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Admissibility of Guilty and No Contest Pleas in Subsequent Civil Actions

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Scenario One: A drunk driver collides with another vehicle, causing injury to its occupants. The drunk driver has multiple, prior DUI¹ convictions and, therefore, is charged with a felony. As a result of the collisions, a personal injury action is instituted against the drunk driver. Rather than dispute the criminal charges, the drunk driver enters a guilty plea.

Scenario Two: During an incident of road rage, a driver punches another driver causing injury to the victim. The driver is charged with assault and enters a no contest plea. The victim sues the assailant for the injuries caused by the assault.

Scenario Three: The plaintiff’s vehicle is rear-ended by an inattentive driver and, as a result, plaintiff is injured. The defendant is ticketed for failure to maintain an “assured clear distance” and pays the ticket by mailing it to the violations bureau of his local municipal court.

In the foregoing scenarios, if you are the plaintiff’s attorney, which, if any of the pleas are admissible to prove the defendant’s culpability? If you are defense counsel in the personal injury action, how do you keep the defendants’ convictions from the jury? If you are a criminal defense lawyer, what impact will the various pleas have on your client after the criminal case is closed? This article addresses each of those questions and, generally, the admissibility of guilty and no contest pleas in subsequent civil actions.

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Permitted Pleas Under Ohio Law

In Ohio, defendants in criminal and traffic matters may plead not guilty, guilty, or no contest.² The admissibility of those pleas in subsequent civil actions is governed generally by Evid. R. 410(A) which reads:

[E]vidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions:

- (1) a plea of guilty that later was withdrawn;³
- (2) a plea of no contest or the equivalent plea from another jurisdiction;
- (3) a plea of guilty in a violations bureau . . .

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Admissibility and Effect of Guilty Pleas

In Scenario One, because the drunk driver pled guilty to felony DUI, the plea is admissible in a subsequent civil action. In the DUI case, the guilty plea was a “complete admission of the defendant’s guilt.”⁴ In a subsequent civil action, pursuant to Evid. R. 803(21), the plea is exempted from the hearsay rule and, therefore, is admissible. Evidence Rule 803(21) states that “[e]vidence of a final judgment, entered after a trial or upon a plea of guilty . . . , adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, [is admissible] to prove any fact essential to sustain the judgment” It is important to note that Rule 803(21) permits only evidence of convictions of crimes punishable by more than one year of incarceration. Thus, only felony convictions are admissible under the rule.⁵

Once a guilty plea is admitted into evidence in a civil case, it serves as an admission of a party opponent, but may be rebutted. The weight accorded to evidence of guilty pleas in civil matters was explained by the Fourth District Court of Appeals in *Phillips v. Rayburn*.⁶ The *Phillips* court stated that

[E]vidence offered pursuant to Evid. R. 803(21) is not conclusive of the fact sought to be proved, and the opponent may explain the prior conviction and may offer any evidence rebutting the fact sought to be proved by the proponent.

Thus, the conviction may

be admitted into evidence and accorded whatever weight the factfinder deems appropriate. It does not, however, preclude additional litigation involving the facts and legal issues underlying the conviction. We recognize, of course, that the conviction will likely be very strong evidence in most instances. Nevertheless, the party against whom the evidence is admitted should have an opportunity to offer evidence rebutting the inference provided by the conviction.⁷

Thus, admission of a guilty plea is only some evidence of a fact to be proved in a subsequent civil case.⁸ The plea is only an evidentiary admission and does not have the conclusive effect of a judicial admission, such as a stipulation or an admission given pursuant to Civ. R. 36.⁹ Evidentiary admissions are not determinative and may be rejected by the trier or fact.¹⁰ Although the fact that there may be a pending appeal may also be shown in a civil proceeding, that has no effect on the admissibility of the guilty plea.¹¹

Admissibility of No Contest Pleas

In Scenario Two, the defendant entered a no contest plea to assault charges stemming from an incident of “road rage.” Under Ohio law, the plea is inadmissible in a subsequent civil action. Ohio Rule of Criminal Procedure 11(B)(2) states that a no contest plea “is not an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal

proceeding.”¹² Evidence Rule 410 is in accord with Crim. R. 11 and provides that, except in certain limited exceptions, no contest pleas (or their equivalent in other jurisdictions¹³) are not admissible in subsequent legal proceedings.¹⁴

To fully understand permitted uses of no contest pleas in subsequent civil actions, the mechanics of a no contest plea must first be examined. As noted in Crim. R. 11(B)(2), a no contest plea is not an admission of guilt. Many mistakenly assume that a no contest plea is really a guilty plea that is inadmissible in a civil action. No contest pleas, however, are a bit more complex.

A no contest plea is a statement from the defendant that he or she does not contest the facts of the case, and will permit the judge to make a decision, without trial, based upon the admitted facts. Although rare, judges are permitted to find for the person entering the no contest plea.

A helpful explanation of the procedure following a no contest plea is set forth in R.C. 2937.07. That section, which is applicable to misdemeanor cases,¹⁵ reads:

A plea to a misdemeanor offense of “no contest” or words of similar import shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense. If a finding of guilty is made, the judge or magistrate shall impose the sentence or continue the case for sentencing accordingly. A plea of “no contest” or words of similar import shall not be

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construed as an admission of any fact at issue in the criminal charge in any subsequent civil or criminal action or proceeding.

Once a person is found guilty after entering a no contest plea, as a general rule, Crim. R. 11, Traf. R. 10, Evid. R. 410 and R.C. 2937.07 all prohibit the use of the plea in subsequent legal proceedings. Evid. R. 410(B), however, contains two exceptions to the rule.

Under Evid. R. 410(B), the fact that a person entered a no contest plea is admissible if: 1) "another statement made in the course of the same plea or plea discussions has been introduced and the statement should, in fairness, be considered contemporaneously with it,"¹⁶ or 2) in "a criminal proceeding for perjury . . . if the statement was made by the defendant under oath, on the record, and in the presence of counsel."¹⁷

The first exception, found in Evid. R. 410(B)(1), is a restatement of the "rule of completeness" found in Evid. R. 106.¹⁸ Evidence Rule 106 permits a party to introduce parts of a writing the proffering party omits. For instance, during a trial, assume a plaintiff offers portions of a transcript containing inculpatory statements made by a defendant. Rule 106 permits the defendant to offer the omitted portions of the transcript if the portions offered by the plaintiff unfairly presented only one side of the story.¹⁹ No reported case has applied Evid. R. 410(B)(1) to a no contest plea. The dearth of cases on the subject is understandable, because the exception is seemingly more applicable to other statements rendered in admissible under Evid. R. 410, such as statements made during a plea bargain.²⁰

Not all exceptions to the general rule of inadmissibility of no contest pleas

are found in Evid. R. 410(B). A very significant exception was created by the Ohio Supreme Court in *State v. Mapes*.²¹ In *Mapes*, the Court held that evidence of a conviction entered after a no contest plea could be introduced in subsequent legal proceedings. The rule was initially carved out in criminal matters, but was later applied to civil cases by lower courts.

In *Mapes*, a criminal defendant was convicted of aggravated murder. Revised Code 2929.04 states that the death penalty may not be imposed for aggravated murder unless certain factors are present. One of the factors is whether the defendant committed a prior murder. In *Mapes*, to establish that the defendant had a prior murder conviction, the prosecution offered evidence that the defendant pled *non vult* to a prior murder in New Jersey.

The defendant appealed and argued that his *non vult* plea was equivalent to a no contest plea and, therefore, inadmissible under Evid. R. 410. The Supreme Court held that a conviction entered as a result of a no contest plea is admissible. The Court stated that Crim. R. 11(B)(2) and Evid. R. 410 do not "prohibit the admission of a conviction entered upon [a no contest] plea when such conviction is made relevant by statute."

The Court's holding, however, is arguably *dicta* because, in the very next sentence, the Court stated that evidence of the *non vult* plea was admissible because "it was not the equivalent of a no contest plea."²² Further, a strict reading of *Mapes* would seem to limit it to criminal matters because the court's analysis focused on the "purpose of Evid. R. 410 as it relates to criminal

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trials."²³

Regardless, in *Steinke v. Allstate Ins. Co.*²⁴, the Third District Court of Appeals extended *Mapes* to civil actions. The *Steinke* court permitted evidence of a conviction after a no contest plea to be offered in support of summary judgment. Allstate filed a declaratory relief action against Steinke in which it asserted that it had no duty to

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defend him because the claim in which he was involved arose from his criminal and intentional acts. Allstate moved for summary judgment and supported its motion with evidence of the no contest plea Steinke entered in a related criminal matter. The motion was sustained and Steinke appealed, arguing that evidence of his no contest plea was inadmissible under Crim. R. 11(B) and Evid. R. 410. Citing *Mapes*, the court of appeals stated:

[C]ontrary to appellant's assertions, his plea of no contest was not being used as an admission upon the merits of the counterclaim. Rather, the resulting criminal conviction was being introduced by Allstate to establish that the injuries herein might reasonably be expected to result from the criminal act of the insured, and, thus, relieve Allstate of any duty to cover or defend under the terms of the policy. Thus, we find no error in the admission of the criminal conviction for this purpose.²⁵

Steinke's holding that a conviction after a no contest plea is admissible has been followed by a few other courts, but not extensively. *Steinke's* extension of *Mapes* into civil matters, however, seems contrary to the language of *Mapes* and the aim of Crim. R. 11(B) and Evid. R. 410. As noted above, *Mapes* explicitly examined Evid. R. 410 as it related to criminal proceedings. Further, *Mapes* held that a conviction stemming from a no contest plea was admissible only "if made relevant by statute."²⁶ Unlike *Mapes*, the *Steinke* court did not consider a

no contest pleas because a statute required it to do so, but because it needed to determine whether an exclusion in an insurance policy was applicable.

Further, Ohio Criminal Rule 11 is modeled after Federal Criminal Rule 11, which is in accord with Federal Evidence Rule 410. The Advisory Notes to Federal Evidence Rule 410 state that the reason no contest pleas are inadmissible in subsequent legal actions is to "promot[e] disposition of criminal cases by compromise." Prohibiting the subsequent use of no contest pleas encourages free discussion between the parties in the criminal matter and, ultimately, promotes the efficient resolution of the case. *Steinke's* allowance of evidence of convictions stemming from no contest pleas is contradictory to such a goal. If criminal defendants fear that their plea will be utilized to impose civil liability, they might decline to accept plea bargains to avoid exposure to civil liability.

Finally, *Steinke* is at odds with Evid. R. 803(21). Rule 803(21) provides that guilty pleas punishable by more than a year of imprisonment are excluded from the hearsay rule and are, therefore, admissible. The rule explicitly states, however, that no contest pleas are inadmissible. Thus, at a minimum, *Steinke* has complicated the law regarding admissibility of no contest pleas in subsequent civil actions.

Admissibility of Pleas Entered in Violations Bureaus

In Scenario Three, the defendant driver was cited for failing to maintain an "assured clear distance" and paid the ticket by mailing the fine to a violations bureau. Evidence of the driver's conviction is inadmissible in a

subsequent civil action. Evidence Rule 410(A)(3) states that guilty pleas entered with a violation bureau are inadmissible in subsequent legal actions. Traffic Rule 13 states that Ohio courts shall establish violation bureaus to process all traffic violations except for a few serious traffic offenses.²⁷

Traffic Rule 12 states that "pleas of guilty and no contest shall be received only by personal appearance of the defendant in open court, except that, the plea of guilty may be received in accordance with Rule 13 at a regularly established traffic violations bureau." Traffic Rule 13(D) states that defendants in traffic matters may enter a guilty plea in person, sign the ticket and pay the fine by mail, or, through an established means of accepting electronic or telephone payments. Further, Rule 13(D)(3) states that "[r]emittance of the fine and costs to the traffic violations bureau by any means other than personal appearance by the defendant at the bureau constitutes a guilty plea and waiver of trial whether or not the guilty plea and waiver of trial provision of the ticket are signed by the defendant." Thus, combined, Traf. R. 12 & 13 render virtually every guilty plea entered in traffic matters inadmissible, because most traffic matters are handled by violations bureaus and tickets are often paid by mail.²⁸

According to the Staff Notes to Evid. R. 410, the rule precludes the use of guilty pleas in subsequent legal actions "to encourage the use of the violations bureau in traffic offenses in preference to a time consuming adjudication for the sole purpose of avoiding the use

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of a guilty plea in a subsequent civil action.”²⁹

Impeachment with Evidence of Pleas

Which of the defendants in the scenarios above could be impeached with their convictions? Only the defendant in Scenario One because he committed a felony.

Subject to Evid. R. 4023, Evid. R. 6509 permits impeachment of witnesses with evidence of felony convictions and misdemeanors involving dishonesty. Generally, convictions older than ten years are inadmissible unless the court determines that the probative value of the evidence outweighs the prejudice of its admission.³⁰ Further, calculation of the ten years begins from the latter of the date of conviction, or release from any sentence based upon the conviction.³¹ Additionally, if a party desires to use evidence of a conviction older than ten years, advance notice must be given to the opposing party so that its use may be contested.³²

If the conviction has been pardoned, annulled or expunged, it may not be used as impeachment.³³ Juvenile convictions may not be used for impeachment unless the legislature so provides. The pendency of an appeal does not preclude the use of a conviction for impeachment.³⁴

Because impeachment with convictions is primarily limited to felonies under Evid. R. 609, it is consistent with Evid. R. 803(21), which exempts evidence of felony convictions from the hearsay rule. Although it is true that evidence of a misdemeanor conviction made inadmissible under Evid. R. 803(21) could be entered through

the “back door” in a civil action via impeachment under Evid. 609, such a use is probably not that prevalent because Evid. R. 609 only permits impeachment with misdemeanor convictions of dishonesty,³⁵ and the vast majority of misdemeanor crime do not involve dishonesty.

Whether Evid. R. 609 permits impeachment with a conviction for a felony or misdemeanor of dishonesty after entering a no contest plea is less clear. Three Ohio cases touched on the issue in *dicta*, but none rendered a decision on the subject.

In *Leine v. Qureshi*,³⁶ the Eight District Court of Appeals stated that if a defendant in a civil matter pled “no contest to the charge, such a plea arrangement could not be used against him in a subsequent proceeding for purposes of impeachment.”³⁷ In *Attallah v. Midwestern Indem. Co.*,³⁸ the very same court, during the very same year, state “a prior conviction [after a no contest plea] might serve to impeach his general credibility.” In *In Re Johns*,³⁹ the United States Bankruptcy Court for the Northern District of Ohio, construing Ohio law, stated that convictions after a no contest pleas could not be used for impeachment.⁴⁰

Two treatises on Ohio law state that witnesses may be impeached with convictions based on pleas of no contest pleas.⁴¹ The authors are of the opinion that policies underlying no contest pleas are not applicable in the context of impeachment.⁴² Needless to say, the matter remains undecided in Ohio.⁴³

Endnotes

¹ The actual term used in Ohio is Operating a Vehicle under the Influence (OVI). The legislature amended R.C. 4511.19 in and changed the vernacular from DUI to OVI effective January 1, 2004.

² Crim. R. 11 and Traf. R. 10.

³ The admissibility of withdrawn pleas is not discussed in this

article because. The focus of the article is on pleas actually entered in a prior criminal matter.

⁴ Crim R. 11(B)(1); Traf. R. 10(B)(1).

⁵ But see *Stockdale v. Baba* (2003), 153 Ohio App. 3d 712 (permitting evidence of a misdemeanor charge, but not the resultant conviction).

⁶ (1996), 113 Ohio App. 3d 374 (citations omitted).

⁷ Id. At 381

⁸ *Vancamp v. Austintown Twp.* (Mar. 19, 2002), Mahoning App. No. 01 C.A. 17, unreported (2002-Ohio-1537).

⁹ Id. Rule of Civil Procedure 36(B) states that matters admitted in response to requests for admission are “conclusively established” and therefore need not be proven at trial.

¹⁰ Id.

¹¹ Evid. R. 803(21).

¹² Identical language is contained in Traf. R. 10 stating that no contest pleas may not be used in subsequent legal actions against the person tendering the plea.

¹³ In some jurisdictions, the Latin phrase *nolo contendere* is used instead of no contest.

¹⁴ Evid. R. 410(B)(2).

¹⁵ There is no statute delineating the procedure to be used in felony cases, but it is similar, if not the same, procedure to be used in misdemeanor cases. No contest pleas in felony cases are governed by Crim. R. 11(C), and just like misdemeanor cases, the “trial court thus possesses discretion to determine whether the facts alleged in the indictment, information, or complaint are sufficient to justify conviction of the offense charge.” *State ex rel. Stern v. Mascio* (1996), 75 Ohio St. 3d 422, 424.

¹⁶ Evid. R. 410(B)(1).

¹⁷ Evid. R. 410(B)(2). The second exception, found in Evid. R. 410(B)(2), permitting evidence of a no contest plea to be used against a defendant in a subsequent prosecution for perjury is self explanatory and will not be addressed.

¹⁸ See Staff Notes to Evid. R. 410. Ohio Evidence Rule 106 states When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which is otherwise admissible and which out in fairness to be considered contemporaneously with it.”

¹⁹ Evidence Rules 106 and 410(B)(1) are similar to Civ.R. 32(A)(4) which states that when portions of a deposition are introduced, the adverse party may require the proffering party to introduce all parts of the deposition which are relevant to the part introduced.

²⁰ See e.g. *State v. McNeal* (Nov. 02, 2001), Hamilton App. No. C000717, unreported.

²¹ (1985), 19 Ohio St. 3d 108

²² The court noted that under New Jersey law, appellant’s non vult plea to the murder indictment had the effect of insuring that appellant would not receive the death penalty. This non vult plea was made pursuant to a statute, the purpose of which was “the humane end that a guilty defendant need not run the gauntlet of a trial on capital punishment” *State v. Forcella* (1968), 52 N.J. 263. Id at 111.

²³ Id.

²⁴ (1993), 86 Ohio App. 3d 798.

²⁵ Id. At 802.

²⁶ Mapes, 19 Ohio St. at 110

²⁷ Traffic Rule 13(B) excludes the following offenses from the jurisdiction of violations bureaus: (1) indictable offenses; (2) Operating a motor vehicle while under the influence of alcohol or any drug of abuse; (3) Leaving the scene of an accident; (4) Driving while under suspension or revocation of a driver’s license; (5) Driving without being licensed to drive, except where the driver’s or commercial driver’s license had been expired for six months or less; (6) A third moving traffic offense within a twelve-month period; (7) Failure to stop and remain standing upon meeting or overtaking a school bus stopped on the highway for the purpose of receiving or discharging a school child; (8) Willfully eluding or fleeing a police officer; and (9) Drag racing.

²⁸ See e.g. *Forbus v. Davis* (Sep. 25, 2000), Stark County App. No. 1999 CA 0382, unreported (holding that evidence of a traffic citation was inadmissible under Evid. R. 410 because the ticket was paid by mail, and under Traf. R. 113, payment of the ticket was a guilty plea.

²⁹ See also *Goddenow v. Carbone* (Dec. 17, 1993) Lake App. No. 93-L061, unreported.

³⁰ Evid. R. 609(B).

³¹ Id.

³² Id.

³³ Evid. R. 609(C)

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³⁴ Evid. R. 609(D) & (E)

³⁵ The offenses of attempted forgery, petty theft and attempted receiving stolen property are offenses involving dishonesty. See generally Judge Richard Marcus, Trial Handbook for Ohio Lawyers, §12:7 (2004).

³⁶ (Oct. 11, 1990), Cuyahoga App. No. 57544, unreported.

³⁷ Id.

³⁸ (1988), 49 Ohio App. 3d 146.

³⁹ 158 B.R. 687, (Bkrcty. N.D. Ohio 1993).

⁴⁰ Id. At 690.

⁴¹ Lewis R. Katz, Paul C. Gianelli, Beverly J. Blair, and Judith P. Lipton, Baldwin's Ohio Practice Criminal Law, §45:4 (2003); Paul C. Gianelli and Barbara Rook Snyder, Baldwin's Ohio Practice Evidence, §609.5.

⁴² Paul C. Gianelli and Barbara Rook Snyder, Baldwin's Ohio Practice Evidence, §609.5.

⁴³ Federal case law is also undecided. 1 McCormick, Evidence § 42, at 164 (5th Ed. 1999).

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