

R E L E A S E

DECEMBER 7, 2001

ASHTABULA

2000-A-0058 VICTOR A. BATES, Plaintiff-Appellant v. CYNTHIA J. BATES,
Defendant-Appellee.

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

DOMESTIC RELATIONS/CUSTODY:

Evidence admitted at trial supports the trial court's decision awarding custody of children to mother. Child's wishes are but one factor for the court to consider. The trial court explained why it denied child's stated preference to live with father, primarily the control the father exercised over the child.

DOMESTIC RELATIONS/OTHER:

Guardian *ad litem* was not appointed to serve as children's attorney. Appellant never requested such a dual appointment. Guardian *ad litem* fulfilled her duty to the children by asking the court to act in what she believed would be the children's best interest.

DOMESTIC RELATIONS/VISITATION:

Trial court did not err by failing to provide for visitation in its judgment entry. The matter was certified to juvenile court which now has exclusive jurisdiction to determine visitation.

2000-A-0084 and

2000-A-0090 CRYSTAL SMITH, Plaintiff-Appellee v. THOMAS J. SIMON,
Defendant-Appellant.

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

CIVIL PROCEDURE:

The jurisdictional priority rule does not bar a municipal court from exercising jurisdiction over a forcible entry and detainer action when another action is pending in common pleas court that relates to a contract involving the same property. This is because a forcible entry and detainer action seeks possession of the property and is, therefore, not the same cause of action as a contract dispute involving that property.

CONTRACTS:

One party's duty to provide a second party with an itemized list of attorney fees is not a condition precedent to the second party's duty to make an initial payment, when the initial payment can be applied to terms of the settlement agreement other than the attorney fees. Therefore, when the second party fails to pay the initial payment, the first party is free to rescind the settlement agreement and file another complaint.

CONTRACTS/REAL PROPERTY:

A purchase agreement and a management agreement can be treated as a single transaction when the goal is the sale, exchange, or rental of real estate.

2001-A-0047 MICHAEL LORINCE, et al., Relators v. ROMEROCK ASSOCIATION, INC., et al., Respondents.

Petition dismissed. See *Per Curiam* Opinion and Judgment Entry. (FORD) (CHRISTLEY) (NADER)

EXTRAORDINARY WRIT:

Pursuant to R.C. 2733.06, a private citizen can only bring an action in quo warranto when he is asserting that he is entitled to hold a public office. In all other circumstances, an action in quo warranto can only be brought by a prosecuting attorney or the state attorney general.

GEAUGA

2000-G-2309 PARK VIEW FEDERAL SAVINGS BANK, Plaintiff-Appellant v. WILLO TREE DEVELOPMENT, INC., et al., Defendant-Appellee.

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

AGENCY:

A corporation's president has implied authority to enter binding contracts on behalf of the corporation, so long as the contracts fall within the scope of ordinary business

transactions. Mortgaging the corporation's assets is not an ordinary business transaction.

If a principal is not bound to a contract by actual authority, that principal may still be bound by the principles of apparent authority or ratification.

A person claiming apparent agency must show that the principal held the agent out to the public as possessing authority to do the act or knowingly permit the agent to do the act and the person dealing with the agent must know of those facts and have reason to believe and actually believe in good faith that the agent possessed the proper authority.

To prove ratification of a contract, the proponent must show that the principal engaged in conduct, with full knowledge of the facts, which manifests his intention to ratify the unauthorized transaction.

2000-G-2321 IN THE MATTER OF: EDWARD B. SMITH, ALLEGED JUVENILE TRAFFIC OFFENDER

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

MISCELLANEOUS:

Not every unexpected occurrence is a "sudden emergency." In establishing the "sudden emergency" defense, an individual must demonstrate, by the greater weight of the evidence, that the emergency was not the result of any fault of his own or circumstances under his control and that he exercised such care as a reasonably prudent person would under the same or similar conditions. Traveling at a speed in excess of the posted speed limit is prima facie unlawful.

JUVENILE:

Despite the fact that juvenile court proceedings are "civil" and operate in a separate system, there are criminal aspects to juvenile court proceedings. This court and other courts have applied the Crim.R. 29 standard when reviewing a sufficiency of the evidence argument on appeal. In order to preserve a sufficiency of evidence argument for appeal, an accused must move for a motion for an acquittal at trial.

LAKE
99-L-062

STATE OF OHIO, Plaintiff-Appellee v. GEORGE L. BAGNALL, Defendant-Appellant.

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

CRIMINAL LAW:

In *State v. Gowdy* (2000), 88 Ohio St.3d 387, the Ohio Supreme Court held that the notice requirement of R.C. 2950.09(B)(1) is mandatory. It is plain error when a defendant is not provided with adequate notice of a sexual offender classification hearing. Absent compliance with the mandatory notice provision of R.C. 2950.09(B)(1), a defendant's classification must be vacated and the matter remanded for the trial court to conduct a sexual classification hearing with proper advance notice of the hearing to all parties.

R.C. Chapter 2950 is rationally related to a legitimate state interest and there are reasonable grounds for distinguishing between sexual predators and other sexual offenders. R.C. Chapter 2950 is not unconstitutionally vague. R.C. Chapter 2950 is neither a criminal statute nor a statute that inflicts punishment. Rather, its purpose is to protect the safety and general welfare of the people. The registration and notification requirements of R.C. Chapter 2950 are not punitive and are reasonably necessary for the intended purpose of the statute, which is to protect the safety and general welfare of the people of this state. R.C. Chapter 2950 does not infringe on a sex offender's right to privacy because the information that is distributed is already considered public record.

2000-L-067 STATE OF OHIO, Plaintiff-Appellee v. JAMES P. PASKO, Defendant-Appellant.

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

CRIMINAL LAW/EVIDENCE:

Standing alone, the psychological evaluation can be a sufficient basis for finding that an offender is a sexual predator if the evaluation contains clear and convincing evidence, to-wit: R.C. 2950.09(B)(2) factors, from which the trial court can conclude that an offender is likely to engage in the future in one or more sexually oriented offenses.

CRIMINAL LAW/SEXUAL PREDATOR HEARINGS:

R.C. 2950.09(B)(1) provides the state with the opportunity to present evidence and argumentation at the hearing; it is not required to do so.

2000-L-094 STATE OF OHIO, Plaintiff-Appellee v. ROBERT J. FORMICA,
Defendant-Appellant.

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

CRIMINAL LAW:

R.C. 2921.12, tampering with evidence, does not just speak to the impairment of the value of evidence, it also prohibits the purposeful impairment of the availability of evidence. At the outset of an investigation, it is the responsibility of law enforcement to determine whether a crime has been committed, what crime has been committed, and the scope of the investigation. Citizens are not free to cleanse a potential crime scene of things, regardless of their self-incriminating value. The determination of relevance and evidentiary value needs to be made by responsible professionals, not witnesses.

2000-L-115 STATE OF OHIO, Plaintiff-Appellee v. MICHAEL F. TENNYSON,
Defendant-Appellant.

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

CRIMINAL LAW:

Appellant had sufficient notice the trial court would be conducting a sexual predator hearing. The plea agreement signed by appellant states that a possible consequence of the plea would be a sexual predator hearing.

Trial court did not state what statutory factors it considered in determining that appellant is a sexual predator. The record is inadequate for review of the sexual predator determination. The case is remanded for the trial court to state on the record its basis for classifying appellant as a sexual predator.

CRIMINAL LAW/SENTENCING:

Trial court did not mention the factors set forth in R.C. 2929.14(C) before imposing the maximum sentence. The record does not support the imposition of the maximum sentence for the fifth-degree felony.

2000-L-122 KURT ANDREW BARTO, Plaintiff-Appellee v. CHRISTINE M.
BARTO, Defendant-Appellant.

Judgment affirmed. Christley, J., concurs in judgment only. See Opinion and Judgment Entry. [O'NEILL] (FORD) (CHRISTLEY)

DOMESTIC RELATIONS/CHILD SUPPORT:

A court can deviate from the worksheet calculations if it would be unjust or inappropriate to the children or either parent and would not be in the best interest of the children because of the extraordinary circumstances of the parents or because of any other factors or criteria set forth in R.C. 3113.215(B)(6)(a).

2000-L-143 and

2000-L-144 STATE OF OHIO, Plaintiff-Appellee v. MIQUEL A. KING, Defendant-Appellant.

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

CRIMINAL LAW/SENTENCING:

Pursuant to R.C. 2929.14(B), a trial court need not provide the reasons behind a finding that the seriousness of the conduct of an offender, who has not previously served a prison term, will be demeaned by the minimum sentence, or that the minimum sentence will not adequately protect the public from future crimes by such an offender.

2000-L-167 INDIANA INSURANCE COMPANY, Plaintiff-Appellant v. M.D.O. HOMES, INC., et al., Defendants-Appellees.

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

DECLARATORY JUDGMENT:

Trial court correctly determined no real controversy when underlying case was dismissed prior to the Insurance Company filing its complaint for declaratory judgment.

2000-L-179 LAURA M. LEWIS, Plaintiff-Appellee v. ROBERT S. LEWIS, Defendant-Appellant.

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

DOMESTIC RELATIONS/CHILD SUPPORT:

When an appellant failed to attend the administrative review of his child support obligation, and the only evidence before the trial court was a statement by appellee at the administrative review that appellant's income was \$50,000 per year, in the absence of any evidence to the contrary, the trial court has no choice but to conclude that appellant's income was, in fact, \$50,000 per year.

2000-L-188 MAROUS/CHURCH, LLC, Plaintiff-Appellee v. THOMAS STANICH, d.b.a.CHEZ FITNESS, Defendant-Appellant.

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

CIVIL:

R.C.1923.03 governs forcible entry and detainer actions and states that judgments in a forcible entry and detainer action are not a bar to a later action between the same parties arising out of the same subject matter. Yet, a forcible entry and detainer action bars relitigation of issues that were *actually and necessarily* decided in the former action.

2000-L-193 KERRY KAPLOWITZ, Plaintiff-Appellee v. CAROL J. BROCK, Defendant-Appellant.

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

CIVIL/EVIDENCE:

Evid.R. 101(C)(8) specifically excludes small claims proceedings from the Ohio Rules of Evidence.

2001-L-201 KENNETH J. CAHILL, Plaintiff-Appellee v. GLEN PHELPS, Defendant-Appellant.

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

CIV.R. 53:

Under Civ.R. 53(E)(3)(b), a party is barred from raising an error on appeal related to the trial court's adoption of a magistrate's finding unless the party timely objects as required. Further, if a party fails to object, the party is precluded from raising the issue for the first time on appeal. Civ.R. 53(E)(4)(a) permits a trial court to adopt a magistrate's decision where no objections are filed *unless* there is an error of law or other defect on the face of the decision. Thus, prior to adopting a magistrate's decision, a trial court should conduct a cursory examination and review of the decision for any obvious errors.

2001-L-164 FREDERICK E. FABERT, et al., Plaintiff-Appellee v. JESSICA SHEPARD, et al., Defendant-Appellant.

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

2001-L-180 MARTIN HILLYER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CHRISTINA HILLYER, Plaintiff-Appellant/Cross-Appellee v. PAINESVILLE TOWNSHIP LOCAL BOARD OF EDUCATION, et al., Defendant-Appellee/Cross-Appellant.

Upon the joint request of Appellant and Appellee, the appeal and cross-appeal are hereby dismissed. See Judgment Entry.

PORTAGE

2000-P-0048 STATE OF OHIO, Plaintiff-Appellee v. BAKUR GEGIA, Defendant-Appellant.

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

CRIMINAL LAW/PLEAS:

Record does not show trial court personally addressed defendant at the hearing with regard to defendant's written guilty plea as mandated by Crim.R. 11(C). The trial court's judgment entry does not mention any colloquy with the defendant regarding his waiver of his statutory and constitutional rights. Such a waiver cannot be presumed from the record before this court.

2000-P-0060 MICHELE JEAN CANTERBURY, Plaintiff-Appellant/Cross-Appellee v. RAYMOND SKULINA, et al., Defendant-Appellee/Cross-Appellant.

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

MISCELLANEOUS:

When an injury is objective in character, the jury may draw their conclusions as to future pain and suffering from that fact alone because the permanency of the injury is obvious.

A fracture that requires the installation of a plate and screw provides evidence of permanency and thus, is an objective injury.

2000-P-0113 STATE OF OHIO, Plaintiff-Appellant v. RECY KELLY, Defendant-Appellee.

Judgment affirmed. Grendell, J., dissents. See Opinion and Judgment Entry. [FORD] (CHRISTLEY) (GRENDALL)

CRIMINAL LAW/SEARCH & SEIZURE:

Since a canine sniff does not require the opening of the object to be sniffed, nor does it expose the contents of the object to public view, it is not a search within the meaning of the Fourth Amendment of the Constitution. Because the use of a drug canine is not a search, an officer does not need a reasonable suspicion that a drug-related activity is occurring in order to request that a drug dog be brought to the scene or to conduct a drug sniff of the vehicle. Once a trained dog signals the odor of drugs coming from a car, a police officer has probable cause to search the vehicle for contraband.

2001-P-0007 GLENMOORE BUILDERS, INC., Plaintiff-Appellee v. JACK KENNEDY, Defendant-Appellant, DOORS, INC., et al., Defendant-Appellee.

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

ARBITRATION:

Pursuant to R.C. 2711.02, enforcement of an arbitration clause is sought by filing a motion with the trial court to stay the proceedings pending arbitration. When a party is confronted with a lawsuit, the right to arbitrate can be saved by seeking enforcement of the arbitration clause. The party claiming the waiver of arbitration must demonstrate that the party wishing to arbitrate had knowledge of and acted inconsistently with his right to arbitrate. The totality of the circumstances must be examined to determine whether the party seeking arbitration acted inconsistently with his right to arbitrate.

2001-P-0015 MS. RUTH STUDAR, Appellant v. THE AURORA CITY BOARD OF ZONING APPEALS, Appellee.

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

ADMINISTRATIVE LAW:

Trucking business conducted on family farm was not a permitted non-conforming use. Certificate of non-conforming use for a riding stable did not encompass the operation of a commercial trucking business. Appellant did not show that equitable estoppel was applicable.

2001-P-0028 STATE OF OHIO, Plaintiff-Appellee v. JANICE E. COWAN, Defendant-Appellant.

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

CRIMINAL LAW:

A verdict of guilty for the offense of domestic violence, a violation of R.C. 2929.25, is not against the manifest weight of the evidence when it is undisputed that the defendant bit the victim and there was competent, credible evidence that the attack was unprovoked.

TRUMBULL

2000-T-0043 STATE OF OHIO, Plaintiff-Appellee v. SIDNEY L. McGRUFF, Defendant-Appellant.

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

CRIMINAL LAW:

Trial court did not abuse its discretion by overruling appellant's motion for new trial. The testimony to which appellant objects to on appeal was made by the victim who was being questioned by defense counsel while on direct examination. There can be no violation of the defense's motion *in limine* by the state when the defense calls the witness to the stand and the comment is made during direct examination. Further, the trial court issued a curative instruction.

2000-T-0129 and

2000-T-0130 DONALD MAGDYCH, et al., Plaintiffs-Appellants v. JOHN BUSH, Defendant-Appellee.

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

CIVIL:

To set aside a jury award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the jury verdict is so disproportionate as to shock reasonable sensibilities and indicates that the jury lost its way in assessing compensatory damages. A jury verdict should not be set aside unless the damages awarded for personal injury are so excessive or so inadequate as to appear to have been awarded as a result of passion or prejudice. In the absence of prejudice, neither a reviewing court nor the trial court may substitute its judgment for that of the jury in the area of damages in a personal injury case.

TRANSCRIPTS:

When an alleged error is that a trial court judgment is against the weight of the evidence or unsupported by the evidence, an appellant must include in the record all portions of the transcript relevant to the contested issue. When portions of a transcript necessary for resolution of an assigned error are omitted from the record, a reviewing court has nothing to pass upon and has no choice but to presume the validity of the lower court's proceedings.

2001-T-0034 DONALD RYSER, Plaintiff-Appellant v. JAMES CONRAD, ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, et al., Defendants, UNITED STATES CAN COMPANY, Defendant-Appellee.

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

CIVIL/EVIDENCE:

A trial court's ruling as to the admission or exclusion of expert testimony is within its broad discretion and will not be disturbed absent an abuse of that discretion. Evid.R. 703 provides: "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." When an expert's opinion is based, in whole or in major part, on facts or data perceived by him, then the requirements of Evid.R. 703 are satisfied.

2001-T-0113 OHIO MUTUAL INSURANCE GROUP, Plaintiff-Appellee v. ST. PAUL MERCY INSURANCE COMPANY, Defendant-Appellant.

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

RELEASED NOVEMBER 29, 2001:

ASHTABULA

2001-A-0080 STATE OF OHIO *ex rel.* LONNY LEE BRISTOW, Relator v. PLAIN DEALER, et al., Respondents.

Writ dismissed. See Judgment Entry.

GEAUGA

2001-G-2394 STATE OF OHIO *ex rel.* LONNY LEE BRISTOW, Relator v. NEWS JOURNAL, et al., Respondents.

Writ dismissed. See Judgment Entry.