Thomas Shapiro, a psychologist, at the

³³ Id. at pg. 48.

³⁴ Id. at pgs. 48-50.

³⁵ Id. at pg. 68.

³⁶ Wendel Depo. at pg. 64.

³⁷ Wesley Seitz Depo. at pg. 22.

³⁸ Id. at pg. 24.

³⁹ Id. at pg. 113; and Kathleen Seitz Depo. at pg. 103.

⁴⁰ Kristine Ross Depo. at pgs. 11 and 55.

⁴¹ Earnie Ross Depo. at pg. 34.

⁴² Id. at pgs. 34-37.

advice of his counsel but, at that time, Dr. Shapiro had yet to produce a report as to any diagnosis.⁴³

Earnie Ross's older truck that was burned was a 2000 Ford F350.⁴⁴ That truck was "burned down to the frame" and was not insured.⁴⁵ Earnie's newer truck was a 2012 Ford F350 and the repairs to that vehicle cost approximately \$4,000.00.⁴⁶

Kristine's vehicle was a 2004 Ford Expedition.⁴⁷ After the fire, the paint was melted, the frame had begun to melt, and the windows were buckled on the driver's side.⁴⁸ The Expedition cost approximately \$6,000.00 to repair.⁴⁹

Earnie and Kristine only paid a \$250.00 deductible out-of-pocket for each of the two repaired vehicles and did not pay for the thousands of dollars of repair work.⁵⁰ Earnie Ross also testified that there were personal items located in his older truck that were destroyed by the fire and he gave an estimate of approximately \$26,500.00 to replace the truck and the equipment.⁵¹

I. MOTIONS TO STRIKE

(A) AFFIDAVIT OF LEE OTTAWAY

⁴³ Id. at pgs. 33 and 35-37.

⁴⁴ Kristine Ross Depo. at pg. 26.

⁴⁵ Id. at pg. 32; and Earnie Ross Depo. at pg. 27.

⁴⁶ Id. at pg. 33; and Earnie Ross. Depo. at pg. 28.

⁴⁷ Id. at pg. 23.

⁴⁸ Id. at pg. 23.

⁴⁹ Id. at pg. 33.

⁵⁰ Id. at pg. 33; Earnie Ross Depo. at pgs. 28 and 65.

⁵¹ Id. at pgs. 28-32. (There was a short discussion between counsel at the deposition on pg. 32 that the \$42,000 figure included the two \$250.00 deductible payments and \$15,000 for lost wages which are no longer being claimed.)

The defendants move to strike paragraphs nine and ten of the affidavit of Lee Ottaway submitted by the plaintiffs. Those two paragraphs read as follows:

“9. I am aware that Wesley Seitz committed arson upon Earnie Ross’s property three weeks later on December 23, 2012. Because the Ross property is the only property up the hill on Rapp Lane and Wesley had passed all of the properties on the bottom of the hill, it is my belief that Wesley was scoping out the Ross property for the purpose of committing arson sometime later.

10. It is my belief that Steve Seitz was involved in and/or had knowledge of the impending arson of the Ross property.”⁵²

Ottaway states earlier in his affidavit that he saw Wesley go up the hillside on quad runners on Rapp Lane toward Earnie Ross’s house on November 30, 2012.⁵³ He further states that he saw Steve Seitz driving a pick-up truck with approximately five gas cans in the truck bed up on the hill near the Ross property about one week later.⁵⁴ Later that same day, Ottaway saw Wesley and another boy on quad runners near the Ross home.⁵⁵

The plaintiffs argue that both of these paragraphs are proper under Evid.R. 701, which states as follows: “If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”

“In order to satisfy the requirement that the opinion testimony must be rationally based on the perceptions of the witness, the opinion of the lay witness must be “ ‘one

⁵² Affidavit of Lee Ottaway, filed January 21, 2015.

⁵³ Id. at ¶ 7.

⁵⁴ Id. at ¶ 8.

⁵⁵ Id.

that a rational person would form on the basis of the observed facts.’⁵⁶ “If the opinion is not ‘rationally based on the perception of the witness,’ then the opinion is speculation, and as such, cannot be ‘helpful to a * * * determination of a fact in issue.’⁵⁷

The first statement of opinion by Lee Ottaway is that “[b]ecause the Ross property is the only property up the hill on Rapp Lane and Wesley had passed all of the properties on the bottom of the hill, it is [his] belief that Wesley was scoping out the Ross property for the purpose of committing arson sometime later.”

The court finds that this testimony does not meet the standard required by Evid.R. 701 and constitutes improper speculation regarding the intent of Wesley Seitz. However, the court would also note that this testimony is of no consequence to the issues at hand because Wesley Seitz himself testified that he committed the arson at issue. Whether the idea to commit the arson occurred to Wesley the day he committed it or several weeks earlier does not impact any operative fact at issue to the motions for summary judgment.

The second statement challenged by the defendants is Mr. Ottaway’s testimony that “[i]t is [his] belief that Steve Seitz was involved in and/or had knowledge of the impending arson of the Ross property.” This opinion is based only on the fact that he saw Steve Seitz, who lives in the same area, driving with several gas cans in the bed of his truck toward the Ross property several weeks before the arson. This opinion is not a

⁵⁶ *Hand v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-946, 2013-Ohio-4341, ¶ 14, quoting *State v. Mulkey*, 98 Ohio App.3d 773, 784 (10th Dist.1994), quoting *Lee v. Baldwin*, 35 Ohio App.3d 47, 49, 519 N.E.2d 662 (1st Dist.1987).

⁵⁷ *State v. Cornish*, 12th Dist. Butler No. CA2014-02-054, 2014-Ohio-4279, ¶ 24, quoting *State v. Feerer*, 12th Dist. Warren No. CA2008-05-064, 2008-Ohio-6766, ¶ 23, quoting *State v. Hall*, 2nd Dist. Montgomery No. 19671, 2004-Ohio-663, ¶ 8.

rational inference based on the perception of Ottaway from simply seeing Seitz driving on the road toward the Ross property and is instead merely speculative.

As a result, the entirety of paragraph ten and the final sentence of paragraph nine shall be stricken from Lee Ottaway's affidavit.

(B) AFFIDAVIT OF ALLISON A. KELLY

The defendants seek to strike the entirety of the affidavit of Allison Kelly, arguing that "the entire affidavit is speculative and void of personal knowledge."

Portions of Ms. Kelly's affidavit consist of her recounting statements made to her by Kristine Ross about her fears and anxieties. Ms. Kelly also states that, since the arson, she has noticed a "significant level of stress and anxiety in [Kristine] that was not present prior."⁵⁸ Other portions of Ms. Kelly's affidavit appear to consist of her opinions regarding Kristine's mental state. For example, Ms. Kelly avers that "[Kristine] and her husband have lost the ability to feel safe and secure in their own home, on their own property[.]" and that "[s]he worries about the safety of her family, as well as their psychological wellbeing, particularly her two young sons."⁵⁹

The defendants also argue that the affidavit includes hearsay statements. Hearsay, which is generally inadmissible, is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁶⁰

⁵⁸ Affidavit of Allison A. Kelly, filed January 23, 2015.

⁵⁹ Id.

⁶⁰ Evid.R. 801(C) and 802.

Pursuant to Evid.R. 803(3), “[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed * * *[,]” is excluded from the hearsay rule.

To be admissible under Evid.R. 803(3), the witness has to be recounting the statement that was made by the person, not her interpretation of what the person was saying, and the statement has to be made by the declarant as to her “then existing” state of mind, emotion, or sensation. The statement has to be as to what she is feeling at the time as opposed to her recollection of the way she felt previously.

The witness’s opinions must be based on her perception of the witness and must be rationally based on her perception. Enough has to be included in the affidavit as to her perceptions for the court to find that the opinions are rationally based on her perceptions. The opinion must be one that a normal person would form on the basis of the observed facts.

Opinions as to “significant anxieties” and “significant changes” can’t be tested as to whether they are rationally based on Ms. Kelly’s perception. These opinions appear to be based on Ms. Kelly’s interpretation of statements made to her by the plaintiff which were not statements made as to her “then existing” state of mind but were instead recollections of the way that Kristine Ross felt in the past. At the very least, it cannot be determined by this court whether they are statements of how Mrs. Ross was feeling at the time.

The witness's opinion as to what Kristine Ross was expressing regarding the way she was feeling at some point in the past is hearsay and does not come in under 803(3). Ms. Kelly's opinions as to what the plaintiff was aware of or what she was worrying about are speculation as to what the plaintiff's mental state was at the time, and to the extent they are not speculation but are based on information provided to her by the plaintiff as to what she was feeling at some previously existing time, these statements are not properly admissible under Evid.R. 803(3).

The third and fourth paragraphs of Ms. Kelly's affidavit appear to be attempts to get into evidence the mental conditions of the Ross children and of Earnie Ross through summations of statements made by them to Kristine Ross as communicated to Ms. Kelly. Ms. Kelly then offers her opinions that these matters are causing anxieties or worries to the victim without recounting what statements Kristine Ross made which show that she was worried or anxious at the time. This is all the more apparent in the last paragraph where Ms. Kelly is speculating as to the reasons for her stress and anxiety and/or providing her opinion as to what Mrs. Ross was saying rather than recounting the plaintiff's statements made at the time as to her then existing mental condition. This is not admissible evidence.

As a result, the motion to strike shall be granted as to the entirety of Allison Kelly's affidavit.

(C) INDEPENDENT MEDICAL EXAMINATION REPORT

In their motion to strike filed on January 27, 2015, the defendants moved to strike several documents submitted in support of the plaintiffs' memorandum in opposition to the defendants' motion for summary judgment. At the hearing on this matter, the defendants withdrew the motion with regard to all of the documents except the IME report by Dr. Thomas Sullivan.

Dr. Sullivan's report was filed in opposition to the defendants' motion for summary judgment on January 14, 2015. However, there was no affidavit accompanying the report to authenticate it.

The court set a briefing schedule for the motions for summary judgment and that briefing schedule provided that there would be a non-oral hearing on any motion for summary judgment on January 5, 2015 at 9:00 a.m.⁶¹ The entry further explains that "** * any evidence to be presented in opposition to the motion for summary judgment needs to be filed prior to the day of the hearing."⁶² Although not stated explicitly, this statement is intended to put counsel on notice that the non-oral hearing serves as the Civ.R. 56(C) hearing by which "the adverse party prior to the day of [that] hearing may serve and file opposing affidavits."⁶³

By agreement of counsel, the time for filing motions for summary judgment was extended but all other deadlines in the briefing order remained in effect.⁶⁴ Thereafter, the deadline for filing evidence in opposition to summary judgment was extended twice; once until January 16, 2015 and then until January 23, 2015.⁶⁵ The agreed entries

⁶¹ Briefing/Hearing Schedule re: Motion(s) for Summary Judgment, filed August 5, 2014.

⁶² Id. at ¶ 2.

⁶³ Civ.R. 56(C).

⁶⁴ Agreed Entry Extending Time for Filing Motions for Summary Judgment, filed December 1, 2014.

⁶⁵ Agreed Entry Extending Time for Filing Evidence, filed January 7, 2015; and, Agreed Entry Extending Time for Filing Evidence, filed January 21, 2015.

extending time to file affidavit evidence did not explicitly state that the non-oral hearing would be the day following the deadline.

After the January 23rd deadline passed, the defendants filed the present motion to strike on January 27th. Thereafter, on February 5, 2015, the plaintiffs filed the affidavit of Dr. Thomas Sullivan in an attempt to authenticate the previously-filed IME report.⁶⁶

" 'Documents submitted in opposition to a motion for summary judgment which are not sworn, certified, or authenticated by affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial.' "⁶⁷ A doctor's medical report must be authenticated by the doctor who authored the report; otherwise, the report contains inadmissible hearsay.⁶⁸

The plaintiffs filed the affidavit of Dr. Sullivan after the deadline for filing affidavits had passed. The plaintiffs did not seek leave of the court to file the affidavit out of time. The defendants seek to have the report stricken because it was unauthenticated documentary evidence at the time of the deadline.

The late-filed affidavit was filed "out of rule and without leave of court."⁶⁹ At least one court has suggested that such affidavits should not be considered by the trial court absent a showing of excusable neglect which would have justified an extension of time

⁶⁶ Affidavit of Thomas Sullivan, Ph.D., ABPP, filed February 5, 2015.

⁶⁷ *Wolk v. Paino*, 8th Dist. Cuyahoga No. 93095, 2010-Ohio-1755, ¶ 28, quoting *Lotarski v. Szczepanski*, 8th Dist. Cuyahoga No. 68088, 1995 WL 753927 (Dec. 20, 1995), quoting *Green v. B.F. Goodrich Co.*, 85 Ohio App.3d 223, 228, 619 N.E.2d 497 (9th Dist.1993).

⁶⁸ *Byrd v. Midland Ross/Grimes Aerospace*, 6th Dist. Lucas No. L-03-1078, 2003-Ohio-6971, ¶ 20, citing *Sweatman v. Yellow Freight System, Inc.*, 10th Dist. Franklin No. 96APE03-329, 1996 WL 492980 (Aug. 29, 1996); and, *Oliver v. Wal-Mart Stores, Inc.*, 10th Dist. Franklin No. 02AP-229, 2002-Ohio-5005, at ¶ 16.

⁶⁹ *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, ¶ 16 (8th Dist.).

pursuant to Civ.R. 6(B).⁷⁰ Other case law suggests that it is within the court's discretion to allow the filing of a surreply and to consider affidavits filed out of time.⁷¹

The court in *Spagnola v. Spagnola*, 7th Dist. Mahoning No. 07MA178, 2008-Ohio-3087, held as follows: “* * * [I]f the trial court has set a hearing on the summary judgment motion (whether oral or non-oral), the Civ.R. 56(F) motion for continuance must be made prior to the date of the hearing. A party may also use Civ.R. 6(b)(1) to request a continuance prior to the date of the hearing. However, after that date, the only means that a party can request additional time to respond is by a Civ.R. 6(b)(2) motion that alleges the failure to act was the result of excusable neglect.”⁷²

In the case at bar, this court set the non-oral hearing in January and the deadline was extended on two occasions by the agreement of counsel. At the time the filing for evidence in opposition to the defendants' motion for summary judgment closed, the IME report was unauthenticated and, therefore, unable to be considered by the court. Alerted to this fact by the filing of the motion to strike, the plaintiffs sought to rectify the situation by filing an affidavit by the doctor but they failed to seek leave of the court to file said affidavit.

Given the multiple opportunities the parties had to file affidavit evidence and the fact that leave was not sought prior to the late filing of the Sullivan affidavit, the court, in

⁷⁰ Id.

⁷¹ See, e.g., *First Financial Servs., Inc. v. Cross Tabernacle Deliverance Church, Inc.*, 10th Dist. Franklin No. 06AP-404, 2007-Ohio-4274, ¶ 39 (“* * * [I]t was within the discretion of the trial court whether to grant appellant's motion for leave to file a surreply.”); *Wildar v. Young*, 6th Dist. Lucas No. L-05-1184, 2006-Ohio-868, ¶ 37 (“Caselaw makes clear, however, that the question of whether to consider an untimely filed affidavit is within the discretion of the trial court.”), citing *Clodgo v. Kroger Pharmacy*, 10th Dist. Franklin No. 98AP-569, 1999 WL 165695 (Mar. 18, 1999), citing, *Stanger v. Waterford Tower Co.*, 10th Dist. Franklin No. 94APE03-371, 1994 WL 463786 (Aug. 25, 1994); *Bush v. Dictaphone Corp.*, 10th Dist. Franklin No. 00AP-1117, 2003-Ohio-883, ¶ 76 (“A trial court's decision to consider untimely filed affidavits is well within its discretion and such decision will not be reversed absent an abuse of that discretion.”); and, *Roush v. Butera*, 8th Dist. No. 97463, 2012-Ohio-2506, ¶ 37 (Defendant did not produce the expert report before the stated deadlines and did not seek leave under Civ.R. 56(F) to produce the report and, as such, there was no abuse of discretion in the trial court's decision to strike the report.).

⁷² *Spagnola v. Spagnola*, supra, 2008-Ohio-3087 at ¶ 33.

its discretion, will not consider the untimely filed affidavit of Dr. Thomas Sullivan. As such, the Independent Medical Examination report written by Dr. Thomas Sullivan remains unauthenticated and cannot be considered by the court. Based on that fact, the motion to strike the report shall be granted.

For these same reasons, the plaintiffs' "motion for leave to file a supplemental pleading after the court's ruling on the motion to strike,"⁷³ which was filed after the hearing on this matter, is not well-taken and shall be denied.

II. MOTIONS FOR SUMMARY JUDGMENT

(A) STANDARD OF REVIEW

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 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."⁷⁴

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.⁷⁵ Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the

⁷³ Plaintiffs' Motion for Leave to File Supplemental Pleading After the Court's Ruling on the Motion to Strike, filed April 3, 2015.

⁷⁴ Civ. R. 56(C); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); and, *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993).

⁷⁵ *Engel v. Corrigan*, 12 Ohio App.3d 34, 35, 465 N.E.2d 932 (8th Dist.1983); *Vlock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378 (6th Dist.1983); *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.⁷⁶

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."⁷⁷

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[?]"⁷⁸ "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 resolved only by a finder of fact because they may reasonably be resolved in favor of either party."⁷⁹

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.⁸⁰ 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."⁸¹

⁷⁶ *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

⁷⁷ *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

⁷⁸ *Id.* at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

⁷⁹ *Id.* at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.

⁸⁰ *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

⁸¹ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

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.⁸² 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.⁸³ 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.⁸⁴

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.⁸⁵ However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.⁸⁶ The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.⁸⁷ 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."⁸⁸

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

⁸² *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); and, *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Baughn v. Reynoldsburg*, 78 Ohio App.3d 561, 563, 605 N.E.2d 478 (10th Dist.1992).

⁸⁸ *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *Welco Indus., Inc.*, supra, 67 Ohio St.3d at 346; and, *Gockel v. Eble*, 98 Ohio App.3d 281, 292, 648 N.E.2d 539 (8th Dist.1994).

allegations.⁸⁹ 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.⁹⁰

"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."⁹¹

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.⁹²

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

⁸⁹ *Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 659, 612 N.E.2d 1295 (9th Dist.1992).

⁹⁰ Civ.R.56(E); *Carlton v. Davisson*, 104 Ohio App.3d 636, 646, 662 N.E.2d 1112 (6th Dist.1995); and, *Smith v. A-Best Products Co.*, 4th Dist. Scioto No 94 CA 2309, 1996 WL 80533 (Feb. 20, 1996).

⁹¹ *Carlton*, supra, 104 Ohio App.3d at 646; *Brannon v. Rinzler*, 77 Ohio App.3d 749, 756, 603 N.E.2d 1049 (2nd Dist.1991).

⁹² *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

affidavit.⁹³ 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.⁹⁴ Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.⁹⁵

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 evidence, a claim to survive a summary judgment motion must be more than merely colorable.⁹⁶

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.⁹⁷

⁹³ *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); and, *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

⁹⁴ *Loopco Indus., Inc.*, supra, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

⁹⁵ *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

⁹⁶ *Wing*, supra, 59 Ohio St.3d at 111.

⁹⁷ Civ.R.56(D); *Holeski v. Lawrence*, 85 Ohio App.3d 824, 834, 621 N.E.2d 802 (11th Dist.1993).

(1) PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiffs move for summary judgment against Wesley Seitz on the issue of liability for "the intentional tort of arson" and against Steve Seitz and Kathleen Seitz as to liability under R.C. 3109.09(B) and R.C. 2307.70(B)(1).

(a) INTENTIONAL TORT

The plaintiffs move for summary judgment for "the intentional tort of arson" based upon him committing the criminal act of arson. In doing so, they rely on R.C. 2307.60(A), which states:

"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."

The First and Eighth District Courts of Appeals have concluded that R.C. 2307.60 requires a criminal violation before civil liability may arise.⁹⁸ The statute itself uses the term "criminal act," which would support the appellate courts' interpretation.

Black's Law Dictionary defines a "criminal act" as "commission of a crime."⁹⁹ Meanwhile, "criminal" is defined as "that which pertains to or is connected with the law

⁹⁸ See, *Hite v. Brown*, 100 Ohio App.3d 606, fn. 1, 654 N.E.2d 452 (8th Dist.1995), citing *Ivancic v. Cleveland Elec. Illum. Co.*, 8th Dist. Cuyahoga No. 63372, 1993 WL 367092 (Sept. 16, 1993); and *Tri-State Computer Exchange, Inc. v. Burt*, 1st Dist. Hamilton No. C-020345, 2003-Ohio-3197, ¶ 23.

⁹⁹ Black's Law Dictionary 372 (6th Ed.1990)

of crimes, or the administration of penal justice, or which relates to or has the character of crime," and "crime" is defined as "a positive or negative act in violation of penal law; an offense against the State or United States."¹⁰⁰

The plaintiffs bring a claim against the defendant Wesley Seitz for the act he committed of setting at least one truck on fire on their property. It is an undisputed fact that Wesley committed the act at issue while he was a minor.

The plaintiffs argue that it is undisputed that Wesley committed arson and that the defendant pleaded guilty to the crime of arson. However, to the contrary, the record is clear that Wesley Seitz never pleaded guilty and was never convicted of violating the arson law in this state. Instead, he was adjudicated to be delinquent in Juvenile Court for the offense of arson¹⁰¹, and the plaintiffs in their argument fail to comprehend the distinction that exists in the law between a "delinquency" and a "criminal offense."

"Being found a juvenile delinquent is different from being guilty of a crime in Ohio."¹⁰² "The purpose of a delinquency proceeding is to determine if the juvenile is delinquent, i.e., has violated a law of this state * * * which would be a crime if committed by an adult."¹⁰³ "Juvenile proceedings are not punitive, but corrective."¹⁰⁴ "The very purpose of the Juvenile Code is to avoid treatment of youngsters as criminals and insulate them from the reputation and answerability of criminals."¹⁰⁵

Certainly, juvenile delinquency laws feature inherently criminal aspects, and the Ohio Supreme Court recognized in *In Re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919,

¹⁰⁰ Id.

¹⁰¹ Kathleen Seitz Depo. at pg. 75.

¹⁰² *In re Good*, 118 Ohio App.3d 371, 375, 692 N.E.2d 1075 (12th Dist.1997), citing *In re Agler*, 19 Ohio St.2d 70, 80, 249 N.E.2d 808 (1969).

¹⁰³ *In re J.D.S.*, 12th Dist. Clermont Nos. CA2013-06-046 and CA2013-06-051, 2014-Ohio-77, ¶ 11.

¹⁰⁴ *In re Richardson*, 7th Dist. Mahoning No. 01MA78, 2002-Ohio-6709, ¶ 5, citing *In re Haas*, 45 Ohio App.2d 187, 188, 341 N.E.2d 638 (5th Dist.1975).

¹⁰⁵ Id., quoting, *In re Agler*, supra, 19 Ohio St.2d at 80.

874 N.E.2d 1177, that the state has a valid interest in enforcing its criminal laws against juveniles.¹⁰⁶ However, notwithstanding all of this, juvenile proceedings are often characterized as civil rather than criminal.¹⁰⁷

Moreover, there is a well-recognized distinction in the law that a delinquent act does not constitute a criminal act. Thus, in *In Re C.S.*, the court noted the distinction in the law:

"Not surprisingly then, the juvenile courts adopted proceedings that were less formal and more inquisitorial than adversarial, *In re T.R.*, 52 Ohio St.3d at 15, 556 N.E.2d 439, and a new lexicon that denoted differences between the two court systems, cf. *State v. Hanning* (2000), 89 Ohio St.3d 86, 89, 728 N.E.2d 1059 (noting that 'delinquency' does not equate to 'criminal' and that 'respondents' are not 'defendants'). As one Ohio court explained, 'Delinquency has not been declared a crime in Ohio, and the Ohio juvenile act is neither criminal nor penal in its nature, but is an administrative police regulation of a corrective character; and while the commission of the crime may set the machinery of the juvenile court in motion [,] the accused was not tried in that court for his crime but for incorrigibility.' *State v. Joiner* (C.P.1917), 28 Ohio Dec. 199, 20 Ohio N.P.(N.S.) 313, 319, 1917 WL 1173, *2, citing *Ex parte Januszewski* 196 F. at 127-128."¹⁰⁸

The difference is further highlighted in Ohio law, in that every delinquency complaint in Juvenile Court states that the offending conduct is "an act that would be a crime if committed by an adult."¹⁰⁹ While the statute requires that the act be one that would be a criminal act or violation if the minor were an adult, the use of the word "would" clearly suggests that the minor could not have committed a criminal act or violation as a juvenile.

¹⁰⁶ *In re C.S.*, supra, 2007-Ohio-4919 at ¶¶ 76-77.

¹⁰⁷ *Id.* at ¶ 76.

¹⁰⁸ *Id.* at ¶ 67.

¹⁰⁹ R.C. 2152.02(F)(1).

Referring again to the definitions of "criminal act" and "crime", the record seems to be clear that Wesley Seitz, by virtue of his age and the distinction between the treatment of juveniles and adults by the legislature, did not commit either a "crime" or a "criminal act"

Based on this analysis, the court finds that the plaintiffs are not entitled to judgment as a matter of law on this issue and the motion for summary judgment shall be denied as to this claim.

(b) R.C. 3109.09(B) and 2307.70(B)(1)

The plaintiffs seek to hold Steve Seitz and Kathleen Seitz liable for the actions of their then-minor son, Wesley Seitz, which caused damage to the plaintiffs' property.

R.C. 3109.09(B) provides as follows:

"Any owner of property, including any board of education of a city, local, exempted village, or joint vocational school district, may maintain a civil action to recover compensatory damages not exceeding ten thousand dollars and court costs from the parent of a minor if the minor willfully damages property belonging to the owner or commits acts cognizable as a 'theft offense,' as defined in section 2913.01 of the Revised Code, involving the property of the owner. The action may be joined with an action under Chapter 2737 of the Revised Code against the minor, or the minor and the minor's parent, to recover the property regardless of value, but any additional damages recovered from the parent pursuant to this section shall be limited to compensatory damages not exceeding ten thousand dollars, as authorized by this section. A finding of willful destruction of property or of committing acts cognizable as a theft offense is not dependent upon a prior finding that the child is a delinquent child or upon the child's conviction of any criminal offense."

The Ohio Supreme Court has stated that “the Ohio General Assembly had a dual purpose in enacting R.C. 3109.09, that is, both to provide a means by which the injured party might receive some compensation for the damaged property and to incentivize parents to supervise and guide their children so as to avoid the imposition of a statutory penalty for the destructive acts of those children.”¹¹⁰ “The high court opined that, because the statute was enacted in derogation of the common law which did not hold parents liable for the tortious acts of their children, parental liability must be construed in a strict, rather than a liberal, manner.”¹¹¹

The Ohio Supreme Court devised a two-part test for determining parental liability under R.C. 3109.09(B).¹¹² “First, the child must have intentionally done the act which gave rise to the damage.”¹¹³ “Second, the child must have intended or acted with purpose to cause such damage.”¹¹⁴ “The high court reasoned that ‘this dual finding is necessary under this statute, in that the intentional doing of an act does not necessarily make the unintentional damage it produces, willful or intentional.’”¹¹⁵

Under the statute, a “parent may not be held liable under the willful acts provision of Section 3109.09 for damage caused by joyriding in a stolen car unless the child also intentionally caused the subsequent damage to it.”¹¹⁶ However, a parent can be held liable if the minor child intentionally hits other vehicles while driving, including for the purpose of clearing those vehicles out of the path of the vehicle being driven by the

¹¹⁰ *State Farm Mut. Ins. Co. v. Jiles*, 9th Dist. Summit No. 26841, 2014-Ohio-2512, ¶ 8, citing *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St.2d 258, 263, 383 N.E.2d 880 (1978).

¹¹¹ *Id.*, citing *Bill*, *supra*.

¹¹² *Id.*

¹¹³ *Id.*, citing *Bill* at 266.

¹¹⁴ *Id.*

¹¹⁵ *Id.*, quoting *Bill* at 266.

¹¹⁶ *Allstate Ins. Co. v. Jaeger*, 9th Dist. No. 09CA009591, 2009-Ohio-5756, ¶ 6, citing *Bill* at 266.

child.¹¹⁷ The key consideration is whether the child intended to cause the damage at issue or if the property damage was simply a consequence of another intentional act.

The plaintiffs in the case at bar are seeking relief under the “willfully damages property” portion of R.C. 3109.09(B). As set forth above, Wesley Seitz admitted in his deposition that he intentionally committed the arson at issue and intended to cause damage to the plaintiffs’ property. Therefore, the two-part test to determine liability under R.C. 3109.09(B) has been met. There is no factual dispute as to this issue, no genuine issue of material fact remains to be litigated, and the plaintiffs have established that they are entitled to judgment as a matter of law on this claim. As such, the unrefuted record demonstrates that Wesley Seitz willfully damaged the plaintiffs’ property and, as his parents, Steve Seitz and Kathleen Seitz are liable for up to ten thousand dollars of the resulting damages as well as court costs.

The plaintiffs also seek to hold Steve and Kathleen Seitz liable under R.C. 2307.70(B)(1), which states as follows:

“Any person who suffers injury or loss to person or property as a result of an act committed in violation of section 2909.05, 2927.11, or 2927.12 of the Revised Code by a minor child has a civil action against the parent of the minor child and may recover in that action compensatory damages not to exceed fifteen thousand dollars, court costs, other reasonable expenses incurred in maintaining that action, and reasonable attorney’s fees incurred in maintaining that action. A parent and the parent’s minor child are jointly and severally liable as specified in this division for the injury or loss to person or property caused by the minor child’s act committed in violation of section 2909.05, 2927.11, or 2927.12 of the Revised Code. If a person recovers compensatory damages from a parent of a minor child pursuant to this division, that recovery does not preclude the person from maintaining a civil action against the minor child pursuant to division (A) of this section.”

¹¹⁷ *Jiles*, supra, 2014-Ohio-2512 at ¶ 19.

R.C. 2909.05 is the vandalism statute and provides in relevant part as follows:

“(A) No person shall knowingly cause serious physical harm to an occupied structure or any of its contents.

(B)(1) No person shall knowingly cause physical harm to property that is owned or possessed by another, when either of the following applies:

(a) The property is used by its owner or possessor in the owner’s or possessor’s profession, business, trade, or occupation, and the value of the property or the amount of physical harm involved is one thousand dollars or more;

(b) Regardless of the value of the property or the amount of damage done, the property or its equivalent is necessary in order for its owner or possessor to engage in the owner’s or possessor’s profession, business, trade, or occupation.”

There is no requirement in the statute that the subject minor must have been adjudicated delinquent for the offense of vandalism. Instead, an act must simply be committed in violation of the vandalism statute.¹¹⁸ Therefore, the fact that Wesley was not adjudicated delinquent for the specific offense of vandalism does not preclude recovery under this section.

An “occupied structure” is defined as follows:

“* * * [A]ny house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

¹¹⁸ See, e.g., *Hayes v. Heintz*, 8th Dist. Cuyahoga No. 79335, 2002-Ohio-2608, ¶ 24 (“In giving 2307.70 its plain and ordinary reading, a person seeking to impose civil liability against another would only be required to prove beyond a preponderance of the evidence that the injury or loss suffered was caused by the actions of another which would be equivalent or tantamount to a violation of one of the criminal statutes listed therein. Proof that the person was found guilty by reason of committing a violation of one of the criminal statutes is not required.”)

(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

(4) At the time, any person is present or likely to be present in it."¹¹⁹

There is no evidence that any of these definitions of "occupied structure" apply to the trucks at issue. They were not used as a means of habitation and there was no one present or likely to be present in the trucks at the time of the fire. Therefore, R.C. 2905.05(A) does not apply in this case.

R.C. 2905.05(B) would apply if the truck or trucks at issue were used for work purposes or were essential for work purposes. While it does not appear that there was a specific discussion of this issue in Earnie Ross's deposition testimony, the older truck is often referred to as a "work truck," it had logging equipment in it at the time of the fire, and Earnie testified that he is a self-employed logger.¹²⁰ Therefore, the court finds that there is no genuine issue of material fact that the truck was used by Earnie Ross in his profession and the value of the property or the amount of physical harm involved is one thousand dollars or more. As set for above, there is no factual dispute that Wesley Seitz, the then-minor son of Steve Seitz and Kathleen Seitz, set fire to a truck on the Ross property and that he aided Chad Wendel in setting fire to a second truck, causing damages to both of those trucks, as well as personal property in the trucks. As such, R.C. 2905.05(B)(1)(a) applies.

¹¹⁹ R.C. 2909.01(C).

¹²⁰ Earnie Ross Depo. at pgs. 7, 26, 29, and 31.

There is no genuine issue of material fact to be litigated on this issue and a finding of liability against Steve Seitz and Kathleen Seitz under R.C. 2307.70(B)(1) is appropriate.

However, the parties disagree as to whether the plaintiffs can seek to hold the Seitz parents liable under both statutes, thereby "stacking" the maximum liability for damages to a total of \$25,000.

R.C. 3109.09(F) states that "[t]he monetary limitation upon compensatory damages set forth in this section does not apply to a civil action brought pursuant to section 2307.70 of the Revised Code." R.C. 2307.70(C) states that "[t]he monetary limitation upon compensatory damages set forth in section 3109.09 or 3109.10 of the Revised Code does not apply to a civil action brought pursuant to division (A) or (B) of this section."

It is not entirely clear what the Ohio legislature was attempting to accomplish by including this language in the two statutes. Furthermore, this court was unable to find case law which would illuminate the meaning of these subsections or the issue of whether recovery under the statutes can be "stacked."

R.C. 3109.09 as it applies in this case operates to hold parents liable for their child's willful damaging of property. R.C. 2307.70 as it applies in this case operates to hold parents liable for their minor child's act of vandalism. "Willfully damages property" is a fairly broad, all-encompassing term, while vandalism is a specifically-defined act that must meet several requirements, as set forth above. If one can demonstrate that the minor engaged in vandalism, that plaintiff is entitled to a higher amount of damages. The only distinction between the two statutes is that intent is required under R.C.

3109.09(B), while the mental state under the vandalism statute is "knowingly." For all practical purposes, the claims are the same and involve the same conduct, with one statute simply being slightly more specific than the other. It is difficult to conceive of a situation in which a minor is found to have committed an act which would constitute vandalism but not to have engaged in the willful damage of property. Therefore, these statutes are duplicative of each other when the facts allow recovery under both the more general statute (R.C. 3109.09) and the more restrictive statute (R.C. 2307.70).

The Ohio legislature appears to have recognized this fact somewhat by including the relevant language in the two statutes. It may have been anticipated that a defendant could argue that they engaged in an act of vandalism but that act is clearly also the willful damaging of property and, as such, that the lower cap on damages under R.C. 3109.09 should apply. Given the similarity between the two statutes, this court does not believe that the legislature intended to allow recovery under both statutes and a "stacking" of the cap on damages.

As such, in the case at bar, the court has found that the plaintiffs are entitled to summary judgment under both statutes. However, they can only collect damages under one statute. The court assumes, for obvious reasons, that the plaintiffs would choose to collect under the statute with the higher cap on damages, which is R.C. 2307.70. Therefore, the plaintiffs are entitled to a maximum of \$15,000 in compensatory damages against Steve Seitz and Kathleen Seitz.

There is somewhat of a "moving target" in the plaintiffs' motion for partial summary judgment as to whether they are seeking summary judgment only on the issue of liability or whether they are also seeking an award of damages. However, even if they

are seeking an award of damages on summary judgment, the court finds that there is clearly a genuine issue of material fact that remains on the issue of damages.

The amount being claimed for property located inside the trucks and for the damage to the older truck is unclear and entitlement to those amounts of damages has not been demonstrated as a matter of law. Also, there is an issue of fact as to whether the plaintiffs' insurance company now has a subrogated interest in any award for damage and repair to two of the vehicles at issue. The plaintiffs argue that there is no showing that the insurance company has a subrogated interest. However, both Earnie Ross and Kristine Ross testified that they paid only a \$250.00 deductible for repairs to two vehicles that totaled over \$10,000.¹²¹ This creates a question of fact on this issue.

Therefore, while the plaintiffs are entitled to summary judgment as to liability under R.C. 2307.70, they are not entitled to summary judgment as to an award of damages under the statute and the issue of damages will have to be decided by the trier of fact.

(2) DEFENDANTS STEVE AND KATHLEEN SEITZ'S MOTION FOR SUMMARY JUDGMENT

(a) NEGLIGENCE SUPERVISION

"At common law, a parent is not ordinarily liable for damages caused by a child's wrongful conduct."¹²² However, a parent may be liable for the acts of their minor child

¹²¹ Kristine Ross Depo. at pg. 33; and, Earnie Ross Depo. at pgs. 28 and 65.

¹²² *Huston v. Konieczny*, 52 Ohio St.2d 214, 556 N.E.2d 505 (1990), syllabus.

“when they negligently entrust their child with an instrumentality (such as a gun or car) which, because of the child’s immaturity or lack of experience, may become a source of danger to others.”¹²³ Additionally, a parent may incur liability when the parent knows of the child’s wrongdoing and consents to it, directs it or sanctions it, and when a parent fails “to exercise reasonable control over the child when the parent knows, or should know, that injury to another is a probable consequence.”¹²⁴ It is this last theory of liability that is at issue in the case at bar.

“To prevail in a negligent supervision complaint, plaintiffs must show that: (1) the parents knew of their child’s particular reckless or negligent tendencies (thus knew they needed to exercise control over him); (2) the parents had the ability to exercise control; and (3) the parents did not exercise that control.”¹²⁵ “Finally, plaintiffs must show that the alleged parental negligence was the proximate and foreseeable cause of the injury suffered.”¹²⁶

“In Ohio, parental knowledge of a child’s ‘vicious propensities’ is an essential element in establishing negligent supervision.”¹²⁷ “ ‘To establish foreseeability of the act or injury [pursuant to negligent supervision], plaintiff must prove that specific instances of prior conduct were sufficient to put a reasonable person on notice that the act complained of was likely to occur.’ ”¹²⁸ “ * * * [P]arents cannot be held liable for

¹²³ Id. at 217.

¹²⁴ Id. at 217-218.

¹²⁵ *Shupe v. Childers*, 5th Dist. Fairfield No. 2003CA00068, 2004-Ohio-1767, ¶ 15, citing *D’Amico v. Burns*, 13 Ohio App.3d 325, 327, 469 N.E.2d 1016 (8th Dist.1984); and *Nearor v. Davis*, 118 Ohio App.3d 806, 813, 694 N.E.2d 120 (1st Dist.1997).

¹²⁶ Id., citing *Nearor*, supra, at 812.

¹²⁷ Id. at ¶ 16, citing *Landis v. Condon*, 95 Ohio App. 28, 29-30, 116 N.E.2d 602 (2nd Dist.1952).

¹²⁸ Id., quoting *Nearor*, supra, at 813, quoting *Haefele v. Phillips*, 1st Dist. No. 90AP-1331, 1991 WL 64896 (April 23, 1991).

negligent supervision of their children when the parents do not know of the children's propensity to engage in the sort of conduct that caused the plaintiff's injury.' ¹²⁹

In *Midwestern Indemn. Co. v. Wiser*, 144 Ohio App.3d 354, 760 N.E.2d 62 (11th Dist.2001), the court held that the parents of a boy who caused a fire at the residence of his maternal grandparent could not be held liable for negligent supervision.¹³⁰ The court noted that, although the parents had caught the child playing with matches in the past, this was the first time anything that he played with actually caught on fire.¹³¹ The court found that the fire was not the result of any parental negligence or lack of supervision and control.¹³²

In *American Economy Ins. Co. v. Knowles*, 113 Ohio App.3d 71, 680 N.E.2d 237 (2nd Dist.1996), the parents of three minor children who were present when their friend set fire to a store moved for summary judgment as to the claims against them for parental liability. The court noted that, for the purposes of parental liability, "the child's alleged misconduct, at the very least, must be within the reasonable comprehension of the alleged negligence of the parents."¹³³ The court found that there was no evidence that "the destructive fire * * *, or any similar catastrophe, was a probable or foreseeable consequence of any parental negligence of lack of supervision and control."¹³⁴

In the case sub judice, Steve Seitz and Kathleen Seitz knew that their son Wesley had poached one buck and that he had been arrested for poaching by the Ohio Department of Natural Resources on another occasion. If the case at bar involved a

¹²⁹ *Id.*, quoting *Doe v. Kahrs*, 75 Ohio Misc.2d 7, 10, 662 N.E.2d 101 (Ohio Com.Pl.Clermont.1999).

¹³⁰ *Wiser*, supra, 144 Ohio App.3d at 359.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Knowles*, supra, 113 Ohio App.3d at 74.

¹³⁴ *Id.*

poaching incident, the plaintiffs may have been able to sustain a claim for negligent supervision. However, there is no evidence in the record which suggests that Wesley's parents were or should have been on notice that he was likely to commit arson. There is no evidence that Wesley had committed any prior acts of lighting things on fire or that he had any propensity to commit arson. Furthermore, while Wesley had poached several deer, there is no evidence that his parents had any reason to believe that he would be violent or destructive toward any person or their personal property. As such, Steve Seitz and Kathleen Seitz cannot be held liable for negligent supervision of Wesley when they did not know of Wesley's propensity to engage in the sort of conduct that caused the plaintiffs' injury, which in the present case was arson.

As a result, there is no genuine issue of material fact remaining as to this claim and the defendants are entitled to judgment as a matter of law on the negligent supervision claims against them.

(b) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

"A claim for intentional infliction of emotional distress lies where '[o]ne who by extreme and outrageous conduct intentionally * * * causes serious emotional distress to another.'"¹³⁵ "In a case for intentional infliction of emotional distress, a plaintiff must prove (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

¹³⁵ *Sibera v. Kordes*, 11th Dist. Trumbull No. 2009-T-0129, 2010-Ohio-6574, ¶ 33, quoting *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), syllabus.

distress.’ ”¹³⁶

In the case at bar, there is no evidence of any intentional act committed by either Steve Seitz or Kathleen Seitz which would have caused the plaintiffs any emotional distress. The plaintiffs contend that Steve and Kathleen Seitz are liable for the actions of Wesley Seitz via the doctrine of vicarious liability.

“The relationship of principal and agent or master and servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks.”¹³⁷

There is no support in the law for this theory of recovery to be applied in the present situation. This court was unable to locate any legal precedent in Ohio which holds that a parent can be held vicariously liable for the intentional tort of their child other than under the statutes discussed above. Additionally, even if an agency theory could be applied, there is no evidence in the present case that the actions of Wesley Seitz were directed toward the attainment of any objective sought by either of his parents.

Additionally, “ [i]n order to state a claim alleging intentional infliction of emotional distress, the emotional distress alleged must be serious.’ ”¹³⁸ “ ‘Serious emotional distress’ is ‘emotional injury which is both severe and debilitating.’ ”¹³⁹ “ [S]erious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the

¹³⁶ Id., quoting *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286.

¹³⁷ *Hanson v. Kynast*, 24 Ohio St.3d 171, 494 N.E.2d 1091 (1986), paragraph one of the syllabus.

¹³⁸ *Mills v. Sunoco Phoenix*, 5th Dist. Stark No. 2013CA00067, 2014-Ohio-366, ¶ 24, quoting *Smith v. Redecker*, 4th Dist. Athens No. 08CA33, 2010-Ohio-505, ¶ 60.

¹³⁹ Id.

circumstances of the case.’¹⁴⁰ Based on the state of the evidence as presented, there is no triable issue as to whether any of the plaintiffs has suffered serious emotional distress.

As such, Steve Seitz and Kathleen Seitz are entitled to judgment as a matter of law as to the claims against them for intentional infliction of emotional distress.

(c) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

“ * * * [A] cause of action may be stated for negligent infliction of serious emotional distress without a contemporaneous physical injury.’¹⁴¹ “The factors to be considered in order to determine whether a negligently inflicted emotional injury was reasonably foreseeable include: (1) whether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) whether the plaintiff and victim (if any) were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.”¹⁴²

In the case at bar, the court has already determined that there is no claim of parental negligence that can be maintained against Steve Seitz or Kathleen Seitz. As such, there is no action or inaction by either of those defendants upon which to base a

¹⁴⁰ Id.

¹⁴¹ *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St.3d 54, 2004-Ohio-1883, 806 N.E.2d 537, ¶ 10, quoting *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 447 N.E.2d 109 (1983), syllabus.

¹⁴² *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983), paragraph 3(b) of the syllabus.

claim for negligent infliction of emotional distress. Furthermore, the same definition of “serious emotional distress” set forth in the preceding section applies to claims for negligent infliction of emotional distress.¹⁴³ As stated above, there is no triable issue as to whether any of the plaintiffs has suffered serious emotional distress.

Therefore, the defendants are entitled to judgment as a matter of law as to the claims against them for negligent infliction of emotional distress.

CONCLUSION

The defendants’ motion to strike portions of the affidavit of Lee Ottaway is well-taken and is hereby granted as to the entirety of paragraph ten and the final sentence of paragraph nine.

The defendants’ motion to strike the affidavit of Allison Kelly is well-taken and is hereby granted in its entirety.

The defendants’ motion to strike the independent medical evaluation report of Dr. Thomas Sullivan is well-taken and is hereby granted.

The plaintiffs’ motion for partial summary judgment is well-taken and is hereby granted in part only as to the liability of Steve Seitz and Kathleen Seitz under R.C. 2307.70. The remainder of the plaintiffs’ motion for partial summary judgment is not well-taken and is hereby denied, including as to the claim against Wesley Seitz pursuant to R.C. 2307.60 and the issue of damages under R.C. 2307.70. As discussed

¹⁴³ *Winkle v. Zettler Funeral Homes, Inc.*, 12th Dist. Butler No. CA2008-06-144, 2009-Ohio-1724, ¶ 33 (“* * * [T]o defeat a motion for summary judgment for negligent infliction of emotional distress, the plaintiffs must present evidence creating a genuine issue of material fact that they ‘suffered serious emotional distress’ as a result of a cognizance, or fear, of peril.”).

above, the court found that the defendants proved their entitlement to summary judgment as to their claim under R.C. 3109.09; however, the court also determined that the defendants could not recover under that statute and R.C. 2307.70 simultaneously.

The motion for summary judgment filed by Steve Seitz and Kathleen Seitz is well-taken and is hereby granted as to the claims against them for negligent supervision, intentional infliction of emotional distress, and negligent infliction of emotional distress.

A telephone case management conference will be held on Friday, June 12, 2015 at 1:00 p.m. at which time a trial in the case will be scheduled.

IT IS SO ORDERED.

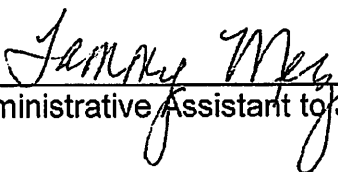
DATED: 6-1-15



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were e-mailed on this 1st day of June, 2015 to Eric P. Allen, attorney for the plaintiffs, at allene@rittgers.com; to David P. Bolek, attorney for the defendants Steve Seitz and Kathleen Seitz, at david_bolek@staffdefense.com; and to Justin C. Walker, attorney for the defendant Wesley Seitz, at Justin@FinneyLawFirm.com.



Administrative Assistant to Judge McBride