**[Cite as *Jacobson v. Akron Children's Hosp.*, 2023-Ohio-2225.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| JESSICA M. JACOBSON, et al.<br><br>Appellants<br><br>v.<br><br>AKRON CHILDREN'S HOSPITAL, et al.<br><br>Appellees | C.A. No. 30188<br><br>APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2019-10-4087 |

DECISION AND JOURNAL ENTRY

Dated: June 30, 2023

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SUTTON, Judge.

**{¶1}** Plaintiff-Appellants Jessica Jacobson ("Jessica") and Joann Jacobson-Kirsch ("Joann") (collectively "Plaintiffs") appeal the grant of summary judgment in favor of Defendant-Appellees Akron Children's Hospital ("ACH"), Cleveland Clinic Children's Hospital for Rehabilitation ("CCCHR"), and Summit County Children Services ("SCCS") (collectively "Defendants"), on all counts of their complaint. For the reasons that follow, this Court affirms.

I.

**{¶2}** On April 10, 2001, Jessica, then a seven-year-old child, was admitted to an ACH facility to undergo pharyngeal flap surgery. Both Jessica and her mother, Joann, suffer from a rare genetic disorder that causes certain physical and developmental problems. Prior to the incidents that formed the basis for their complaint, Joann had voluntarily requested a conservatorship from the Summit County Probate Court. The Probate Court approved Joann's

request and entered an order appointing Attorney Ellen Kaforey as Joann's medical conservator and giving Attorney Kaforey the power to make "all medical, healthcare, and social, psychological, and visitation decisions for her minor daughter, Jessica[.]"

**{¶3}** During Jessica's initial admission to the hospital, and during her subsequent readmission, Joann began exhibiting increasingly inappropriate and erratic behavior. She was staying in Jessica's room for long periods of time, and not bathing or showering. Joann began intervening in Jessica's treatment and questioning and threatening hospital staff.

**{¶4}** In light of Joann's erratic behavior and intervention into Jessica's treatment during Jessica's initial admission and immediately after her surgery, ACH staff and Attorney Kaforey began discussing whether limitations on the interactions between Jessica and Joann were needed. However, no limitations were implemented at that time. On April 21, 2001, Jessica was discharged from the ACH facility, and she returned to her home with her mother. Unfortunately, that same day, Jessica's surgical wound reopened and began to bleed, requiring her to be re-admitted to ACH. After Jessica was readmitted, a team of ACH medical professionals, social workers, and Attorney Kaforey met with Joann, and ACH began limiting Joann's visitation with her daughter at the direction of Attorney Kaforey. Joann's visitation was limited to between the hours of 10:00 AM and 6:00 PM daily, and she was also limited to calling the nurses on the floor up to three times a day.

**{¶5}** After Jessica's contact with her mother was limited, Jessica began improving.[1] However, the medical professionals at ACH noted that she was still not receiving sufficient

[1] As this Court previously wrote in *In re: J.J.*, 9th Dist. Summit No. 21226, 2002-Ohio-7330, ¶ 27: "During [Jessica]'s second hospital stay, [Joann]'s visitation was cut off completely because [Jessica] "had developed an eating disorder so severe that she was starving herself to the point where doctors were thinking about putting in a feeding tube[.]" Consequently, the medical

nutrition. Another meeting was held with ACH medical professionals, social workers, and Attorney Kaforey on May 4, 2001. It was decided during that meeting that the best course of medical treatment for Jessica would be to transfer her care to CCCHR because the group believed it was, as a specialized rehabilitation hospital, better equipped to handle Jessica's long-term nutritional and other medical needs.

**{¶6}** As a result of the events that occurred in April of 2001, SCCS had moved for emergency custody of Jessica. After receiving care at CCCHR's facility, Jessica was discharged. Upon her discharge from CCCHR's facility, Jessica was not returned to her mother's care. Instead, Attorney Kaforey took Jessica to Florida to live with her maternal grandmother. Eventually, SCCS was awarded custody of Jessica in 2002, which continued through Jessica's 18th birthday in December of 2011.[2]

**{¶7}** In 2012, Jessica filed a complaint in Summit County Court of Common Pleas, naming ACH, CCCHR, and Attorney Kaforey as defendants. SCCS was not named as a defendant in that case, and Joann did not join her daughter as a plaintiff in that case. Jessica voluntarily dismissed that case on October 25, 2018, and re-filed the case forming the basis for this appeal on October 23, 2019. The re-filed case included both Jessica and Joann as plaintiffs, and named ACH, CCCHR, and SCCS as defendants, but Attorney Kaforey was not named as a defendant in this matter. The complaint sought civil money damages for the alleged criminal acts of interference with custody in violation of R.C. 2919.23, unlawful restraint in violation of R.C. 2905.03, kidnapping in violation of R.C. 2905.01(B)(1) and (2), criminal child enticement in violation of

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conservator [Attorney Kaforey] made the decision to cut off [Joann]'s visitation so that [Jessica] could have the opportunity to get better, which she did."

[2] This Court previously considered the merits of the Summit County Juvenile Court's termination of Joann's parental rights and placing Jessica in the permanent custody of the agency in *In re: J.J.*, 9th Dist. Summit No. 21226, 2002-Ohio-7330.

R.C. 2905.05, intimidation in violation of R.C. 2921.03, and civil conspiracy. The complaint also included claims for defamation and false imprisonment.

**{¶8}** The case proceeded through discovery, with Defendants moving for, and the trial court allowing, admittance of discovery from the 2012 case. All three defendants filed motions for summary judgment. Plaintiffs responded with one response in opposition to the motions of all three defendants. Plaintiffs also filed their own motion for summary judgment, to which each of the three defendants responded in opposition. Additionally, ACH and SCCS moved to strike certain exhibits from Plaintiffs' motion for summary judgment on the grounds the exhibits contained improper summary judgment evidence pursuant to Civ.R. 56. On November 2, 2021, the trial court issued an order granting ACH and SCCS's motion to strike certain exhibits from Plaintiffs' motion for summary judgment. The order also granted summary judgment in favor of Defendants on all claims and dismissed Plaintiffs' motion for summary judgment as moot.

**{¶9}** It is from that order Plaintiffs appeal, assigning three errors for this Court's review.

II.

**ASSIGNMENT OF ERROR I**

**THE TRIAL COURT ERRED IN AWARDING SUMMARY JUDGMENT TO DEFENDANTS RATHER THAN TO PLAINTIFFS.**

**{¶10}** In their first assignment of error, Plaintiffs allege the trial court erred in granting summary judgment on all counts of the complaint in favor of Defendants. For the reasons that follow, we disagree.

**Standard of Review for Summary Judgment**

**{¶11}** Appellate review of an award or denial of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is appropriate under Civ.R. 56 when: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving

party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327 (1977), citing Civ.R. 56(C). A court must view the facts in the light most favorable to the nonmoving party and must resolve any doubt in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992). A trial court does not have the liberty to choose among reasonable inferences in the context of summary judgment, and all competing inferences and questions of credibility must be resolved in the nonmoving party's favor. *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St.3d 215, 218 (1988).

**{¶12}** The party moving for summary judgment bears the initial burden of demonstrating the absence of genuine issues of material facts concerning the essential elements of the nonmoving party's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). The moving party must support the motion by pointing to some evidence in the record of the type listed in Civil Rule 56(C). *Id*. at 292-293. However, the moving party need not support its motion for summary judgment with evidence negating his opponent's claim, but may simply point out that there is an absence of evidence to support the non-moving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also R & R Plastics, Inc. v. F.E. Myers Co.*, 92 Ohio App.3d 789, 807 (6th Dist.1993).

**{¶13}** If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Dresher* at 293. The nonmoving party may not rest upon the mere allegations or denials in her pleadings but must point to or submit evidence of the type specified in Civ.R. 56(C). *Id*.; Civ.R. 56(E). Types of evidence

specified in Civ.R. 56 (C) are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." Civ.R. 56(C).

**Counts One, Two, and Eight: No evidence in the record establishing Defendants acted without privilege**

**{¶14}** In Counts One, Two, and Eight of the complaint, Plaintiffs allege civil actions for alleged criminal actions, all of which require by either statute or common law for the criminal actor to have acted "without privilege." With respect to Count One, Plaintiffs' claim for civil damages based on the alleged criminal action of interference with custody, R.C. 2919.23 (A)(1) states: "[n]o person, knowing the person is *without privilege* to do so or being reckless in that regard, shall entice, take, keep, or harbor [a child under the age of eighteen] from the parent, guardian, or custodian of the person[.]" (Emphasis added.) With respect to Count Two, Plaintiffs' claim for civil damages based on the alleged criminal act of unlawful restraint, R.C. 2905.03(A) states: "[n]o person, *without privilege* to do so, shall knowingly restrain another of the other person's liberty." (Emphasis added.) With respect to Count Eight, Plaintiffs' claim for civil damages based on the alleged criminal act of false imprisonment, false imprisonment occurs when a person confines another intentionally "*without* lawful *privilege* and against [her] consent within a limited area for any appreciable time, however short." (Emphasis added.) *Feliciano v. Kreiger*, 50 Ohio St.2d 69, 71 (1977).

**{¶15}** R.C. 2901.01(A)(12) states: "[a]s used in the Revised Code[,] "[p]rivilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity."

**{¶16}** Here, both ACH and CCCHR argued in their motions for summary judgment that they were each immune from liability because Plaintiffs were unable to establish that they acted

"without privilege" in restricting Joann's visitation with her daughter. Both ACH and CCCHR argued they were acting at the direction of Attorney Kaforey, who had the power to make medical decisions for Jessica as the result of a conservatorship established for Joann. Both ACH and CCCHR received Letters of Conservatorship from the Summit County Probate Court, and Attorney Kaforey executed authorization for medical treatment for both ACH and CCCHR.

**{¶17}** In response, Plaintiffs argued that Attorney Kaforey's position was "confusing" because Attorney Kaforey allegedly "insisted that she 'cannot/will not attempt to take guardianship[.]" Plaintiffs do not challenge the existence of the conservatorship, but instead focused their arguments in response as challenging the scope and the powers of the conservatorship as it relates to the ability to authorize medical care and treatment for Jessica.

**{¶18}** Here, a review of the record shows that a conservatorship was indeed established by the Summit County Probate Court for Joann. The Letters of Conservatorship state:

> The Conservator's powers are limited to: [] make medical and health care decisions for [Joann] and all medical, health care, and social, psychological and visitation decisions for her minor daughter, Jessica[.]

Therefore, Attorney Kaforey, as Joann's conservator, had the right to make medical decisions for her minor daughter, Jessica, as Attorney Kaforey was expressly granted the power to do so by the Summit County Probate Court. As such, she was authorized to execute the authorizations for medical treatment at both ACH and CCCHR for Jessica. Those authorizations granted both hospitals the privilege to treat Jessica. Plaintiffs do not argue, and there is no evidence in the record to establish that ACH or CCCHR acted outside of the scope of the authorization for medical treatment Attorney Kaforey executed. As such, with respect to Plaintiffs' claims against ACH and CCCHR on Counts One, Two, and Eight, Plaintiffs failed to establish that a genuine issue of material fact exists as to whether ACH and CCCHR acted without privilege to meet their reciprocal

burden under *Dresher*. Therefore, ACH and CCCHR are entitled to summary judgment as a matter of law.

**Count One: Civil Action for Damages Resulting from the Alleged Criminal Act of Interference with Custody, R.C. 2919.23**

**{¶19}** In Count One, Plaintiffs alleged that employees for SCCS aided both ACH and CCCHR in their "unprivileged keeping and harboring" of Jessica away from Joann by confining Jessica while she was admitted for treatment at facilities belonging to ACH and CCCHR during the time period of April 23, 2001 until July 23, 2001.

**{¶20}** R.C. 2919.23 states in relevant part:

> (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;
>
> (2) A person committed by law to an institution for delinquent, unruly, neglected, abused, or dependent children;
>
> (3) A person committed by law to an institution for the mentally ill or an institution for persons with intellectual disabilities.
>
> (B) No person shall aid, abet, induce, cause, or encourage a child or a ward of the juvenile court who has been committed to the custody of any person, department, or public or private institution to leave the custody of that person, department, or institution without legal consent.
>
> (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.
>
> (D)(1) Whoever violates this section is guilty of interference with custody.

R.C. 2919.23(A)-(D). R.C. 2901.01(A)(12) defines "privilege" as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity."

**{¶21}** We have already addressed Count One with respect to ACH and CCCHR above. With respect to Count One and SCCS, SCCS argued in its motion for summary judgment that the undisputed facts of the case do not support the allegations against it contained within Count One of the complaint because SCCS was not involved with the decisions related to Jessica's hospitalization at ACH or CCCHR.

**{¶22}** In their response in opposition to summary judgment, Plaintiffs did not point to evidence in the record that refutes SCCS's claim that none of its employees were involved in the decision-making process and did not point to any evidence in the record establishing their claim that SCCS employees "aided" ACH and CCCHR in their "unprivileged keeping and harboring" of Jessica. Therefore, Plaintiffs have not met their reciprocal burden under *Dresher* and have not demonstrated that a genuine issue of material fact exists as to their claim of interference with custody with respect to SCCS, and SCCS was entitled to summary judgment on Count One of Plaintiffs' complaint as a matter of law.

**Count Two: Civil Action for Damages Resulting from Alleged Criminal Acts R.C. 2905.03 Unlawful Restraint**

**{¶23}** Plaintiffs alleged in Count Two of their complaint that SCCS acted together with both ACH and CCCHR to confine Jessica to their facilities "without privilege" and "with malicious dishonest purpose, in bad faith, and in a wanton or reckless manner" in violation of R.C. 2905.03(A). R.C. 2905.03(A) states: "[n]o person, without privilege to do so, shall knowingly restrain another of the other person's liberty."

**{¶24}** We have already addressed Count Two with respect to ACH and CCCHR above. With respect to SCCS, SCCS moved the trial court in its motion for summary judgment to grant summary judgment on the unlawful restraint claim because there is no evidence in the record that established Jessica was ever unlawfully restrained by SCCS. In response, Plaintiffs argued that SCCS should not be granted summary judgment because the record contained sufficient evidence to support the facts of Plaintiffs' claim for unlawful restraint.

**{¶25}** A review of the record shows that Plaintiffs failed to point to any evidence in the record that any employee or agent of SCCS took any action that resulted in either of the plaintiffs' liberty being restrained while Jessica was a patient at ACH or CCCHR to meet the reciprocal burden placed on them under *Dresher*. Plaintiffs failed to establish that a genuine issue of material fact existed as to whether any employee or agent of SCCS acted to unlawfully restrain either of the plaintiffs, and, therefore, SCCS was entitled to summary judgment as a matter of law on Count Two of the complaint.

**Count Three: Civil Action for Damages Resulting from Alleged Criminal Acts R.C. 2905.01(B)(1) Kidnapping**

**{¶26}** In Count Three of the complaint, Plaintiffs alleged that Defendants "acted to remove, or contributed to the removal" of Jessica at CCCHR's facility in Ohio and caused Jessica to be "involuntarily restrained, kept and harbored in Florida" in violation of R.C. 2905.01(B)(1).

**{¶27}** R.C. 2905.01(B)(1) states:

> No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen * * * by any means, shall knowingly * * * under circumstances that create a substantial risk of serious physical harm to * * * in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim[,] remove another from the place where the other person is found.

**{¶28}** In their motions for summary judgment, all three Defendants argued the undisputed facts in the record showed that none of them were involved in the act of removing Jessica from Ohio and taking her to her grandmother's house in Florida. In their response in opposition, Plaintiffs failed to dispute this assertion, and did not point to any evidence in the record that established that any employee or agent of ACH, CCCHR, or SCCS "by force, threat, or deception" kidnapped Jessica when she was taken to her grandmother's house in Florida. The only mention of kidnapping contained within Plaintiffs' response in opposition stated: "[CCCHR] knowingly released [Jessica] to the custody of someone other than her legal custodian, [Joann], thereby contributing, i.e., abetting, to [Jessica's] kidnapping to Florida[.]"

**{¶29}** In her deposition testimony, Attorney Kaforey testified that ACH was not involved in the decision to take Jessica to her grandmother's home in Florida. The record does not contain any evidence that any employee or agent of ACH, CCCHR, or SCCS acted in any way to remove Jessica from Ohio and take her to Florida. The evidence in the record shows that Jessica was taken to Florida by Attorney Kaforey, who was not an employee or agent of any of the defendants. Plaintiffs failed to meet their reciprocal burden under *Dresher* by establishing that a genuine issue of material fact existed as to whether any employee or agent of Defendants kidnapped Jessica. Therefore, Defendants were entitled to summary judgment on Count Three of the complaint as a matter of law.

**Count Four: Civil Action for Damages Resulting from Alleged Criminal Acts –R.C. 2905.05 Criminal Child Enticement**

**{¶30}** In Count Four of their complaint, Plaintiffs alleged that on or about May 30, 2001, Defendant CCCHR, employees of SCCS, and "others," agreed to entice Jessica to leave CCCHR's facility with a promise of a "vacation in Florida." Plaintiffs allege that this activity constituted the

criminal act of child enticement, pursuant to R.C. 2905.05, and Plaintiffs were bringing forth their claim pursuant to the authority set forth in R.C. 2307.60.

**{¶31}** R.C. 2905.05 reads, in relevant part:

> (A) No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under fourteen years of age to accompany the person in any manner, including entering into any vehicle or onto any vessel, whether or not the offender knows the age of the child, if both of the following apply:
>
> (1) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity.
> (2) The actor is not a law enforcement officer, medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education, or the actor is any of such persons, but, at the time the actor undertakes the activity, the actor is not acting within the scope of the actor's lawful duties in that capacity.
>
> (B) No person, with a sexual motivation, shall violate division (A) of this section.
>
> (C) No person, for any unlawful purpose other than, or in addition to, that proscribed by division (A) of this section, shall engage in any activity described in division (A) of this section.
>
> (D) It is an affirmative defense to a charge under division (A) of this section that the actor undertook the activity in response to a bona fide emergency situation or that the actor undertook the activity in a reasonable belief that it was necessary to preserve the health, safety, or welfare of the child.

**{¶32}** In their individual motions for summary judgment, each defendant argued that it was entitled to summary judgment on Plaintiffs' claims for child enticement because the undisputed facts in the record do not support Plaintiffs' claims.

**{¶33}** In their response in opposition, Plaintiffs failed to point to any evidence in the record establishing Defendants acted in a manner to "solicit, coax, entice, or lure" Jessica "into any vehicle or vessel" as required by the statute to establish a claim for child enticement.

**{¶34}** A review of the record shows that the record does not contain any evidence to establish that any agent or employee of ACH, CCCHR or SCCS was involved in the "enticement"

of Jessica from Ohio to Florida. The evidence in the record established that Attorney Kaforey, who was not an employee of ACH, CCCHR, or SCCS took Jessica from Ohio to Florida. Jessica's deposition indicates that she was told she was going to Florida by an employee of SCCS, but does not indicate that she, at any point, was ever solicited, coaxed, enticed, or lured into a vessel or vehicle by any ACH, CCCHR, or SCCS employee or agent. Plaintiffs failed to establish that a genuine issue of material fact exists as to whether any employee or agent of ACH, CCCHR, or SCCS was involved in the alleged criminal enticement of Jessica in order to meet their reciprocal burden under *Dresher*. Therefore, the trial court properly granted summary judgment to each defendant with regard to the Plaintiffs' claim for criminal child enticement.

**Count Six: Civil Action for Damages Resulting from Alleged Criminal Acts –R.C. 2921.03 Intimidation**

**{¶35}** In Count Six of their complaint, Plaintiffs alleged that SCCS committed criminal intimidation when an agent of SCCS filed an affidavit in bad faith in Summit County Juvenile Court for the purposes of SCCS seeking emergency temporary custody of Jessica, in violation of R.C. 2921.03. R.C. 2921.03 states:

> (A) No person, knowingly and by force, by unlawful threat of harm to any person or property, or by filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, or in a wanton or reckless manner, shall attempt to influence, intimidate, or hinder a public servant, a party official, or an attorney or witness involved in a civil action or proceeding in the discharge of the person's the duties of the public servant, party official, attorney, or witness.
> (B) Whoever violates this section is guilty of intimidation, a felony of the third degree.
>
> (C) A person who violates this section is liable in a civil action to any person harmed by the violation for injury, death, or loss to person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs, and other expenses incurred as a result of prosecuting the civil action commenced under this division. A civil action under this division is not the exclusive remedy of a person who incurs injury, death, or loss to person or property as a result of a violation of this section.

*Defendant ACH's Motion for Summary Judgment – Count 6*

**{¶36}** In its motion for summary judgment, ACH asserted that Plaintiffs failed to present a prima facie case of intimidation because Jessica is not a public servant, party official, or acting as a witness as required by R.C. 2921.03. In their response in opposition, Plaintiffs failed to address ACH's argument that it was entitled to summary judgment on the claim for intimidation and also failed to point to any evidence in the record establishing that a genuine issue of material fact existed as to whether any agent or employee of ACH had violated R.C. 2921.03. Therefore, because Plaintiffs failed to meet their reciprocal burden under *Dresher*, ACH was entitled to summary judgment as a matter of law on Plaintiffs' claim for intimidation.

*Defendant CCCHR's Motion for Summary Judgment – Count 6*

**{¶37}** In its motion for summary judgment, CCCHR moved the trial court for summary judgment on Count Six of the complaint, noting to the trial court that there were no allegations contained within Count Six of the complaint which named CCCHR. In their response in opposition to CCCHR's motion for summary judgment, Plaintiffs did not dispute CCCHR's contention that it was entitled to summary judgment, and did not point to evidence in the record establishing that there was a genuine issue of material fact as to whether or not any employee or agent of CCCHR committed the act of criminal intimidation within the meaning of R.C. 2921.03. Because Plaintiffs failed to establish that no genuine issue of material fact existed as to whether or not any employee or agent of CCCHR had committed intimidation in violation of the statute in order to meet their reciprocal burden under *Dresher*, CCCHR was entitled to summary judgment on the intimidation claim of the complaint.

*Defendant SCCS's Motion for Summary Judgment – Count 6*

**{¶38}** In its motion for summary judgment, SCCS argued that the undisputed facts in the record did not establish a claim for intimidation. Specifically, SCCS argued to be in violation of R.C. 2921.03, "the person being intimidated must be a public servant, a party official, or an attorney or witness involved in a civil action." Further, SCCS argued that the claim was based on an alleged false affidavit that was submitted to the juvenile court for the purpose of influencing a magistrate, and that Plaintiffs do not have standing to assert a cause of action for supposed wrongful intimidation of another person.

**{¶39}** In their response in opposition to summary judgment, Plaintiffs did not address SCCS's argument that neither plaintiff is entitled to relief under the statute, and did not point to any evidence in the record establishing that either plaintiff was a public servant, party official, or acting as a witness as required by R.C. 2921.03.

**{¶40}** Plaintiffs failed to establish that a genuine issue of material fact existed as to whether any employee or agent of SCCS committed intimidation within the meaning of R.C. 2921.03 to meet their reciprocal burden under *Dresher*. Therefore, SCCS was entitled to summary judgment on Count Six of the complaint as a matter of law.

**Count Seven: Common Law Defamation**

**{¶41}** In Count Seven of the complaint alleging defamation, Plaintiffs alleged that Defendants, along with Attorney Kaforey, "created and disseminated to [third-parties] information about Plaintiffs that was blatantly false on its face and known to ACH, SCCS, and Kaforey to be materially false." As this Court has previously stated with regard to establishing a defamation claim:

> To prevail in a defamation case, a plaintiff who is a private person must prove five elements: "(1) a false and defamatory statement; (2) about plaintiff; (3) published without privilege to a third party; (4) with fault of at least negligence on the part of

> the defendant; and (5) that was either defamatory per se or caused special harm to the plaintiff."

*Bennett v. Roadway Express, Inc.*, 9th Dist. Summit No. 20317, 2001 WL 866261, *4, citing *Gosden v. Louis*, 116 Ohio App.3d 195, 206 (1996).

**{¶42}** In their motions for summary judgment, ACH and SCCS both argued that the undisputed facts in the record did not establish a claim for defamation. Both ACH and SCCS noted Plaintiffs failed to identify the allegedly false and defamatory statements made by any employee or agents and without identification of those statements, Plaintiffs' claim for defamation must fail as a matter of law. In its motion for summary judgment, CCCHR asked the trial court to grant it summary judgment on the basis that the facts alleged in the complaint did not reference CCCHR in any way.

**{¶43}** Plaintiffs did not respond in their response in opposition to any of the arguments made by Defendants in their motion for summary judgment. Plaintiffs did not point to any evidence in the record identifying any alleged defamatory statements by any employee or agent of Defendants.

**{¶44}** Therefore, Plaintiffs failed to meet their reciprocal burden under *Dresher* by failing to establish that a genuine issue of material fact existed as to whether any of the defendants had defamed Plaintiffs. As such, Defendants were entitled to summary judgment on the defamation claim as a matter of law.

**Count Eight: Common Law False Imprisonment**

**{¶45}** In Count Eight of their complaint alleging false imprisonment, Plaintiffs alleged that Defendants forced the unprivileged isolation of Jessica from her mother while Jessica was a patient at both the ACH and CCCHR facilities and during the time Jessica was in Florida. False imprisonment occurs when a person confines another intentionally without privilege and against her consent within a limited area for any appreciable time, however short. *Feliciano*, 50 Ohio St.2d at 71.

**{¶46}** We have already addressed Count 8 with respect to defendants ACH and CCCHR above. With respect to SCCS, SCCS argued in its motion for summary judgment it was entitled to summary judgment because the undisputed facts establish that SCCS was not involved in the alleged confinement of Jessica at ACH and CCCHR. In their response in opposition, Plaintiffs did not point to any evidence in the record that established any employee or agent participated in the false imprisonment of Jessica to meet their reciprocal burden under *Dresher*.

**{¶47}** Because no genuine issue of material fact exists as to whether or not an employee or agent of SCCS committed the act of false imprisonment, SCCS was entitled to summary judgment on Count Eight of the complaint as a matter of law.

**Count Five: Civil Conspiracy**

**{¶48}** "Civil conspiracy" has been defined as "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419 (1995). "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475 (1998).

**{¶49}** In their motions for summary judgment, Defendants argued that Plaintiffs cannot establish their claim for civil conspiracy because they have failed to prove the underlying torts that support the conspiracy claim. In response, Plaintiffs asserted there is sufficient evidence to support the existence of an underlying tort, and therefore a genuine issue of material fact exists as to whether there is a claim for civil conspiracy.

**{¶50}** As discussed above, this Court has determined that Defendants were entitled to summary judgment on Plaintiffs' claims for civil damages for the alleged criminal acts of interference with custody, unlawful restraint, kidnapping, criminal child enticement, defamation, and false imprisonment. Therefore, Plaintiffs' claim for civil conspiracy also fails as there are no underlying claims to support it. As such, Defendants were entitled to summary judgment on the civil conspiracy claim as a matter of law.

**{¶51}** Joann and Jessica's first assignment of error is overruled.

**ASSIGNMENT OF ERROR II**

**THE TRIAL COURT ERRED IN AWARDING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT WHILE SUMMARILY IGNORING AS "MOOT," PLAINTIFFS' SIMULTANEOUSLY-PENDING CIV.R. 12(C) MOTIONS FOR JUDGMENT ON THE PLEADINGS, CIV.R.12(H)(2) [SIC.] OBJECTIONS FOR FAILURE TO STATE A LEGAL DEFENSE, CIV.R. 12(G) WAIVER OF DEFENSES, AND OTHER DISPOSITIVE MEASURES.**

**{¶52}** In their second assignment of error, Plaintiffs argue the trial court erred in finding their pending motions moot after granting summary judgment to Defendants. For the reasons that follow, we disagree.

**{¶53}** "The issue of mootness is a question of law; therefore, we review the trial court's decision finding the instant matter moot under the de novo standard of review." *Harris v. Akron*, 9th Dist. Summit No. 24499, 2009-Ohio-3865, ¶ 6, quoting *Poulson v. Wooster City Planning Comm.*, 9th Dist. Wayne No. 04CA0077, 2005–Ohio–2976, at ¶ 5; *University Hosps. of Cleveland,*

*Inc. v. Lynch*, 96 Ohio St.3d 118, 2002–Ohio–3748, ¶ 52. Using a de novo standard, this Court conducts an independent review of the trial court's decision, giving no deference to the trial court's determination. *Id.*, citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993).

**{¶54}** A matter becomes moot when the issues "are no longer 'live.'" *State v. Hendon*, 9th Dist. Summit No. 28067, 2017-Ohio-352, ¶ 13, citing *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010-Ohio-1844, ¶ 10, citing *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979). Here, the trial court resolved all pending counts of the complaint in favor of Defendants and against Plaintiffs. It can be logically inferred from that grant of summary judgment in favor of Defendants on all counts that Plaintiffs cannot continue to pursue those same claims. The matter was resolved in favor of Defendants, and no live controversy existed. Therefore, the trial court did not err in finding the Plaintiffs' motions were moot, because a live controversy no longer existed.

**{¶55}** Joann and Jessica's second assignment of error is overruled.

**ASSIGNMENT OF ERROR III**

**THE TRIAL COURT ERRED IN STRIKING PLAINTIFFS' EXHIBITS PROVIDED BY DEFENDANTS TO PLAINTIFFS THROUGH THE DISCOVERY PROCESS**.

**{¶56}** In their third assignment of error, Plaintiffs argue the trial court erred in striking exhibits attached to their response in opposition to Defendants' motions for summary judgment. For the reasons that follow, we disagree.

**{¶57}** "A trial court's decision to grant a motion to strike will not be overturned on appeal absent an abuse of discretion. * * * [A]n abuse of discretion indicates that the trial court was unreasonable, arbitrary, or unconscionable in its ruling." *Smith v. Heslop, Inc.*, 9th Dist. Summit

No. 27465, 2015-Ohio-3452, ¶ 7, quoting *Cooper v. BASF, Inc.*, 9th Dist. Summit No. 26324, 2013-Ohio-2790, ¶ 22.

**{¶58}** Here, ACH and SCCS moved to strike certain attachments to Plaintiffs' joint response in opposition to summary judgment. ACH and SCCS moved to strike the exhibits on the grounds that the exhibits were not appropriate evidence in a summary judgment proceeding under Civ.R. 56(C). Exhibits EP, VK, EB, PC, NW, ANX, Sec 1, Sec 2, PO, CVM, M2, O, OPR, P, PICU, T, U, V, X and ZZ were medical records of Jessica's from various dates. Exhibit M-a and M-b was a letter from Joann to a magistrate. Exhibit M-c was a copy of the Summit County Probate Court docket for case number 1997 CO 07021. Exhibit GW was a letter from Dr. Meral Gunay-Aygun, MD to Dr. Lehman dated February 23, 2001. Exhibits S, S2, Z, and ADM were agreements and informed consent documents for Jessica.

**{¶59}** In response, Plaintiffs argued that the Civ.R. 56(C) requirement that only certain types of evidence be considered in a summary judgment motion applied to only moving parties, and not Plaintiffs as non-moving parties. The Plaintiffs did not dispute that the exhibits did not qualify as the types of permissible evidence outlined in Civ.R. 56(C); rather, Plaintiffs argued that the rule did not apply to Plaintiffs as the non-moving parties.

**{¶60}** The trial court found that "the only evidence it may consider as part of a motion for summary judgment - either the motion or its opposition - are the items specifically set forth in Civ.R. 56(C)." The trial court then found that the exhibits "do not comply with Civ.R. 56(C) and cannot be considered[.]"

**{¶61}** We agree with the trial court. With respect to the proceedings on a motion for summary judgment, Civ.R. 56(C) states:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence,

> and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

Plaintiffs do not dispute Defendants' assertion that the documents the trial court struck were not "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." A review of the documents struck reveals in fact the documents did not meet the requirements of Civ.R. 56(C). Therefore, the trial court did not abuse its discretion in striking the documents.

**{¶62}** Joann and Jessica's third assignment of error is overruled.

III.

**{¶63}** Joann and Jessica's first, second, and third assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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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 to Appellants.

BETTY SUTTON
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

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

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