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## H. B. 456: PROPERTY OWNER'S CIVIL ACTION FOR MINOR'S THEFT

### I. INTRODUCTION

In October of 1965, the Ohio Legislature enacted section 3109.09 of the Ohio Revised Code which permitted a property owner to bring a civil action for the recovery of compensatory damages against the parents of a minor who willfully damaged the property of the owner, provided that the parents had custody and control of the minor. The amount of recovery was the actual damages sustained, but with a limit of \$250 per child.<sup>1</sup> The minor need not have been adjudged delinquent in order for the property owner to recover. All the property owner needed to prove was willful destruction by the minor, custody and control of the minor by his parents, and actual damage. That law created an anomalous situation in that the property owner was not expressly afforded similar protection if his property were instead stolen.<sup>2</sup> Effective May 23, 1978, this situation has been rectified by the Ohio Legislature with the enactment of House Bill 456, amending section 3109.09 of the Ohio Revised Code.

House Bill 456 amends section 3109.09 by raising the statutory limit of recovery to \$3,000 and allowing a property owner to also recover damages from the parents of a minor who commits acts which are defined as theft offenses by section 2913.01 of the Ohio Revised Code.<sup>3</sup> The action is not dependent upon a prior conviction of the minor for a criminal offense, but presumably the owner would have to prove the statutory elements of the theft offense that serves as the basis of his action.

The new law also permits the property owner to join this theft action with a replevin action<sup>4</sup> against the minor, or against the minor and

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1. Subsequent to the enactment of section 3109.09, this limit of liability was twice raised. In 1967 the maximum liability was raised to \$800; in 1969 the ceiling was moved to \$2,000. See OHIO REV. CODE ANN. § 3109.09 (Page Supp. 1978) for the current version of the law.

2. *But see* Liberty Mutual Insurance Co. v. Davis, 52 Ohio Misc. 26, 368 N.E.2d 336, 338 (Akron Mun. Ct. 1977). See also notes 6-12 and accompanying text *infra* for a discussion of that case.

3. See OHIO REV. CODE ANN. § 2913.01 (Page 1953 and 1977 Supp.). Examples of these offenses are robbery and aggravated robbery, burglary and aggravated burglary, breaking and entering, tampering with coin machines, theft, unauthorized use of a vehicle or property, misuse of credit cards, forgery, and making or using slugs.

4. Recovery of personal property, or replevin, actions can be brought in the common pleas courts under chapter 2737 of the Ohio Revised Code or in the county courts under chapter 1919.

his parents, regardless of the value of the property. If the property is recovered, however, the parents' liability is still only for actual damages to the recovered property, again subject to the \$3,000 statutory limit. Finally, the bill makes it clear that a minor is not within the custody and control of his parents if the minor is married.

A number of issues remain after enactment of House Bill 456 including whether a property owner could have maintained an action for theft under the old version of section 3109.09; whether a subrogated insurance company can maintain an action in the right of the property owner under this law; whether insurance companies who have issued homeowner's policies to parents of the minor wrongdoers are required to defend and pay for a claim brought under section 3109.09; and finally, whether individuals other than the natural parents can be held liable under this law. Many of these issues have already been discussed prior to the enactment of House Bill 456.<sup>5</sup> The purpose of this analysis is to explain the changes made in section 3109.09 by the House bill, and to review these issues in light of recent case law concerning the construction of this statute.

## II. ANALYSIS

Perhaps one of the major reasons for the changes incorporated into section 3109.09 by House Bill 456 was the controversy over whether the original version of the law contemplated an action for theft. Prior to the enactment of House Bill 456, it had been argued that section 3109.09 was remedial in nature<sup>6</sup> and therefore, the concept of "damage" in the statute included within its meaning losses by reason of theft because remedial statutes were to be construed liberally in Ohio.<sup>7</sup> Conversely, it was argued that section 3109.09 did not allow recovery for theft losses because the statute was in derogation of the common law<sup>8</sup> and therefore had to be interpreted narrowly.<sup>9</sup>

At least two Ohio courts ruled specifically on this issue prior to the enactment of House Bill 456. In the unreported case of *Centennial Insurance Co. v. Dukes*,<sup>10</sup> the municipal court of Garfield Heights held that section 3109.09 did not apply to a taking of property and dismiss-

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5. See Laven, *Liability of Parents for the Willful Torts of Their Children Under Ohio Revised Code Section 3109.09*, 24 CLEV. ST. L. REV. 1 (1975).

6. *Id.* at 5. Laven argued that the statute was remedial because recovery was limited to actual damages and no penal sanctions, such as fines, were imposed on the parents.

7. See Laven, *supra* note 5, at 5 n.13, citing OHIO REV. CODE ANN. § 1.11 (Page 1969).

8. See Laven, *supra* note 5, at 5.

9. *Id.*

10. No. 11520 (Garfield Hts. Mun. Ct., March 3, 1972).

ed an action against the parents of minors who had stolen items of clothing from a store. The Akron Municipal Court held otherwise in *Liberty Mutual Insurance Co. v. Davis*.<sup>11</sup> The court there granted recovery, holding that the use of the word damages “signified a compensation in money for all the damage caused, which in this action includes theft.”<sup>12</sup> The Ohio Supreme Court never spoke on this issue. At any rate, the Ohio Legislature has resolved the controversy by amending section 3109.09 to now expressly allow recovery for losses as a result of theft by minors.

The *Liberty Mutual Insurance* case is probably the most comprehensive ruling on section 3109.09 to date. In that case, minors broke into the home of an insured homeowner and both damaged and stole his property. The plaintiff insurance company, Liberty Mutual, paid the homeowner for the damage under the terms of the policy and sought to be subrogated to the property owner’s claim against the parents of the minor wrongdoers.<sup>13</sup> The court held that a subrogated insurance company could maintain an action under section 3109.09 against the parents of a minor wrongdoer.<sup>14</sup> The court reasoned that “to hold that the subrogated party cannot maintain the action would allow defendants to receive the benefit of the plaintiff’s insurance without having to pay for it . . . . The granting of subrogations will reach an equitable result; to deny it would accomplish injustice.”<sup>15</sup> This view agrees with the case authority in other jurisdictions.<sup>16</sup>

The *Liberty Mutual* court also dealt with the question whether insurance companies, which have issued homeowner’s policies to the parents of minor wrongdoers, are required to defend and pay a claim under section 3109.09. Such policies generally exclude coverage for intentional acts committed by the policyholder; thus, it is arguable that the parents’ insurance company would not be subject to liability. The *Liberty Mutual* court, however, held otherwise.<sup>17</sup> The court relied on the long standing rule of statutory construction<sup>18</sup> that exceptions and exclusions in insurance policies must be construed strictly against the

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11. 52 Ohio Misc. 26, 368 N.E.2d 336 (Akron Mun. Ct. 1977).

12. *Id.* at 29, 368 N.E.2d at 339.

13. *Id.* at 27, 368 N.E.2d at 337.

14. *Id.*

15. *Id.* at 28, 368 N.E.2d at 338.

16. See Laven, *supra* note 5, at 9-11. See, e.g., General Insurance Company of America v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

17. 52 Ohio Misc. 26, 30, 368 N.E.2d 336, 339 (Akron Mun. Ct. 1977).

18. *Id.* citing Nationwide Mutual Fire Insurance Company v. Blake, No. 72, CIV-0221 (Lake County Ct. C. P. 1973) (unreported); Arenson v. National Auto and Casualty Insurance Co., 45 Cal. 2d 81, 286 P.2d 816 (1955). See also Laven, *supra* note 5, at 11-16 for a discussion of this issue.

insurer and liberally in favor of the insured. Because judgments against the parents under a section 3109.09 action were not based on intentional acts of the policyholders—here the parents—the exclusion clauses of the policy were inapplicable.<sup>19</sup> Therefore, insurance companies which issue a homeowner's policy to the parents of a minor wrongdoer are obligated to defend or pay the claim asserted against the parents in a section 3109.09 action.<sup>20</sup> Consequently, liability under section 3109.09 may often be resolved in a battle between insurance companies—the subrogated insurer of the property owner versus the insurer of the minor's parents. Further, there is no clear reason why the holdings of *Liberty Mutual* would not apply equally well to theft actions brought under section 3109.09.

Section 3109.09 also presents the question of who are "parents" within the meaning of that section. The statutory language makes it clear that natural parents are liable under the law,<sup>21</sup> but leaves open the question whether adoptive parents, step-parents, or agencies charged with custody and control of the child can be held liable under section 3109.09.<sup>22</sup>

The clearest statement as to who has liability under section 3109.09 appears in *Hahn v. Brown*.<sup>23</sup> In that case, two minors in custody of the Ohio Youth Commission for previous juvenile offenses escaped from a camp run by the Commission. They then stole a car, eventually entering it in a demolition derby. The owner of the car brought an action under section 3109.09 against the Ohio Youth Commission for damages to the car. In affirming the lower court's dismissal of the case, the Franklin County Court of Appeals held that the Ohio Youth Commission was not a "parent" in the sense contemplated by the legislature when it enacted section 3109.09.<sup>24</sup> In fact, the court used a very literal definition of the word "parent" as "one that begets or brings forth offspring: father, mother . . . ."<sup>25</sup> The court reasoned that "had the legislature intended for other persons, or entities, to be included within the meaning of the statute, they would not have used the word 'parent'."<sup>26</sup> The view taken by the *Hahn* court indicates that

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19. *Liberty Mutual Insurance Co. v. Davis*, 52 Ohio Misc. 26, 30, 368 N.E.2d 336, 339 (Akron Mun. Ct. 1977).

20. *Id.*

21. See OHIO REV. CODE ANN. § 3109.09 (Page Supp. 1978) wherein it is stated that recovery is to be had "from the parents having the custody and control of a minor under the age of eighteen years."

22. See Laven, *supra* note 5, at 6-9 for a discussion of these questions.

23. 51 Ohio App. 2d 177, 367 N.E.2d 884 (Franklin County 1976).

24. *Id.* at 178, 367 N.E.2d at 886.

25. *Id.* quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).

26. 51 Ohio App. 2d 177, 178, 367 N.E.2d 884, 886 (Franklin County 1976).

agencies are not parents within the meaning of that word under section 3109.09. Further, dictum in that case defining the word "parents" lends support to the position that step-parents,<sup>27</sup> and perhaps even adoptive parents,<sup>28</sup> are not liable under section 3109.09 in that neither "beget" or "bring forth" their children.

The policy argument on the other side is that one of the purposes of section 3109.09 is to force those who are in the best position to prevent such offenses to fulfill their "parental" obligations and responsibilities. Consequently, there is no good reason to limit the action to include only the natural parents of the minor wrongdoer. Resolution of the conflict will depend on whether the court gives greater weight to the literal meaning of the word chosen by the legislature or to the policies which likely motivated them to provide this statutory remedy.

*Ron Mount*

Code Sections Affected: § 3109.09.

Effective Date: May 23, 1978.

Sponsors: Pope, et al. (H), Aronoff, et al. (S).

Committees: Judiciary (H & S).

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27. At least one Ohio court believes that section 3109.09 is not applicable to step-parents. See Laven, *supra* note 5, at 8 citing St. Paul Fire and Marine Insurance Co. v. Boyd, No. A930-021 (Cleveland Mun. Ct., January 19, 1972) (unreported). In the *St. Paul* case, the step-father of a minor wrongdoer moved to have a judgment against him vacated on the grounds that he was not a statutory "parent" as contemplated by section 3109.09. The court granted the motion without opinion.

28. A strong argument has been made that adoptive parents are liable under section 3109.09. In section 3107.13 of the Ohio Revised Code, the Ohio Legislature has declared that "a legally adopted child shall have the same status and rights, and shall bear the same legal relationship to the adopting parents as if born to them in lawful wedlock and not born to natural parents." Because the Ohio Legislature has thus expressed its intent to treat adoptive parents and natural parents the same, it would appear that the term "parent" in section 3109.09 of the Ohio Revised Code should be read to include adoptive parents. See Laven, *supra* note 5, at 6 n.19.

