

# Court of Appeals of Ohio

## *Eleventh Appellate District*

Diane V. Grendell  
Judge

Timothy P. Cannon  
Judge

Colleen Mary O'Toole  
Judge

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Cynthia Westcott Rice  
Presiding/Administrative Judge

Thomas R. Wright  
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Shibani Sheth-Massacci  
Court Administrator/Magistrate/  
Administrative Counsel

**December 29, 2017**

### **RELEASE**

**ASHTABULA**  
2017-A-0022

STATE OF OHIO, Plaintiff-Appellee v. KYLE W. M. STARKEY, Defendant-Appellant.

Judgment affirmed. O'Toole, J., dissents. See Opinion and Judgment Entry. [GRENDALL] (WRIGHT) (O'TOOLE)

CRIMINAL - Murder; Felonious Assault; Tampering With Evidence; Domestic Violence; manifest weight of the evidence; sufficiency of the evidence; credibility of witnesses; consecutive sentences; R.C. 2929.14(C)(4); change of venue; Crim.R. 18(B); bias; cross-examination; abuse of discretion; Confrontation Clause; Evid.R. 611(B); harmless error; court costs; ability to pay; R.C. 2929.19(B)(5).

**GEAUGA**  
2017-G-0107

CHRISTOPHER P. HITCHCOCK, TREASURER OF GEAUGA COUNTY, OHIO, Plaintiff v. SHERMAN F. DENISON, et al., Defendants-Appellants, SYLVIA B. IMARS, Defendant-Appellee.

Judgment reversed and remanded. Rice, P.J., dissents with a Dissenting Opinion, Wright, J., concurs with a Concurring Opinion. See Opinion and Judgment Entry. [GRENDALL] (RICE) (WRIGHT)

CIVIL - foreclosure; lien priority; statute of limitations; waiver; junior mortgagee.

2017-G-0108

SANDRA L. BERGER, Plaintiff-Appellant/Cross-Appellee v. THEODORE J. BERGER, JR., Defendant-Appellee/Cross-Appellant.

Judgment modified and affirmed as modified. See Opinion and Judgment Entry. [WRIGHT] (RICE) (CANNON)

DOMESTIC RELATIONS - SPOUSAL SUPPORT - PROPERTY - evaluating evidence and witness credibility are issues for the trier of fact; trial court's spousal support determination within scope of

remand order; judicial admission by counsel during remand hearing eliminated need for evidence; trial court's order to the contrary constitutes an abuse of discretion.

**LAKE**

2016-L-108            STATE OF OHIO, Plaintiff-Appellee v. MAX S. STRUBLE, Defendant-Appellant.

Judgment affirmed in part; reversed in part and remanded. See Opinion and Judgment Entry. [WRIGHT] (CANNON) (O'TOOLE)

CRIMINAL LAW - R.C. 2925.041(B); illegal assembly of chemicals; manifest weight; admission of NPLeX report; prior purchases of pseudoephedrine; inadequate foundation; prejudicial error; expert testimony on ultimate issue in crime; Evid.R. 704; actions of methamphetamine user; defendant's right to self-representation; untimely request; three witnesses presented.

2017-L-015            STATE OF OHIO, Plaintiff-Appellee v. BRYAN M. FRANKLIN, Defendant-Appellant.

2017-L-016

2017-L-017

Judgment affirmed. O'Toole, J., concurs in judgment only. See Opinion and Judgment Entry. [RICE] (GRENDALL) (O'TOOLE)

CRIMINAL LAW - no direct appeal filed; all issues res judicata.

2017-L-024            NICHOLAS KOUDELA, et al., Plaintiffs-Appellants v. JOHNSON & JOHNSON CUSTOM BUILDERS, LLC, et al., Defendants-Appellees.

Judgment affirmed. Wright, J., concurs in Judgment Only. See Opinion and Judgment Entry. [O'TOOLE] (RICE) (WRIGHT)

CIVIL - motion to stay proceedings pending binding arbitration; construction contract; binding arbitration provision; fraud in the inducement; R.C. 1329.10(B); the arbitration provision is valid and enforceable.

2017-L-025            STATE OF OHIO, Plaintiff-Appellee v. CHAD A. MURRAY, Defendant-Appellant.

Judgment affirmed and remanded. Wright, J., dissents with a Dissenting Opinion. See Opinion and Judgment Entry. [RICE] (GRENDALL) (WRIGHT)

CRIMINAL LAW - SEARCH & SEIZURE - consent search of defendant's shoes; immediately after officer asked defendant if he would mind taking off his shoes, officer said, "Just take off your shoes for me;" this was not a separate exchange between officer and defendant but, rather, part of officer's request.; based on totality of circumstances, trial court did not err in finding defendant's consent to search his shoes was voluntary.

2017-L-026            PATRICIA L. FOWLER, Plaintiff-Appellant v. CAROLYN J. FIMIANI, Defendant-Appellee.

Judgment affirmed. Wright, J., concurs in judgment only. See Opinion and Judgment

Entry. [RICE] (WRIGHT) (O'TOOLE)

REAL PROPERTY - real estate transaction; summary judgment; trial court did not err in allowing defendant-seller to supplement her motion for summary judgment by including an affidavit that merely authenticated documents defendant attached to her motion for summary judgment; trial court does not commit reversible error by considering documents not in accord with Civ.R. 56(C) or (E) where there is no suggestion that the documents are not authentic or that the result would be different if documents were properly authenticated; trial court did not err in granting summary judgment in favor of defendant where no genuine issues of material fact remained as to plaintiff-purchaser's claim for fraudulent concealment and fraudulent misrepresentation where plaintiff's inspector pointed out various defects related to the water leakage problem in basement and advised plaintiff to verify the basement wall was properly backfilled but plaintiff failed to do so and instead proceeded with the purchase and used the inspection to obtain better terms of sale.

2017-L-043      DANA R. BYERS, Plaintiff-Appellant v. MARK CARTECHINE, Defendant-Appellee.

Judgment affirmed. See Opinion and Judgment Entry. [WRIGHT] (RICE) (GRENDALL)

JUVENILE - CHILD SUPPORT - motion to modify child support following ex parte motion for custody and modified, agreed shared parenting plan; mother voluntarily unemployed and imputed with minimum wage income; mother designated as obligor; no abuse of discretion; no downward deviation required.

2017-L-046      STATE OF OHIO, Plaintiff-Appellee v. JOHN R. LANE, JR., Defendant-Appellant.

Judgment affirmed. O'Toole, J., concurs in judgment only. See Opinion and Judgment Entry. [WRIGHT] (GRENDALL) (O'TOOLE)

CRIMINAL LAW - JAIL-TIME CREDIT - appellant indicted on new charges when already in prison on unrelated offenses; no jail-time credit warranted; appellant was already serving time upon the issuance of the new conviction, the offenses were unrelated, and the new sentence was ordered to run consecutive to his pre-existing sentence, not concurrent.

2017-L-060      RONALD ABRAMEZYK, et al., Plaintiffs-Appellees v. THE CITY OF WILLOWICK, Defendant-Appellant.

Judgment affirmed. Grendell, J., concurs in judgment only. See Opinion and Judgment Entry. [RICE] (GRENDALL) (WRIGHT)

SOVEREIGN IMMUNITY - planning, design, construction, or reconstruction of sewer system is shielded by immunity, maintenance or operation is not; motion for judgment on the pleadings; when ruling on such motion, plaintiff is not required to

prove his case at pleading state; plaintiff is only required to allege set of facts which would plausibly allow for recovery; while complaint does not need detailed factual allegations, it requires more than mere conclusions or recitation of elements of claim; appellees alleged sufficient facts to support their claims and to defeat city's immunity defense; facts alleged supported reasonable inference that sewer problems connected with recent sewer backup were not repaired by the time of the subject backup and were thus also related to that backup; the decision to provide maintenance and repair to sewer system does not involve exercise of discretion that would provide for the restoration of immunity under R.C. 2744.03(A)(5).

2017-L-061            KIMBERLEY RAGAZZO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff-Appellee v. THE CITY OF WILLOWICK, Defendant-Appellant.

Judgment affirmed. Grendell, J., concurs in judgment only. See Opinion and Judgment Entry. [RICE] (GRENDALL) (WRIGHT)

SOVEREIGN IMMUNITY - class action; planning, design, construction, or reconstruction of sewer system is shielded by immunity, maintenance or operation is not; motion for judgment on the pleadings; when ruling on such motion, plaintiff is not required to prove his case at pleading state; plaintiff is only required to allege set of facts which would plausibly allow for recovery; while complaint does not need detailed factual allegations, it requires more than mere conclusions or recitation of elements of claim; appellees alleged sufficient facts to support their claims and to defeat city's immunity defense; facts alleged supported reasonable inference that sewer problems connected with recent sewer backup were not repaired by the time of the subject backup and were thus also related to that backup; the decision to provide maintenance and repair to sewer system does not involve exercise of discretion that would provide for the restoration of immunity under R.C. 2744.03(A)(5).

2017-L-116            STATE OF OHIO, Plaintiff-Appellee v. GARY D. MASSEY, Defendant-Appellant.

Appeal dismissed. O'Toole, J., dissents. See Memorandum Opinion and Judgment Entry. [RICE] (GRENDALL) (O'TOOLE)

APPELLATE REVIEW - order striking a petition for post-conviction relief is a procedural, interlocutory order which does not dispose of the petition; lack of a final appealable order; R.C. 2505.02.

2017-L-119            STATE OF OHIO, Plaintiff-Appellee v. DAVID V. ROCK, JR., Defendant-Appellant.

Appeal dismissed. Wright, J., concurs in judgment only. See Memorandum Opinion and Judgment Entry. [CANNON] (RICE) (WRIGHT)

APPELLATE REVIEW - final, appealable order; R.C. 2505.02(B); motion for reconsideration; motion for change of venue; lack of

jurisdiction.

**PORTAGE**

2017-P-0012

STATE OF OHIO, Plaintiff-Appellee v. TERRANCE A. PRISBY, Defendant-Appellant.

Judgment affirmed and remanded. Grendell, J., concurs in judgment only; Wright, J., concurs in part and dissents in part with Opinion. See Opinion and Judgment Entry. [RICE] (GRENDALL) (WRIGHT)

CRIMINAL LAW - SENTENCING/FINES, RESTITUTION, EXPUNGEMENT - since R.C. 2950.99, the specific sentencing statute for repeat nonreporting sex offenders, sets forth the felony level of a defendant's current nonreporting offense and the mandatory nature of the offense, there is no need to refer to the general sentencing statutes for guidance in sentencing; since appellant's sexually oriented offense that was the basis of his notification requirement was gross sexual imposition, a felony-three, his notification violation was also a felony-three; while R.C. 2950.99 does not expressly state the three-year sentence for the notification violation is mandatory, the statute describes this sentence as such and the sentence is thus mandatory.

2017-P-0018

STATE OF OHIO, Plaintiff-Appellee v. WILLIAM T. FERRELL, Defendant-Appellant.

Judgment reversed and remanded. Grendell, J., dissents with a Dissenting Opinion. See Opinion and Judgment Entry. [WRIGHT] (GRENDALL) (O'TOOLE)

CRIMINAL LAW - SEARCH & SEIZURE - suppression motion; backseat passenger's consent to search his pockets; search of his socks violated scope of consent; objective reasonableness dictates the scope; officer's request to search pockets was limited; Miranda warnings; consent to search is not determinative as to admissibility of statements in response to officer questioning; suspect's statements in response to police questions while handcuffed and after finding object hidden in suspect's sock were custodial, warranting Miranda warnings; public-safety exception inapplicable.

2017-P-0025

SHELLY MATERIALS, INC., Appellee v. CITY OF STREETSBORO PLANNING AND ZONING COMMISSION, et al., Appellants.

Judgment reversed and judgment entered for appellants. Grendell, J., dissents with a Dissenting Opinion. See Opinion and Judgment Entry. [WRIGHT] (GRENDALL) (O'TOOLE)

ZONING - Zoning commission; denial of application for conditional use permit; surface mining; administrative appeal to common pleas court; R.C. 2506.04; standard of review; credibility of expert witness; detrimental effect of mining on adjacent properties; no requirement to accept expert's opinion notwithstanding lack of conflicting evidence; viable reason to reject testimony; amendment to zoning ordinance

inapplicable to pending matter.

2017-P-0041      BRANDON GREEN, Appellant v. MARC GLASSMAN, INC., et al., Appellee.

Judgment affirmed. See Opinion and Judgment Entry. [GRENDALL] (WRIGHT) (O'TOOLE)

CIVIL – workers' compensation; summary judgment; Civ.R. 56(C); in the course of/arising out of employment; coming and going rule; R.C.4123.01(C); fixed-situs employee; special hazard exception.

**TRUMBULL**

2015-T-0053      RICHARD McCONNELL, Plaintiff-Appellant v. BARE LABEL PRODUCTIONS, INC., et al., Defendants, TAMMY SCHMITT, Intervening Defendant-Appellee.

Judgment modified, reversed and remanded. Wright, J., dissents with a Dissenting Opinion. See Opinion and Judgment Entry. [GRENDALL] (WRIGHT) (O'TOOLE)

CIVIL - corporate records; R.C.1701.37(C); judgment of the appellate court; lost profits; punitive damages; law of the case.

2017-T-0012      STATE OF OHIO, Plaintiff-Appellee v. MARQUES JAMES SHANNON, Defendant-Appellant.

Judgment affirmed. Wright, J., concurs in judgment only with a Concurring Opinion; O'Toole, J., dissents with a Dissenting Opinion. See Opinion and Judgment Entry. [GRENDALL] (WRIGHT) (O'TOOLE)

CRIMINAL - *Anders* brief; frivolous issues; Crim.R. 32.1; guilty plea; coercion; voluntary plea; change of heart; speedy trial; merger; ineffective assistance of counsel; advice to take plea deal.

2017-T-0013      LORI A. HUDZIK, et al., Plaintiff-Appellant v. BOULEVARD CENTRE COMPANY, Defendant-Appellee.

Judgment affirmed. Cannon, J., concurs in judgment only with a Concurring Opinion. See Opinion and Judgment Entry. [O'TOOLE] (RICE) (CANNON)

CIVIL - motion for summary judgment; Civ.R. 56; de novo review; slip and injury in parking lot; no competent evidence of actual or constructive notice of any alleged defective condition; open and obvious.

2017-T-0026      ANN KARNOFEL, Plaintiff-Appellant v. SUPERIOR WATERPROOFING, INC., Defendant-Appellee.

Judgment affirmed. Wright, J., concurs in judgment only. See Opinion and Judgment Entry. [O'TOOLE] (CANNON) (WRIGHT)

CONTRACTS - summary judgment; a vexatious litigator requires leave of the court making that designation on any claim requesting an order or relief; privity; res judicata; logical relation test.

2017-T-0031      DENNIS WATKINS, TRUMBULL COUNTY PROSECUTING ATTORNEY, Plaintiff-Appellee v. ALFONSIA PERRY, Defendant-Appellant.

Judgment affirmed. O'Toole, J. dissents. See Opinion and Judgment Entry. [GRENDALL] (WRIGHT) (O'TOOLE)

CIVIL - vexatious litigator; R.C. 2323.52; statute of limitations; motion to dismiss; civil action; postconviction proceedings; vexatious conduct.

2017-T-0036      JOHN R. BARYAK, Plaintiff-Appellant v. WERNER LANGE, et al., Defendants-Appellees.

Judgment affirmed. O'Toole, J., dissents. See Opinion and Judgment Entry. [CANNON] (GRENDALL) (O'TOOLE)

CIVIL - frivolous conduct; R.C. 2323.51; sanctions; attorney fees; Civ.R. 41(A); voluntary dismissal; double dismissal; without prejudice; with prejudice; jurisdiction; adjudication on the merits; timeliness.

2017-T-0050      STATE OF OHIO, Plaintiff-Appellee v. CHRISTOPHER L. McBRIDE, Defendant-Appellant.

Judgment modified and affirmed as modified. Grendell, J., concurs in judgment only. See Opinion and Judgment Entry. [RICE] (GRENDALL) (O'TOOLE)

CRIMINAL LAW - SENTENCING/FINES, RESTITUTION, EXPUNGEMENT - R.C. 2901.08(A), which treats juvenile adjudication as prior conviction to enhance degree or sentence for a subsequent offense committed as adult, violates due process; this rule, however, does not apply to R.C. 2929.12, and sentencing court may still consider juvenile adjudications in weighing seriousness and recidivism factors.

2017-T-0110      CLEAN ENERGY FUTURE, LLC, Plaintiff-Appellee v. CLEAN ENERGY FUTURE-LORDSTOWN, LLC, Defendant-Appellant.

Appeal dismissed. See Memorandum Opinion and Judgment Entry. [CANNON] (RICE) (WRIGHT)

APPELLATE REVIEW - R.C. 2505.02(B)(4); final appealable order; provisional remedy; preliminary injunction; meaningful or effective remedy; status quo; affirmative action; calculable monetary losses; motion to compel arbitration; lack of jurisdiction.