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Irene Wood et al., Plaintiffs-Appellants, v. Health Care and Retirement Corp. of America, Defendant-Appellee.

No. 97APE10-1398

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1998 Ohio App. LEXIS 3468

July 30, 1998, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, insureds and an insurer, challenged a judgment from the Franklin County Court of Common Pleas (Ohio), which granted summary judgment in favor of defendant nursing home after one of the insureds brought claims for injuries she suffered when she tripped and fell while visiting her husband who was a patient at the nursing home.

OVERVIEW: The insureds, a husband and a wife, claimed that the nursing home negligently equipped each patient's room with a single telephone with an excessively long cord, which created an unreasonably hazardous condition as the telephone was moved from place to place in the room with the cord trailing across the floor causing the wife to trip and fall. Accordingly, the insureds claimed that the nursing home breached its legal duty to the wife, who was a business invitee on the premises. The insureds subrogated their claims to the insurer who intervened as a plaintiff in the action. On appeal, the court held that the trial court properly granted summary judgment in favor of the nursing home regarding the claims. In pertinent part, the court determined that on the precise facts before the court, a six-foot telephone cord installed for the purpose of allowing some telephone mobility between two beds in a nursing home room, when the existence of such a cord was open, obvious, and apparent, would not constitute an unreasonable and unnecessary hazard to business invitees, particularly in the absence of any prior report to the nursing home of incidents with the telephone cord.

OUTCOME: The court affirmed the trial court's judgment granting summary disposition in favor of the nursing home.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] Pursuant to *Ohio R. Civ. P. 56(C)*, a motion for summary judgment shall be granted if no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and the evidence, construed most favorably to the non-moving party, demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-moving party. The appellate court shall independently review the pleadings and evidentiary materials submitted to the trial court and apply the same standard to determine whether the materials submitted establish a genuine issue of material fact. When reviewing the grant of a motion for summary judgment, an appellate court will review the judgment independently and will not defer to the trial court.

Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty to Maintain
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Known Dangers

Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Obvious Dangers

[HN2] A business owner owes a duty to business invitees to maintain the premises in a reasonably safe condition and warn the invitee of any latent dangers on the premises. However, the owner has no duty to protect against dangers which are known to the invitee, or which are so obvious and apparent to such an invitee that he or she may reasonably be expected to discover them and protect against them.

COUNSEL: J. Boyd Binning; Paul Croushore, for appellants.

Keener, Doucher, Curley & Patterson, and W. Charles Curley, for appellee.

JUDGES: DESHLER, P.J. PETREE and TYACK, JJ., concur.

OPINIONBY: DESHLER

OPINION: (REGULAR CALENDAR)

DECISION

DESHLER, P.J.

Plaintiffs-appellants, Irene Wood, Carl Wood, and Community Insurance Company (the Woods' subrogated health insurer), appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment to defendant-appellee, Health Care and Retirement Corp. of America ("Health Care"), a nursing home operator.

This matter arose from injuries suffered by Irene Wood when she tripped over a telephone cord and fell while visiting her husband, Carl Wood, who was a patient at Health Care's facility. Appellants' complaint asserted that Health Care had maintained its premises in an unreasonably dangerous and unsafe manner, and thus breached its legal duty to Irene Wood, who was a business invitee on the premises. The complaint asserted that Health Care had negligently equipped each patient's room with a single telephone with an excessively long cord, [*2] which created an unreasonably hazardous condition as the telephone was moved from place to place in the room and the cord trailed across the floor. Appellant Community Insurance Company, as the Woods' health insurer, subsequently sought and received leave to intervene as plaintiff, being subrogated for Irene Wood's medical expenses.

The principal facts in this case are not at issue. Based upon Irene Wood's deposition, Health Care filed its motion for summary judgment alleging that, construing the evidence in a light most favorable to appellants, Health Care was entitled to judgment as a matter of law. On September 8, 1997, the trial court granted Health Care's motion for summary judgment, finding that appellants had not produced evidence showing that Health Care had maintained its premises in an unreasonably dangerous or unsafe manner, or that Health Care had breached any legal duty owed to plaintiff as a business invitee. The trial court further found that Health Care had not created the dangerous condition which caused Irene Wood's injuries and had no notice, either actual or constructive, of the condition.

Appellants timely appeal and bring the following two assignments of error: [*3]

> "I. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANT HEALTH CARE AND RETIREMENT CORPORATION OF AMERICA WHERE THE EVIDENCE BEFORE THE COURT DID NOT DEMONSTRATE THAT MRS. WOOD IGNORED A KNOWN PERIL.
>
> "II. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANT HEALTH CARE AND RETIREMENT CORPORATION OF AMERICAN [*sic*] WHERE THE EVIDENCE BEFORE THE COURT SHOWED THAT THE DEFENDANT CAUSED THE PERIL BY WHICH MRS. WOOD SUFFERED INJURY AND DAMAGES."

The two assignments of error present interrelated issues and will be addressed together. [HN1] Pursuant to *Civ.R. 56(C)*, a motion for summary judgment shall be granted if no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and the evidence, construed most favorably to the non-moving party, demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-moving party. *Davis v. Loopco Industries, Inc. (1993), 66 Ohio St. 3d 64, 609 N.E.2d 144.* The appellate court shall independently review the pleadings and evidentiary materials submitted to the trial court and apply the [*4] same standard to determine whether the materials submitted establish a genuine issue of material fact. When reviewing the grant of a motion

for summary judgment, an appellate court will review the judgment independently and will not defer to the trial court. *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co. (1988), 42 Ohio App. 3d 6, 536 N.E.2d 411.*

The evidence forming the basis for summary judgment in this matter is drawn from the depositions of plaintiff Irene Wood and Lisa Roush, a nurse employed by Health Care.

Lisa Roush testified that at the moment Irene Wood fell, Roush was carrying a tray of food into the room. She observed Mrs. Wood fall to the ground and the telephone, which was sitting on Carl Wood's bed, fly in the air as Irene Wood tripped on the cord. Roush assisted in removing the phone cord from Irene Wood's legs after she fell.

Roush further testified that the phone cord in Carl Wood's room was the same length as the other phone cords in the facility, and long enough, (although she could not give the exact length) to reach either patient's bed in the semi-private rooms from the jack located between the heads of the two beds. She further testified that [*5] during the course of her employment with Health Care, she had never known a patient or staff member to trip over the phone cords and had no knowledge of anyone else reporting an accident caused by the phone cords. Roush was familiar with Carl Wood and his family, who visited him frequently, and observed Irene Wood using the phone in the room on many occasions.

Irene Wood testified at her deposition that her husband became disabled due to a severe stroke, and spent approximately two months in Health Care's nursing facility before her accident. During that time, she visited him every day for seven or eight hours each day, spending some of the time in his room and some of the time walking her husband about in a wheelchair. Carl Wood was also frequently visited by other family members.

Irene Wood testified that the telephone in the room was connected to a jack between the patient beds by a cord approximately six feet long. Over the period in which she came to visit her husband, the phone was commonly kept on a food table near the occupant of the other bed. The phone cord would be frequently tangled with the lights above the beds, or other objects. Irene Wood testified that she did not [*6] recall ever using the phone herself, and that her husband was unable to use the phone at all because of his physical condition. Her husband's roommate used the phone from time to time, as did Irene Wood's granddaughter. Irene Wood testified that the phone cord was normally visible, and that she was aware that it was sometimes tangled or lying on the floor and that there was no problem with the lighting in the room on the day in question. She did not notice before her fall where the telephone was located, or whether the cord was plugged into the jack. After the fall, she testified she was in too much pain to notice whether the cord was still plugged in, but she remembered that when help arrived, the phone cord had to be freed from around her feet.

As to the circumstances of the fall itself, she testified that just prior to falling, she had walked between the beds to the head of her husband's bed to adjust his pillows. While walking to the head of the bed she did not notice the phone cord or phone. When she started back to the foot of the bed, she felt her feet tangle in the cord and fell to the ground. She testified that she could not be sure how the phone cord might have appeared [*7] suddenly behind her, but speculated that her husband's roommate had shoved the phone over so the cord was in her path while she was attending to her husband's pillows.

Health Care appears to concede, for purposes of the motion for summary judgment, that Irene Wood was a business invitee on the premises of Health Care's nursing home. [HN2] A business owner owes a duty to business invitees to maintain the premises in a reasonably safe condition and warn the invitee of any latent dangers on the premises. *Sidle v. Humphrey (1968), 13 Ohio St. 2d 45, 233 N.E.2d 589,* paragraph one of the syllabus. However, the owner has no duty to protect against dangers which are known to the invitee, or which are so obvious and apparent to such an invitee that he or she may reasonably be expected to discover them and protect against them. *Paschal v. Rite Aid Pharmacy, Inc. (1985), 18 Ohio St. 3d 203, 480 N.E.2d 474.*

While the parties have devoted some effort to briefing the issue of whether Irene Wood contributed to her accident through her use and placement of the telephone, that issue is subject to factual dispute based upon the content of the depositions in the record, and clearly not a basis for [*8] summary judgment. The narrow issue before us, therefore, is the question of whether the provision of a six-foot telephone cord in a nursing home room, attached to a jack located between two beds and allowing the telephone to be moved between the beds for the convenience of patients and visitors, of itself constitutes an unreasonable hazard which would preclude summary judgment. We find that it does not constitute such an unreasonably unsafe or latent danger, based upon the open and apparent nature of the phone cord, and Irene Wood's uncontroverted testimony that she was aware of the phone cord length and the phone mobility. We further note that the undisputed testimony in the record was that there had been no prior incidents involving telephone cords reported to Health Care either by patients, visitors, or staff.

Two comparable cases involving telephone cords can be discovered in Ohio. In *Neidich v. Cincinnati Bell,*

Inc., 1979 Ohio App. LEXIS 9631 (July 11, 1979), Hamilton App. No. C-780420, unreported, the trial court decision granting summary judgment to the defendant was affirmed because the plaintiff knew of the existence of the telephone cord and knew that it extended for some distance over the floor. [*9] In *Mervine v. Society National Bank, 1993 Ohio App. LEXIS 5064* (Oct. 13, 1993), Summit App. No. 16182, unreported, the grant of summary judgment in favor of the defendant was reversed, but such reversal was based upon the premise that plaintiff had never been in the relevant area of defendant's premises before the accident, and was unaware of the presence of the telephone cord over which she tripped. A distinction was accordingly made from cases in which the hazard was known, open, and apparent, as in the case *sub judice*.

Neither the cited cases nor the one before us should be taken for the blanket proposition that any length of telephone cord or electrical wire, allowed to trail about the room in any quantity, would constitute a reasonably safe condition. However, on the precise facts before us, we find that a six-foot telephone cord installed for the purpose of allowing some telephone mobility between two beds in a nursing home room, when the existence of such a cord was open, obvious, and apparent and on prior occasions was employed by the plaintiff's family in its intended function, would not constitute an unreasonable and unnecessary hazard to business invitees under the rule in *Paschal, supra*, [*10] particularly in the absence of any prior report to a defendant of incidents with the telephone cord. We therefore find that the trial court properly granted summary judgment to Health Care. Appellants' two assignments of error are therefore overruled.

Based upon the foregoing, appellants' two assignments of error are overruled and the judgment of the trial court granting summary judgment is affirmed.

Judgment affirmed.

PETREE and TYACK, JJ., concur.

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MICHAEL LEITSCHUH, Plaintiff-Appellee v. VERNON ALLEN, Defendant-Appellant

C.A. Case No. 16392

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

1997 Ohio App. LEXIS 4094

September 12, 1997, Rendered

PRIOR HISTORY: [*1] T.C. Case No. 96-CVI-2651.

DISPOSITION: Judgment of the trial court is Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant former employer challenged a judgment of the Kettering Municipal Court, Small Claims Division (Ohio), which awarded appellee former employee damages arising from unpaid wages.

OVERVIEW: The employee's claim originally listed a demand for $ 11,100, and the employer sought to have the case dismissed at the hearing because that amount exceeded the jurisdictional limit of $ 2000 for small claims cases. Recognizing that the listed amount was a typographical error, the magistrate permitted the claim to be amended, and the demand was reduced to $ 1100. On appeal, the employer claimed that the small claims court did not have jurisdiction to amend the claim because the listed amount took the case out of the jurisdiction of the small claims court. In affirming the small claims court's judgment, the court held that the small claims court did not err in allowing the employee's original claim to be amended. The court found that a pleading could be amended by the insertion of jurisdictional averments. That rule was a liberal and salutary one that would be steadily adhered to in the furtherance of substantial justice and in avoiding pointless circuitry of action.

OUTCOME: The court affirmed the trial court's judgment in the employee's favor.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Governments > Courts > Authority to Adjudicate
Governments > Courts > Small Claims Courts
[HN1] *Ohio Rev. Code Ann. § 1925.09* gives the small claims courts the power to amend any claim before judgment.

Civil Procedure > Jurisdiction > General Overview
Civil Procedure > Judgments > General Overview
Governments > Courts > Justice Courts
[HN2] Ohio Gen. Code § 1579-202 reads: When the amount due to either party exceeds the sum for which the municipal court is authorized to enter judgment, such party may remit the excess, and judgment may be entered for the residue.

Governments > Courts > Small Claims Courts
Governments > Local Governments > Claims By & Against
[HN3] *Ohio Rev. Code Ann. § 1925.16* makes clear that all sections of the Code within Chapter 1901, the statutes governing municipal courts, apply to small claims courts to the extent that they are not inconsistent with the sections of Chapter 1925, the statutes specifically governing the small claims divisions.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals
[HN4] Without effecting a substantial change in its nature, a pleading may be amended by the insertion of jurisdictional averments. This rule is a liberal and salutary one that should be steadily adhered to in the furtherance

of substantial justice and in avoiding pointless circuitry of action.

COUNSEL: KENNETH R. SHEETS, Atty. Reg. # 0024049, Xenia, Ohio, Attorney for Plaintiff-Appellee.

PAUL CROUSHORE, Atty. Reg. # 0055524, Columbus, Ohio, Attorney for Defendant-Appellant.

JUDGES: BROGAN, J. YOUNG, P.J., and GRADY, J., concur.

OPINIONBY: BROGAN

OPINION:

OPINION

BROGAN, J.

Appellant Vernon Allen appeals from a judgment of the Kettering Municipal Court, Small Claims Division awarding appellee Michael Leitschuh $ 1,100 plus interest. Appellant contends that the small claims court exceeded its jurisdiction and judgment should be reversed and the case remanded with instructions to dismiss.

The appeal arises from a dispute over unpaid wages. Appellant Allen was the sole proprietor of a business known as Moraine Door Sales. After Allen suffered a heart attack, his employees took over the day-to-day operations of the business. At that time, Michael Leitschuh went to work for Moraine Door Sales as a salesperson. He received a salary and commission for his services. During his employment, he was given a garage door by the acting management. He also ordered and received another door from the company.

When Allen [*2] recovered and returned to the operation of his business, he discovered discrepancies in the company's books and other problems with how the business was run during his absence. The employees entrusted with running the business during that time were fired. Allen's accountant also confronted Leitschuh over the two doors that he had received, and Leitschuh agreed to pay for them. After that confrontation, Leitschuh continued to work for Allen for two weeks but was not paid. Leitschuh then filed a claim in the small claims court for his uncollected wages.

Leitschuh's claim originally listed a demand for $ 11,100. Allen sought to have the case dismissed at the hearing because that amount exceeded the jurisdictional limit of $ 2,000 for cases in the small claims division. Recognizing that the listed amount was a typographical error, the magistrate permitted the claim to be amended and the demand was reduced to $ 1,100. The magistrate then heard the case. During the hearing, the parties disputed whether Leitschuh had paid for the two doors. It was undisputed, however, that Allen had not paid Leitschuh his wages for the two weeks of his employment. The magistrate awarded Leitschuh $ 1,100 [*3] for his unpaid wages. The magistrate's report was then adopted and judgment entered by the court on August 21, 1997.

In his sole assignment of error, appellant contends that the small claims court lacked jurisdiction to amend the claim and, therefore, to enter a judgment. Appellant argues that the court had no power to do anything but dismiss the claim because the original demand asked for an amount which placed the case outside the monetary limits of small claims division's jurisdiction.

We begin by noting that [HN1] *R.C. 1925.09* gives the small claims courts the power to amend any claim before judgment. That statute, however, does not address whether a complaint can be amended if, before the amendment, the claim places the case outside the jurisdiction of the court. A similar issue was directly addressed by the Ohio Supreme Court in *State ex rel. Talaba v. Moreland (1936), 132 Ohio St. 71, 5 N.E.2d 159.* In that case, a complaint was filed in the Alliance Municipal Court demanding an amount only slightly in excess of the then $ 1,000 jurisdictional limit of municipal courts. The municipal court permitted the amount demanded to be amended and its judgment was affirmed by the Supreme Court. [*4] *Id. at 72-73.* In its analysis, the Supreme Court first examined the statutory jurisdiction of the Municipal Court. The Court turned to [HN2] G.C. 1579-202 which read:

When the amount due to either party exceeds the sum for which the municipal court is authorized to enter judgment, such party may remit the excess, and judgment may be entered for the residue. . . .

The Court read that statute as permitting the amendment of claims to bring them within the jurisdiction of the municipal court. The Court noted that the statute placed no restrictions on how or when parties may exercise their power to remit the excess of claimed damages. *Id. at 73.* Thus, such a remission could take the form of an amended complaint. *Id. at 73-74.*

Under the *Revised Code, section 1901.22 (F)* grants this same power to parties in municipal court with language that duplicates the General Code provision nearly verbatim. Moreover, [HN3] *R.C. 1925.16* makes clear that all sections of the Code within Chapter 1901, the statutes governing municipal courts, apply to small claims courts to the extent that they are not inconsistent with the sections of Chapter 1925, the statutes specifically governing the small [*5] claims divisions. As there do not appear to be any sections within Chapter 1925 that are inconsistent with 1901.22 (F), that statute should

apply to the small claims courts as well as the municipal courts. Therefore, because the *Moreland* decision appears to be the authoritative interpretation of *R.C. 1901.22(F),* and because that statute applies to the small claims court, we find the rule of *Moreland* dispositive in the present case. Consistent with *Moreland* and the relevant jurisdictional statutes, the small claims court did not err in allowing the appellee's original claim to be amended.

This conclusion is further supported by the fact that the *Moreland* court did not rely wholly on statutory analysis. The Court explained that:

aside from the particular controlling statute here involved, by the great weight of authority it is the general rule that [HN4] without effecting a substantial change in its nature, a pleading may be amended by the insertion of jurisdictional averments. . . . This rule is a liberal and salutary one that should be steadily adhered to in the furtherance of substantial justice and in avoiding pointless circuity of action.

Moreland, supra, [*6] *at 74.* Following this rule, Ohio courts have permitted the amendment of complaints to bring them within a court's jurisdiction. See, e.g., *Jackman v. Jackman (1959), 110 Ohio App. 199, 204, 160 N.E.2d 387.*

Nowhere is the value of such a rule more evident than in the setting of a small claims court. "The small claims divisions of municipal and county courts are intended to provide a forum for persons with relatively small, uncomplicated claims to seek redress without the need for attorney representation." *Klemas v. Flynn (1993), 66 Ohio St. 3d 249, 252, 611 N.E.2d 810.* This intention would be needlessly subverted if courts were incapable of correcting errors in the claims of litigants and litigants were forced to refile their claims to correct errors. In this case, where the error at issue was merely typographical, the general rule permitting such amendments would seem to apply with particular force.

Appellant relies on *State ex rel. Emp. Benefit Serv. v. Cuyahoga County Court of Common Pleas (1990), 49 Ohio St. 3d 49, 550 N.E.2d 941,* for the proposition that the judgment of the small claims court is void. In that case, the Supreme Court held that a municipal court lacked the power to transfer a case to the common pleas [*7] court where the demand exceeded the monetary limits on the municipal court's jurisdiction. That case is easily distinguished from the present case in that it did not involve any attempt to amend a defective complaint. The rule *of Moreland* is more clearly dispositive of the case at hand.

For these reasons, we find that the small claims court acted within its jurisdiction in amending the claim and entering judgment thereon. Appellant's assignment of error is overruled.

Judgment of the trial court is Affirmed.

YOUNG, P.J., and GRADY, J., concur.

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STATE OF OHIO, PLAINTIFF-APPELLEE v. BRAD BEATLEY, DEFENDANT-APPELLANT

CASE NO. 8-96-20

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, LOGAN COUNTY

1997 Ohio App. LEXIS 1150

March 21, 1997, DATE OF JUDGMENT ENTRY

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: CHARACTER OF PROCEEDINGS: Criminal appeal from Municipal Court.

DISPOSITION: JUDGMENT: Judgment reversed and remanded

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed a judgment from the Bellefontaine Municipal Court (Ohio), which convicted defendant of the sale of a motor vehicle without a title pursuant to *Ohio Rev. Code Ann. § 4505.18(B).*

OVERVIEW: Defendant, who ran a motor sales company, sold a vehicle without ownership of the title. Defendant acquired title after the sale. Defendant entered a plea of not guilty to *Ohio Rev. Code Ann. § 4505.18(B)* but changed his plea to no contest pursuant to a plea agreement with the prosecutor. The trial court entered a finding of guilt and sentenced defendant to 90 days jail time with 87 days suspended on condition of two years probation, a fine, and restitution. On appeal, the court reversed because the trial court erred when it accepted the no contest plea without engaging in a dialogue with defendant as required by *Ohio R. Crim. P. 11*. There was nothing on the record to show that defendant was ever informed of the effect of his changing his plea to no contest, and a voluntary, knowing, and intelligent plea of no contest could not be presumed. Moreover, the trial court never offered defendant an opportunity to speak in mitigation of penalty before sentence was imposed, as required by Rule 32. However, the probation conditions imposed were properly within the trial court's discretion as intending to aid in defendant's rehabilitation.

OUTCOME: The court reversed defendant's conviction and remanded the matter for further proceedings.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Nolo Contendere
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Not Guilty
Criminal Law & Procedure > Guilty Pleas > No Contest Pleas

[HN1] *Ohio R. Crim. P. 11(E)* states that, in misdemeanor cases involving petty offenses, the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty. This rule requires that the record affirmatively show that a plea of no contest was entered voluntarily, intelligently, and knowingly. In addition, the court must engage in a meaningful dialogue with the defendant whenever the possibility of incarceration exists. The duty to discuss the consequences of a plea is the trial court's and may not be satisfied by counsel. The requirements of Rule 11(E) are mandatory, and a failure to inform a defendant of his or her rights as required is prejudicial.

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Changes & Withdrawals
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Nolo Contendere
Criminal Law & Procedure > Guilty Pleas > No Contest Pleas

[HN2] A voluntary, knowing, and intelligent plea of no contest cannot be presumed from a silent record.

Criminal Law & Procedure > Counsel > General Overview
Criminal Law & Procedure > Sentencing > Departures
Criminal Law & Procedure > Sentencing > Imposition > Allocution
[HN3] The requirement of allocution is set forth in *Ohio R. Crim. P. 32(A)(1)*, which states that before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant, and shall also address the defendant personally and ask him if he wishes to make a statement on his own behalf or present any information in mitigation of punishment. This language clearly requires the trial court to allow both defense counsel and the defendant to speak before imposing sentence. The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into consideration when determining the sentence to be imposed.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > General Overview
Criminal Law & Procedure > Sentencing > Appeals > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview
[HN4] The trial court has broad discretion in establishing the terms of probation and its decision will not be reversed absent a showing of abuse. In determining whether a condition of probation is related to the interests of doing justice, rehabilitating the offender, and insuring his good behavior, courts should consider whether the condition: (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation.

Criminal Law & Procedure > Sentencing > Alternatives > Probation > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN5] The activity restricted by probation need not be illegal in order to be prohibited. All that is required is that the condition has a direct relationship to the crime of which the defendant was convicted and the prohibition is reasonably related to prevention of future criminality. *Ohio Rev. Code Ann. § 2951.02(C).*

COUNSEL: ATTORNEYS:

MR. PAUL CROUSHORE, Reg. No. 0055524, Attorney at Law, 407 American Building, 30 East Central Parkway, Cincinnati, Ohio 45202, For Appellant.

MR. EDWIN DOUGHERTY, Reg. No. 0055273, Attorney at Law, 226 West Columbus Avenue, Bellefontaine, Ohio 43311, For Appellee.

JUDGES: BRYANT, J. EVANS, P.J., and SHAW, J., concur.

OPINIONBY: BRYANT

OPINION: OPINION

BRYANT, J. This appeal is brought by defendant-appellant Brad Beatley (Beatley) from judgment of the Bellefontaine Municipal Court.

On September 30, 1995, Holiday Motor Sales, owned by Beatley, sold a vehicle belonging to an employee. The dealership did not have title to the vehicle then, but did acquire title on January 26, 1996. A complaint was filed on these facts on April 16, 1996. On May 30, 1996, Beatley was arraigned and entered a plea of not guilty to *R.C. 4505.18(B)*, the sale of a motor vehicle without a title. On September 13, 1996, Beatley appeared for trial and changed his plea to no contest, [*2] pursuant to a plea agreement with the prosecutor. The trial court then entered a finding of guilt and sentenced Beatley to 90 days jail time, 87 suspended on condition of two years probation, a $ 150 fine and ordered restitution. It is from this judgment that Beatley appeals.

Beatley makes the following assignments of error:

The trial court erred when it accepted a plea of "no contest" without engaging in a dialogue with Beatley as required by *Crim.R. 11*.

The trial court erred when it imposed sentence without affording defense counsel an opportunity to speak on behalf of Beatley and without asking Beatley if he wished to make a statement in his own behalf or to present any information in mitigation of punishment.

The trial court erred when it imposed conditions of probation that did not reasonably relate to the rehabilitation of the offender, to the crime, or to conduct which is criminal or to future criminality and serves the purposes of probation.

Beatley's first assignment of error is well taken. [HN1] *Crim.R. 11(E)* states that "in misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such

plea without [*3] first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty." This rule requires that the record affirmatively show that a plea of no contest was entered voluntarily, intelligently, and knowingly. *Garfield Heights v. Brewer (1984), 17 Ohio App. 3d 216, 17 Ohio B. Rep. 458, 479 N.E.2d 309.* In addition, the court must engage in a meaningful dialogue with the defendant whenever the possibility of incarceration exists. *State v. Joseph (1988), 44 Ohio App. 3d 212, 542 N.E.2d 690.* See also *State v. Hess (Dec. 13, 1991), 1991 Ohio App. LEXIS 6069,* Mercer App. No. 10-91-4, unreported and *State v. Davis (Apr. 8, 1992), 1992 Ohio App. LEXIS 2121,* Hardin App. No. 6-90-20, unreported. The duty to discuss the consequences of a plea is the trial court's and may not be satisfied by counsel. *State v. Minor (1979), 64 Ohio App. 2d 129, 18 Ohio Op. 3d 98, 411 N.E.2d 822.* The requirements of *Crim.R. 11(E)* are mandatory, and a failure to inform a defendant of his or her rights as required is prejudicial. *State v. Luhrs (1990), 69 Ohio App. 3d 731, 591 N.E.2d 1251.*

Here, there is nothing on the record to show that Beatley was ever informed of the effect of his changing his plea to no contest. [HN2] "A voluntary, knowing, [*4] and intelligent plea of no contest cannot be presumed from a silent record." *Id. at 735* (citing *Boykin v. Alabama (1969), 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274).* Instead, the trial court merely went on with the finding of guilt.

The Court: Ms. Beck, it's my understanding that Mr. Beatley wishes to change his plea today; is that correct?

Ms. Beck: Yes, your Honor. I would like to withdraw his plea of not guilty and enter a plea of no contest.

The Court: All right. I have in front of me a written report from Melody Price, an investigator for the Ohio Bureau of Motor Vehicles, summarized in her report indicates that on the date in question that Mr. Beatley was in the business of selling used cars as a dealer under the name of Holiday Motor Sales; that he sold a used car to a gentleman by the name of Mr. Carr, Kenneth Carr, and that he failed to deliver a certificate of title to Mr. Carr for that vehicle that he sold him. The vehicle being a 1987 Ford Taurus automobile.

Ms. Beck, is there any statement that you would like to make?

Ms. Beck: Well, your Honor, Mr. Beatley acknowledges the fact for which I would like the Court to understand that the person who had the [*5] title of the car, who owned the car at the time was one of his employees; and he had put it on the lot and asked Mr. Beatley to sell it.

Mr. Beatley didn't have the title, and so he put it on an area of the lot where it wasn't out for show; but the Carrs came, and they saw that car and wanted that car. And Mr. Beatley's understanding was that the owner would pay off the lien and get the title forthwith, but there were delays with the bank; and the bank credited the funds that he paid to make payment on this lien to the wrong account, and that delayed the transfer of the title. He still didn't have the title at the time he sold it, but there were those delays. And he would just like the Court to know that the car did belong to one of his employees who had asked him to sell it. It was a mistake for which he is heartily sorry and he apologizes.

The Court: I didn't hear a defense in that explanation and according to that my findings are that of guilt.

At no point did the trial court ask Beatley if he understood that he was waiving his right to a trial, his right to confront witnesses, or what the maximum sentence could be. Nor did the trial court question Beatley to determine if [*6] the plea was made voluntarily, knowingly, and intelligently. There was no dialogue of any kind between the trial court and Beatley personally at the time the no contest plea was accepted. There was no written waiver of rights. Considering these facts, we find that the trial court failed to engage in a meaningful dialogue with Beatley as required by *Crim.R. 11* and sustain Beatley's first assignment of error.

Beatley's second assignment of error asserts that the trial court should have allowed him to offer a statement in mitigation of his sentence. [HN3] The requirement of allocution is set forth in *Crim.R. 32(A)(1),* which states that "before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant, and shall also address the defendant personally and ask him if he wishes to make a statement on his own behalf or present any information in mitigation of punishment." This language clearly requires the trial court to allow both defense counsel and the defendant to speak before imposing sentence. *Defiance v. Cannon (1990), 70 Ohio App. 3d 821, 592 N.E.2d 884.* The purpose of allocution is to allow the defendant an additional opportunity to state any [*7] further information which the judge may take into consideration when determining the sentence to be imposed." *Id. at 828.*

In opposition to this assignment of error, the state claims that the trial court is not required to accept the defendant's statement when a plea of no contest is entered. The basis for this argument is *State v. Waddell (1995), 71 Ohio St. 3d 630, 646 N.E.2d 821.* However, the question in *Waddell* was not whether the trial court must allow the defendant to make a statement before sentencing, but whether the trial court must consider the

defendant's statement before making a finding of guilt on a no contest plea. These are two separate issues.

Here, the trial court had already found Beatley guilty of the misdemeanor charged. During the hearing, the trial court granted defense counsel an opportunity to speak in explanation. This satisfies the *Crim.R. 32* requirements as to the attorney. *Defiance v. Cannon (1990), 70 Ohio App. 3d 821, 592 N.E.2d 884.* However, the record shows that the trial court never offered Beatley an opportunity to speak in mitigation of penalty before sentence was imposed. *Id.* and *Crim.R. 32*. Therefore, we sustain Beatley's second [*8] assignment of error.

Beatley's third assignment of error argues that the trial court imposed terms to his probation which do not serve the purpose of probation. [HN4] The trial court has broad discretion in establishing the terms of probation and its decision will not be reversed absent a showing of abuse. *State v. Demosthene (1992), 78 Ohio App. 3d 421, 604 N.E.2d 1383.*

In determining whether a condition of probation is related to the "interests of doing justice, rehabilitating the offender, and insuring his good behavior," courts should consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation.

State v. Jones (1990), 49 Ohio St. 3d 51, 53, 550 N.E.2d 469.

Beatley argues that the ban on his selling used cars does not relate to rehabilitation, is not related to the crime on which he was convicted, and does not relate to criminal activities. However, [HN5] the activity restricted by probation need not be illegal in order to be prohibited. [*9] All that is required is that the condition has a direct relationship to the crime of which the defendant was convicted and the prohibition is reasonably related to prevention of future criminality. *R.C. 2951.02(C).* Here, Beatley was convicted of selling a used car without first acquiring the title. After reviewing the record, including Beatley's prior convictions for similar offenses, we find that the condition meets the standard set forth in *Jones, supra.* The trial court is trying to prevent Beatley from having similar opportunities, thus aiding in his rehabilitation. See *State v. Demosthene (1992), 78 Ohio App. 3d 421, 604 N.E.2d 1383.* Second, the condition relates to the crime of selling a car without having title to it. Third, the conduct, selling used cars, is reasonably related to avoiding future criminality and serves the statutory ends of probation. All were appropriate considerations for determining conditions of probation in the circumstances then before the court. We do not speculate about the result of the procedures to be had on remand. Beatley's third assignment of error is overruled.

The judgment of the Bellefontaine Municipal Court is reversed and remanded to [*10] that court for further proceedings.

Judgment reversed and cause remanded.

EVANS, P.J., and SHAW, J., concur.