

R E L E A S E

DECEMBER 14, 2001

ASHTABULA

2000-A-0065 CITY OF ASHTABULA, Plaintiff-Appellee v. DALE L. TACKETT, Defendant-Appellant.

Judgment reversed and remanded. See Opinion and Judgment Entry. [NADER] (O'NEILL) (GRENDALL)

CRIMINAL LAW:

Pursuant to Crim.R. 7(D), a court may amend a complaint at any time provided that no change is made in the name or identity of the crime charged.

To determine whether the trial court's amendment to the complaint constitutes a change in the crime, a reviewing court must determine whether the provisions/crimes contain different elements, each requiring proof of a fact which the other does not.

2001-A-0014 JOSEPH McGRATH, Plaintiff-Appellant v. MANAGEMENT & TRAINING CORP., et al., Defendants-Appellees.

Judgment affirmed. See Opinion and Judgement Entry. [O'NEILL] (FORD) (GRENDALL)

CIVIL:

While *pro se* litigants, as such, receive a degree of special consideration, *pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors. Courts should not assume the role of advocate for the *pro se* litigant. A trial court does not have the duty of assisting a *pro se* litigant in the practice of law.

OTHER CIVIL RULES:

If, pursuant to Civ.R. 12(B)(6), a motion for failure to state a claim is sustained, leave to amend the pleading should be granted unless the court determines that allegations of other statements or facts consistent with the challenged pleading could not possibly cure the defect.

GEAUGA

2000-G-2316 STATE OF OHIO, Plaintiff-Appellee v. PASQUALE ANDERSON, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [GRENDALL] (FORD) (CHRISTLEY)

CRIMINAL LAW:

Because appellant's two sentences were aggregated by the Adult Parole Authority, appellant was still incarcerated for a sex offense.

2000-G-2323 JEFFREY P. JOHNSON, et al., Plaintiffs-Appellants v. RENATO CROMAZ, et al., Defendants, ANNETTE CROMAZ, Defendant-Appellee.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (FORD) (CHRISTLEY)

MISCELLANEOUS:

The equitable doctrine of marshaling assets is based on the principle that a party having two funds to satisfy his demands shall not, by his election, disappoint a party who has only one of the funds upon which to rely.

Because the doctrine of marshaling assets is an equitable principle, it is fundamental that a party seeking to do so must come with clean hands.

2001-G-2332 ANN RAPISARDA, et al., Plaintiffs-Appellants v. CHAGRIN VALLEY ATHLETIC CLUB, INC., et al., Defendants-Appellees.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (FORD) (CHRISTLEY)

TORTS:

A business invitee is a person who comes upon the premises of another for a purpose that is beneficial to the owner. The benefit conferred must take some tangible form. If no tangible benefit can be discerned, the person is a licensee, not a business invitee.

A licensee has a cause of action against the owner of the premises only if the owner wantonly or willfully caused the injury.

LAKE

2000-L-028 STATE OF OHIO, Plaintiff-Appellee v. MICHAEL O. BEAMON,
Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [FORD] (O'NEILL)
(GRENDLELL)

CRIMINAL LAW/ARREST:

A description of a suspect received over a police radio from a fellow police officer, who witnessed the suspect commit a felony, provides a police officer probable cause to arrest the suspect.

2000-L-071 GARY G. LaTOUR, Plaintiff-Appellant v. LENORA M. LaTOUR,
Defendant-Appellee.

Judgment affirmed. See Opinion and Judgment Entry. [CHRISTLEY] (O'NEILL)
(NADER)

DOMESTIC RELATIONS/PROPERTY:

A trial court generally does not have jurisdiction to modify the division of property in a divorce unless the decree contains an express reservation of continuing jurisdiction. However, a trial court does have the inherent power to clarify a prior judgment.

2000-L-089 STATE OF OHIO, Plaintiff-Appellee v. DANIEL J. RHODES,
Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [GRENDLELL] (O'NEILL)
(FORD)

CRIMINAL LAW-EVIDENCE:

Prior to the introduction of expert testimony, a trial court must make a threshold determination as to the qualifications of a person testifying as an expert under Evid.R. 104(A). A trial court's ruling as to the admission or exclusion of expert testimony is within its broad discretion. A witness may testify as an expert if the requirements of Evid.R. 702 and Evid.R. 703 are satisfied. To qualify as an expert, the witness need not be the "best witness" on the particular subject in question. An expert witness qualified in one subject area may not be qualified to testify as an expert in a related subject.

The admission or exclusion of evidence rests within the sound discretion of a trial court. The state maintains the burden of establishing the chain of custody of a piece of evidence. However, the prosecution's burden is not absolute since the state need only establish that it is reasonably certain that substitution, alteration or tampering

did not occur. When a break in the chain of custody is uncovered, such goes to the credibility of the evidence and not its admissibility.

MISCELLANEOUS:

The reenactment, amendment, or repeal of a statute does not affect the prior operation of the statute, any prior action taken under it, any violation, or any penalty, forfeiture, or punishment incurred prior to the amendment or repeal. All legislative enactments enjoy a strong presumption of constitutionality. Any reasonable doubt as to the constitutionality of a statute must be resolved in favor of the General Assembly's power to enact the statute. The General Assembly has plenary power to prescribe crimes and fix penalties. The party asserting the unconstitutionality of a statute must prove this assertion beyond a reasonable doubt.

2000-L-104 STATE OF OHIO, Plaintiff-Appellee v. ANTHONY J. CONTE, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [O'NEILL] (CHRISTLEY) (NADER)

CRIMINAL LAW/SENTENCING:

A court's discretion to impose consecutive sentences is governed by R.C. 2929.14(E)(4). In order to comply with the sentencing provisions therein, the record must contain some indication, by use of specific operative facts, that the court considered those statutory factors in its determination. A sentence which merely repeats the statutory language without any indicia of consideration of the factors set forth in R.C. 2929.14(E)(4) would be insufficient. Appellate review begins by looking to the judgment entry, but it includes the review of any findings the trial court made on the record at the sentencing hearing.

2000-L-105 STATE OF OHIO, Plaintiff-Appellee v. ANTHONY J. CONTE, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [O'NEILL] (CHRISTLEY) (NADER)

CRIMINAL LAW/SENTENCING:

In order to impose anything other than the shortest term authorized by statute on a defendant who has not previously served a prison term, it is necessary for the sentencing court to make findings in accordance with R.C. 2929.14(B). However, R.C. 2929.14(B) does not require

that the trial court give its reasons for its findings in accordance with that section, *i.e.*, that the seriousness of the offender's conduct will be demeaned by not imposing more than the minimum authorized sentence, or that the public will not be adequately protected from future crimes.

2000-L-138 and

2000-L-139 CITY OF WILLOUGHBY, Plaintiff-Appellee v. DEJAN SAPINA, Defendant-Appellant.

Judgment affirmed in part; reversed in part and remanded. See Opinion and Judgment Entry. [CHRISTLEY] (O'NEILL) (NADER)

CRIMINAL LAW/FINES:

R.C. 2947.23 authorizes a trial court to assess the costs related to a prosecution only when a defendant has been found guilty and sentenced.

2000-L-160 STATE OF OHIO, Plaintiff-Appellee v. MICHAEL O. BEAMON, Defendant-Appellant.

Appeal dismissed. See Opinion and Judgment Entry. [FORD] (O'NEILL) (GRENDALL)

CRIMINAL LAW/SENTENCING:

An appeal of the length of a prison sentence, separate and apart from an appeal of the underlying conviction, on the grounds that the trial court erred in sentencing the defendant to the maximum term, is a moot issue if the defendant has already served the prison term, because there is no collateral disability or loss of civil rights that can be remedied by a modification of the length of that sentence in the absence of a reversal of the underlying conviction.

2000-L-169 BARRY M. BYRON, AS ADMINISTRATOR WWA OF THE ESTATE OF FRANK VERONI AND AS TRUSTEE OF THE VERONI TRUST NO. III, Plaintiff-Appellee/Cross-Appellant v. CLARENCE C. CARLIN, et al., Defendants, MARION L. CARLIN, et al., Defendants-Appellants/Cross-Appellees.

Judgment affirmed. See Opinion and Judgment Entry. [FORD] (O'NEILL) (GRENDALL)

PROBATE:

There is a presumption of undue influence, rebuttable by a preponderance of the evidence, when a relationship of attorney and client exists between a testator and an attorney, the attorney is named as a beneficiary in the will, the attorney/beneficiary is not related by blood or marriage to the testator, and the attorney/beneficiary actively

participates in preparing the will. The Supreme Court has extended the foregoing rule to also apply to the beneficiaries of the attorneys via DR 5-101(A)(2), which prohibits a lawyer from drafting a will for a client of the lawyer, in which the lawyer's spouse and/or the lawyer's children are named as beneficiaries.

2000-L-213 CATHERINE ODESSA NICOSON, et al., Plaintiffs-Appellants v. JOAN HACKER, et al., Defendants-Appellees.

Judgment affirmed. O'Neill, P.J., concurs in judgment only, Ford, J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [GRENDALL] (O'NEILL) (FORD)

JUVENILE:

R.C. 3109.12, allowing the natural father and relatives of a child born to an unmarried mother to seek visitation, is not applicable when both natural parents marry each other after the birth of their child.

2001-L-001 KIMBERLY BERTOLONE, Plaintiff-Appellee v. MICHAEL BERTOLONE, Defendant-Appellant.

Judgment affirmed in part, reversed in part. See Opinion and Judgment Entry. [O'NEILL] (FORD) (GRENDALL)

CONTEMPT:

The affirmative defense of impossibility of performance is a valid ground for a court to vacate an order of contempt.

DOMESTIC RELATIONS/PROPERTY:

A division or disbursement of property made under R.C. 3105.171 is not subject to future modification by the trial court.

2001-L-023 STATE OF OHIO, Plaintiff-Appellee v. JAMES J. COMINSKY, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [CHRISTLEY] (NADER) (GRENDALL)

CRIMINAL LAW/SEARCH & SEIZURE:

A stop did not take place when the officer came upon the defendant, who had just fallen off his motorcycle after entering a parking lot, to ascertain whether he needed assistance.

2001-L-146 STATE OF OHIO, Plaintiff-Appellee v. SCOTT M. MOLK, Defendant-Appellant.

This Court, *sua sponte*, dismisses the above-captioned appeal for failure to prosecute. See Judgment Entry.

PORTAGE

2000-P-0082 BOARD OF FRANKLIN TOWNSHIP TRUSTEES, Plaintiff-Appellee v. NOLAN D. ARMENTROUT, Defendant-Appellant.

Judgment reversed and judgment entered for Appellant. Grendell, J., dissents. See Opinion and Judgment Entry. [NADER] (O'NEILL) (GRENDLELL)

ZONING:

The activity of converting the soil taken from the excavation of a farm pond into topsoil and selling a portion of the topsoil is agriculture, as envisioned by the agricultural exception of R.C. 519.01.

2000-P-0098 THERESA A. BROWN, Appellant v. THOMAS ASPHALT PAVING CO., INC., Appellee, JAMES CONRAD, ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, Appellant.

Judgment reversed and judgment entered for Appellant. Grendell, J., concurs in part and dissents in part with Concurring and Dissenting Opinion. See Opinion and Judgment Entry. [NADER] (O'NEILL) (GRENDLELL)

WORKERS' COMPENSATION:

Under R.C. 4123.512, claimants and employers can appeal Industrial Commission orders to a common pleas court only where the order grants or denies the claimant's right to participate.

In an appeal to the Common Pleas Court from an order of the Industrial Commission under R.C. 4123.512, it must be presumed that the issued decided adversely is the only issue before the court.

2000-P-0116 STATE OF OHIO, Plaintiff-Appellant v. CINDY L. MUSTAFA, Defendant-Appellee.

Judgment reversed and remanded. See Opinion and Judgment Entry. [CHRISTLEY] (FORD) (NADER)

DRUNK DRIVING:

A police officer who is also the custodian of records for a law enforcement agency is not precluded from certifying that a public record is a true and accurate copy even if the record was either prepared by the custodian or otherwise identifies the officer in some manner.

2000-P-0127 DARRELL COBB, Plaintiff-Appellant v. MANTUA TOWNSHIP BOARD OF TRUSTEES, et al., Defendants-Appellees.

Judgment affirmed. See Opinion and Judgment Entry. [CHRISTLEY] (NADER) (GRENDLELL)

SOVEREIGN IMMUNITY:

Under R.C. 2744.03(A)(6), employees and officials of a political subdivision acting within the scope of their

employment are immune from tort liability unless one of the exceptions listed in R.C. 2744.03(A)(6)(a)-(c) apply.

Generally speaking, R.C. 2744.02(A)(1) provides that a political subdivision is not liable for injury, death, or loss to person or property incurred in connection with the performance of a governmental function of the political subdivision. However, the immunity afforded a political subdivision is not absolute. Specifically, R.C. 2744.02(B) enumerates five exceptions to the general grant of sovereign immunity.

2001-P-0003 PHYLLIS E. JUST, Plaintiff-Appellee v. HENRY M. JUST, Defendant-Appellant.

Judgment affirmed in part; reversed in part, and remanded. See Opinion and Judgment Entry. [CHRISTLEY] (O'NEILL) (NADER)

DOMESTIC RELATIONS/PROPERTY:

Upon granting a divorce, the trial court is required to divide and distribute the marital estate between the parties in an equitable manner. However, when allocating the property between the parties, the trial court must indicate the basis for its award in sufficient detail to enable the reviewing court to determine that the award is fair, equitable, and in accordance with the law.

2001-P-0091 SUE COMPAN, Plaintiff-Appellee v. GLENN R. COMPAN, Defendant-Appellant.

This Court, *sua sponte*, dismisses the above-captioned appeal for failure to prosecute. See Judgment Entry.

2001-P-0115 STATE OF OHIO, Plaintiff-Appellee v. JOSEPH J. TUZZOLINO, Defendant-Appellant.

This Court, *sua sponte*, dismisses the above-captioned appeal for failure to prosecute. See Judgment Entry.

TRUMBULL

99-T-0119 DANIEL LEE SEYBERT, Plaintiff-Appellee v. MADELINE C. SEYBERT, et al., Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [GRENDALL] (FORD) (NADER)

DOMESTIC RELATIONS/PROPERTY:

R.C. 3105.171(B) requires a trial court to identify the separate property and marital property of the parties. When reviewing a trial court's designation of property as marital or separate, an appellate court applies a manifest weight of the evidence standard of review. The commingling of

separate property with marital property does not destroy the identity of the separate property, provided the separate property is "traceable." The party seeking to have property labeled as separate property bears the burden of proof.

The division of marital property is equal, unless such a division would be inequitable. If a spouse engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, then a trial court *may* compensate the other spouse with a distributive award or with a greater award of the marital property. The party making the allegation of financial misconduct bears the burden of proving such misconduct.

2000-T-0061 ARTHUR G. LAPPING, Plaintiff-Appellant v. HM HEALTH SERVICES, et al., Defendants-Appellees.

Judgment affirmed in part, reversed in part and remanded. See Opinion and Judgment Entry. [GRENDALL] (FORD) (NADER)

CONTRACTS:

An intended third party beneficiary to a contract may bring a contract action. Contract rights are not afforded to an incidental third party beneficiary. To determine whether one is an intended or incidental third party beneficiary, the intent of the contracting parties is determinative. The intention of the parties is ascertained from the language of the contract.

OTHER CIVIL RULES:

Pursuant to Civ.R. 50(A)(4), when a motion for a directed verdict is made, the trial court must construe the evidence most strongly in favor of the non-moving party. If reasonable minds could come to more than one conclusion as to the evidence, the trial court should permit the issue to go to the jury. A motion for a directed verdict tests the legal sufficiency of the evidence, not the weight of the evidence or the witnesses' credibility.

TORTS:

Tortious interference with a contract occurs when one intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract. On the other hand, tortious interference with a business relationship occurs when one intentionally and improperly interferes with another's

prospective contractual relation, not yet reduced to a contract.

2000-T-0072 B-RIGHT TRUCKING COMPANY, Plaintiff-Appellant v. WARFAB FIELD MACHINING AND ERECTION CORP., Defendant-Appellee.

Judgment affirmed. See Opinion and Judgment Entry. [FORD] (NADER) (GRENDALL)

CIV. R. 53:

The time limit for filing objections to a magistrate's decision begins to run on the date the decision is filed and not on the date that the party receives notice of the decision or is served a copy of it.

2000-T-0085 STATE OF OHIO, Plaintiff-Appellee v. BUDD R. BROTHERS, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (O'NEILL) (FORD)

CRIMINAL LAW:

If an offense is a continuing course of conduct, the limitations period does not begin to run until the course of conduct or the defendant's accountability for it terminates, whichever comes first.

CRIMINAL LAW/ALLIED OFFENSES LESSER INCLUDED:

When a court examines offenses to determine whether they are allied offenses of similar import, the court must first analyze the elements of the offenses in the abstract and determine whether the elements correspond so much that the commission of one crime will automatically result in the commission of the other.

JURISDICTION:

Criminal trials must be held in a court that has jurisdiction over the subject matter and in a territory in which the offense or any element of the offense was committed.

2000-T-0087 IN THE MATTER OF: REBECCA VISNICH AND VICTORIA VISNICH

Judgment affirmed in part, reversed in part, and remanded. See Opinion and Judgment Entry. [GRENDALL] (FORD) (NADER)

CONTEMPT:

Appellant's six-month sentence for contempt is vacated because the trial court's judgment entry did not provide for separate sentences for each finding of contempt. Trial court's *nunc pro tunc* judgment entry stating that appellant received three-month sentences for each finding of

contempt was not valid because appellant was not present in open court.

Appellant received adequate notice of the hearing. The substitution of the guardian ad liter for the agency did not impact appellant's preparation of a defense. Further, appellant did not raise the issue below.

2000-T-0120 EARL S. CASTERLINE, Plaintiff-Appellant v. TRUMBULL MEMORIAL HOSPITAL, et al., Defendant-Appellee.

Judgment affirmed. See Opinion and Judgment Entry. [CHRISTLEY] (FORD) (NADER)

TORT:

When determining whether or not a hospital should be held liable under the doctrine of agency by estoppel for the negligence of an independent medical practitioner practicing in the hospital, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment or merely viewed the hospital as the situs where his physician would treat him for his problems.

2000-T-0122 STATE OF OHIO, Plaintiff-Appellee v. MICHAEL J. NAPLES, JR., Defendant-Appellant.

Judgment reversed and remanded. See Opinion and Judgment Entry. [NADER] (FORD) (VUKOVICH-7TH)

(Vukovich, J., Seventh Appellate District, sitting by assignment.)

CRIMINAL LAW:

In a sexual predator hearing, the court is required to provide a general discussion of the factors upon which the court relied in making its determination regarding the likelihood of recidivism.

In a sexual predator hearing, both the defendant and the state are permitted to introduce expert testimony, among other types of evidence, to help the court determine whether the defendant is a sexual predator. The court does not have to rely on any expert testimony that is introduced.

The statute places the responsibility for determining whether an offender is likely to reoffend on the court, not on an expert witness.

2000-T-0134 FLORENCE SOLETRO, Plaintiff-Appellant v. VETERANS LIFE INSURANCE CO., et al., Defendants-Appellees.

Judgment affirmed. See Opinion and Judgment Entry. [O'NEILL] (CHRISTLEY) (GRENDALL)

INSURANCE:

With respect to life insurance contracts entered into prior to the effective date of R.C. 1339.63 in 1990, where the parties to a separation agreement which is incorporated into a decree of dissolution specifically direct their attention to the issue of life insurance and express their intent to release all rights which each may have as beneficiary under the policies of the other, such language is sufficient to eliminate each party as beneficiary of the other notwithstanding the fact that no specific change of beneficiary is made. To eliminate the prior beneficiary, it is sufficient that the agreement award the policy to one party "free and clear of any claims" of the other party.

Under R.C. 1339.63, an ex-spouse only retains beneficiary status on a life insurance policy owned by the other ex-spouse if the decree of divorce specifically provides that they retain beneficiary status. Upon divorce, an ex-spouse who was previously the beneficiary of a life insurance policy insuring the other ex-spouse is presumptively eliminated as the beneficiary of that policy. However, R.C. 1339.63 is not retrospective in application and does not apply to policies issued before its effective date in 1990.

2000-T-0148 HAROLD CLONTZ, Plaintiff-Appellee v. HELEN L. CLONTZ, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [O'NEILL] (CHRISTLEY) (GRENDALL)

CIVIL PROCEDURE/ CIV.R 53:

An objection to a magistrate's finding of fact shall be supported by a transcript of the evidence or an affidavit of the evidence if a transcript is unavailable.

2001-T-0015 WILLIAM E. CLARK, Plaintiff-Appellant v. GREG ALBERINI, et al., Defendants-Appellees.

Judgment affirmed. See Opinion and Judgment Entry. [CHRISTLEY] (O'NEILL) (GRENDALL)

SOVEREIGN IMMUNITY:

Under the unambiguous terms of R.C. 2743.02, the Court of Claims has exclusive and original jurisdiction to determine whether a state employee is entitled to personal immunity under R.C. 9.86, regardless of whether the state has previously consented to be sued for the particular cause of action.

2001-T-0018 KIMBERLY DOLL, Appellant v. JAMES CONRAD, ADMINISTRATOR, et al., Appellee.

Judgment reversed and remanded. See Opinion and Judgment Entry. [O'NEILL] (CHRISTLEY) (NADER)

WORKERS' COMPENSATION:

One of the factors that can toll the statute of limitations is the date that a claimant quit work on account of the disease. There was evidence before the court indicating that the claimant quit work. There was no evidence indicating the claimant quit work for reasons other than her disease. Therefore, granting summary judgement because the statute of limitations had run was inappropriate, as there was a genuine issue of material fact before the court.

2001-T-0073 JERRY BRADLEY, JR., Plaintiff-Appellee v. PHASE II ELECTRONICS, INC., Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [CHRISTLEY] (O'NEILL) (GRENDALL)

CIVIL/CIV.R. 53

Pursuant to Civ.R. 53(E)(4)(a), a trial court judge has a responsibility of examining a magistrate's decision to ensure that it does not contain errors of law.

2001-T-0081 JUNE PASSAIC, Plaintiff-Appellant v. MITCHELL S. FELDER, M.D., et al., Defendants-Appellees.

This Court, *sua sponte*, dismisses the above-captioned appeal for failure to prosecute. See Judgment Entry.

2001-T-0088 STATE OF OHIO, Plaintiff-Appellee v. TIMOTHY SARDICH, Defendant-Appellant.

This Court, *sua sponte*, dismisses the above-captioned appeal for failure to prosecute. See Judgment Entry.

2001-T-0099 SHIRLEY A. DIETELBACH, Plaintiff-Appellant v. OHIO EDISON COMPANY, Defendant-Appellee.

Upon the request of Appellant, the appeal is hereby dismissed. See Judgment Entry.

2001-T-0107 CHARLENE M. ZEKKOUR, Plaintiff-Appellee v. AHMED A. ZEKKOUR, Defendant-Appellant.

This Court, *sua sponte*, dismisses the above-captioned appeal for failure to prosecute. See Judgment Entry.

2001-T-0108 TODD CLINGERMAN, Plaintiff-Appellant v. KIMBERLY CLINGERMAN, Defendant-Appellee.

This Court, *sua sponte*, dismisses the above-captioned appeal for failure to prosecute. See Judgment Entry.