

**R E L E A S E**

**DECEMBER 28, 2001**

**ASHTABULA**

2001-A-0016 EARLENE NELSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOSHUA NELSON, DECEASED, Plaintiff-Appellant v. BOARD OF PARK COMMISSIONERS OF CONNEAUT TOWNSHIP PARK DISTRICT, Defendant-Appellee.

Judgment affirmed. O’Neill, P.J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [GRENDALL] (O’NEILL) (FORD)

**CIVIL:**

Statutory immunity for landowners, pursuant to Ohio’s Recreational User Statute under R.C. 1533.181, promotes the development and availability of recreational lands for recreational use. R.C. 1533.181 encourages owners of land, suitable for recreational activity, to open their lands to public use without the worry of liability. It is well settled that R.C. 1533.181 has been interpreted to include immunity for both privately owned land and lands owned by the state and municipalities.

**MISCELLANEOUS:**

Title to Lake Erie belongs to the state of Ohio, which holds it in trust for the benefit of its citizens.

**SOVEREIGN IMMUNITY:**

R.C. 2744.02(A)(1) confers sovereign immunity for civil liability upon political subdivisions for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function. Conneaut Township Park, organized under R.C. Chapter 1545, is a political subdivision of the state of Ohio. A governmental function of a political subdivision includes the maintenance and operation of any park.

2001-A-0077 STATE OF OHIO, Plaintiff-Appellee v. GRAND JURY INVESTIGATION, Defendant-Appellant.

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

**CRIMINAL/APPELLATE REVIEW:**

The denial of a motion to quash a grand jury subpoena is not a final appealable order because it neither determines an action and prevents a judgment nor is it made in a special proceeding.

**GEAUGA**

2001-G-2388 IN RE: ESTATE OF MELVIN E. WYANT, JR., a.k.a. MELVIN E. WYANT, DECEASED

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

2001-G-2392 GEAUGA COUNTY BOARD OF HEALTH, et al., Appellees v. JEAN PAUER, Appellant.

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

**CIVIL/APPELLATE REVIEW:**

A trial court judgment which simply denies a motion for a continuance of the trial is not a final appealable order as that judgment is clearly interlocutory.

**LAKE**

99-L-179 STATE OF OHIO, Plaintiff-Appellee v. KENNETH N. JARYGA, Defendant-Appellant.

Judgment affirmed in part; reversed in part and remanded. O'Neill, P.J., concurs in part, dissents in part with a Concurring/Dissenting Opinion. Christley, J., concurs in part, dissents in part with a Concurring/Dissenting Opinion. See Opinions and Judgment Entry. [NADER] (O'NEILL) (CHRISTLEY)

**CRIMINAL LAW/ARREST:**

Pursuant to R.C. 2935.26, a police officer may not arrest a person for a minor misdemeanor, but instead should issue a citation, unless one of the enumerated exceptions in the statute is applicable.

**CRIMINAL LAW/SENTENCING:**

R.C. 2929.14(B) requires the sentencing court to impose the minimum sentence for first-time imprisonment unless it specifies on the record that the shortest prison term would demean the seriousness of the conduct or would not adequately protect the public from future crime by the offender. However, the court is not required to make the

findings on the record during the sentencing hearing so long as they appear somewhere in the sentencing entry.

2000-L-128 CLYDE DUBEANSKY, d.b.a. DUBEANSKY'S LANDSCAPING AND WHOLESALE SUPPLY, INC., Plaintiff-Appellant v. CITY OF MENTOR, Defendant-Appellee.

Judgment reversed and remanded. Grendell, J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [FORD] (O'NEILL) (GRENDSELL)

**CIV.R. 60:**

To prevail on a motion for relief pursuant to Civ.R. 60(B), the movant must demonstrate a meritorious claim or defense if relief is granted, entitlement to relief under a ground stated in Civ.R. 60(B)(1) through (5), and timeliness of the motion. Appellee is not required to provide evidence with its opposing motion. Further, the person opposing the motion is not required to submit supporting testimonial evidence.

2000-L-171 JOYCELAIN WARD, Plaintiff-Appellant v. WAL-MART STORES, INC., Defendant-Appellee.

Judgment affirmed. O'Neill, J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [GRENDSELL] (O'NEILL) (NADER)

**NEGLIGENCE:**

*Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, did not modify the open and obvious doctrine. The court only addressed the proximate cause element of negligence in terms of comparative negligence. The court did not mention the open and obvious doctrine or explicitly reject it. The doctrine still is viable.

2001-L-174 DONN MICHAEL ARCIDIACONO, Plaintiff-Appellee v. TINA MARIE LANE, Defendant-Appellant.

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

**PORTAGE**

2000-P-0064 FENO MONACO, Plaintiff-Appellant v. RED FOX GUN CLUB, INC., et al., Defendants-Appellees.

Judgment affirmed in part; reversed and remanded in part. Grendell, J., concurs in part and dissents in part with Concurring and Dissenting Opinion. See Opinions and Judgment Entry. [NADER] (O'NEILL) (GRENDSELL)

**Civ.R. 56:**

Summary judgment is proper when: (1) no genuine issue as to any material fact remains; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, adverse to that party.

After the movant meets his initial burden, a reciprocal burden arises for the non-moving party to set forth specific facts showing a genuine issue for litigation exists.

**TRUMBULL**

2000-T-0100 JOSEPH BELLINO, Plaintiff-Appellee v. SUPERIOR BEVERAGE COMPANY, INC., et al., Defendants-Appellants.

Judgment reversed and judgment entered for Appellants. [O'NEILL] (CHRISTLEY) (GRENDALL)

**OTHER CIVIL RULES:**

A motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence, presenting a question of law for review. The appellate court must construe the evidence most strongly in the favor of the non-moving party and determine whether reasonable minds could only conclude that the moving party was entitled to judgment as a matter of law. If reasonable minds could only conclude that the plaintiff failed to meet his burden on at least one essential element of a cause of action, then the moving party is entitled to judgment as a matter of law.

**TORTS:**

The elements of the tort of malicious criminal prosecution are (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. In the absence of evidence establishing malice in fact, malice may be inferred from the absence of probable cause. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense.

In a malicious prosecution lawsuit, a legal presumption that probable cause existed arises where a tribunal issues a bind over or an indictment, unless there was perjured testimony or another significant irregularity in the proceeding. A plaintiff must bring forward substantial evidence to rebut this presumption. The presumption applies to the time

when the charges were filed. In determining the want of probable cause, the defendant's conduct should be weighed in view of his situation and of the facts and circumstances which he knew or was reasonably chargeable with knowing at the time he made the criminal complaint.

2000-T-0131 STATE OF OHIO, Plaintiff-Appellee v. DAVID GRIFFITHS, Defendant-Appellant.

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

**CRIMINAL LAW/MOTION FOR ACQUITTAL:**

There is sufficient evidence to withstand a motion for acquittal if, after viewing all of the evidence in a light favorable to the prosecution, any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt.

**CRIMINAL LAW/PROSECUTORIAL MISCONDUCT:**

A personalized attack on the defense lawyer constitutes prosecutorial misconduct. However, prosecutorial misconduct will not be grounds for error unless the defendant was denied a fair trial.

**CRIMINAL PROCEDURE:**

A defendant is allowed to inspect results and reports of mental examinations if they are made in connection with that particular case.

**TRANSCRIPTS/GRAND JURY:**

A defendant is not permitted to inspect grand jury transcripts unless the defense shows there is a particularized need that outweighs the need for secrecy.

2001-T-0082 EDWARD HEARRELL, Plaintiff-Appellee v. LEASEWAY MOTORCAR TRANSPORT CO., et al., Defendant-Appellant.

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

2001-T-0086 STATE OF OHIO, Plaintiff-Appellee v. TODD A. HURD, Defendant-Appellant.

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

2001-T-0096 KIMBERLY J. CAPOGRECO, Plaintiff-Appellee v. RONALD CAPOGRECO, Defendant-Appellant.

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

2001-T-0110 JAMES W. JONES, Plaintiff-Appellant v. MELINDA S. JONES, Defendant-Appellee.

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

2001-T-0112 DAVID L. EVANS, et al., Plaintiffs-Appellees v. ALEX CYCLE SHOP, INC., Defendant-Appellant.

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

2001-T-0119 STATE OF OHIO, Plaintiff-Appellee v. STEVEN A. BINION, Defendant-Appellant.

Appeal dismissed. O'Neill, P.J., dissents with Dissenting Opinion. See Memorandum Opinion, Dissenting Opinion and Judgment Entry. [NADER] (O'NEILL) (GRENDALL)

**APPELLATE PROCEDURE:**

Pursuant to App.R. 5(A), after the expiration of the thirty day period provided by App.R. 4(A), an appeal may be taken only by leave of court. A motion for leave to appeal shall set forth the reasons for failing to perfect an appeal as of right. If a motion for leave to appeal fails to set forth the reasons for failing to perfect an appeal of right, such motion shall be denied.

2001-T-0122 STATE OF OHIO *ex rel.* DR. RICHARD R. RAGOZINE, et al., Relators v. MITCHELL F. SHAKER, JUDGE, TRUMBULL COUNTY COMMON PLEAS COURT, Respondent.

Petition dismissed. See *Per Curiam* Opinion and Judgment Entry. (O'NEILL) (CHRISTLEY) (NADER)

**PUBLIC OFFICIALS:**

In an action to remove a public official from his position, the thirty-day limit under R.C. 3.08 is directory in nature. As a result, the failure to commence the trial within thirty days of the filing of the complaint does not deprive the trial court of jurisdiction to proceed.