

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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April 5, 2018

105269 LAKEWOOD MUNI. G CIVIL MUNI. & CITY
CHARLES A. CALANNI v MICHELE KOLODNY, ET AL.

105271 LAKEWOOD MUNI. G CIVIL MUNI. & CITY
JOHN M. DEUTSCH, ET AL. v CHARLIE CALANNI

Affirmed.

Mary Eileen Kilbane, P.J., Anita Laster Mays, J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Magistrate decision; abuse of discretion; credibility; trier of fact. Judgment affirmed.*

Trial court's decision adopting magistrate's decisions was not an abuse of discretion. When testimony is in dispute, we defer to the trier of fact's credibility determination. Here the factfinder found in favor of defendants on some claims and in favor in plaintiff on other claims.

105398 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ANDREW DIEMER, EXECUTOR v MINUTE MEN, INC., ET AL.

Affirmed in part, reversed in part, and remanded.

Frank D. Celebrezze, Jr., J., and Mary Eileen Kilbane, J., concur; Eileen A. Gallagher, A.J., concurs in part and dissents in part with separate opinion.

KEY WORDS: *Negligent promotion; negligence; summary judgment; Civ.R. 56; employment relationship; proximate cause; supervisor; authority; knowledge; borrowed or loaned servant; control; imputed knowledge; reasonable care.*

The trial court erred in granting summary judgment in favor of an employer that had knowledge of circumstances of an individual it promoted to a position of authority that could endanger other employees. Material questions of fact remain. The court did not err in granting summary judgment in favor of another appellee where it had no knowledge of such circumstances and knowledge could not be imputed to it.

105406 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
SANG B. YOO v IL JAE AHN, ET AL.

Affirmed.

Mary Eileen Kilbane, J., Eileen A. Gallagher, A.J., and Kathleen A. Keough, P.J., concur.

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KEY WORDS: Fraudulent conveyance; fraudulent transfer; Ohio's Uniform Fraudulent Transfer Act; R.C. Chapter 1336; rescind contract; punitive damages; attorney fees.

Judgment affirmed. Trial court properly rescinded the contract and awarded punitive damages and attorney fees where the record demonstrated that the defendant owed plaintiff money and bought a house for \$6,500 only to sell it to his friend three months later for \$74,600, with no purchase agreement memorializing the transaction, who then sold it to defendant's sister three months later for \$74,600, with no purchase agreement memorializing the transaction.

105569	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v DASHAWN STROWDER			

Affirmed in part, reversed in part and remanded.

Patricia Ann Blackmon, P.J., Anita Laster Mays, J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *R.C. 2152.10; R.C. 2152.12; juvenile bindover; instructions — attorney jurors; R.C. 2903.11(A)(2); felonious assault; sentencing juveniles.*

R.C. 2152.10 and 2152.12 do not violate due process or equal protection guarantees of Ohio and United States Constitutions; court's instruction to attorney-juror was not erroneous; conviction for felonious assault under R.C. 2903.11(A)(2) was supported by sufficient evidence; convictions for rape, kidnapping and robbery were not against the manifest weight of the evidence; nonhomicide juvenile offender was entitled to resentencing under State v. Moore, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127.

105573	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v THOMAS GRAY-COLE			

Sentence vacated and remanded.

Anita Laster Mays, J., and Mary Eileen Kilbane, P.J., concur; Tim McCormack, J., dissents with separate opinion.

KEY WORDS: *Plea agreement, merger.*

The appellant's plea was made knowingly, intelligently, and voluntarily. The trial court is instructed to follow the plea agreement made between the state and the appellant that the aggravated assault and attempted abduction counts merge for the purpose of sentencing.

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105577 BEREAMUNI. G CIVIL MUNI. & CITY
DOMINIC J. VANNUCCI v DONNA SCHNEIDER

Affirmed.

Eileen T. Gallagher, J., and Melody J. Stewart, J., concur; Kathleen Ann Keough, P.J., dissents with separate opinion.

KEY WORDS: *Abuse of discretion; small claims; adopt; objections; overrule; legal services; attorney fees; representation; attorney-client relationship; benefit; retainer; signature; written agreement; implication.*

The trial court properly relied on defendant's conduct to conclude that an attorney-client relationship was formed by implication. Therefore, the trial court did not arbitrarily conclude that defendants had a legal obligation to compensate counsel for unpaid legal services. The trial court did not abuse its discretion by overruling defendant's objections and adopting the magistrate's decision in its entirety.

105697 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
GLORIA WESOLOWSKI v PLANNING COMMISSION, CITY OF BROADVIEW HEIGHTS

Affirmed.

Mary Eileen Kilbane, P.J., Tim McCormack, J., and Anita Laster Mays, J., concur.

KEY WORDS: *Subdivision; sketch plan; approval; city planning commission; R.C. 711.09(C) for a "certificate in lieu of endorsement of approval"; summary judgment; declaratory judgment; de novo; "home rule"; administrative appeal; R.C. Chapter 2506. Judgment affirmed.*

The trial court properly granted summary judgment as to Wesolowski's declaratory judgment claim. A plain reading of the statute reveals the legislature intended that the remedial procedures in R.C. 711.09 apply to both cities and villages. The City's subdivision planning ordinances are an exercise of "local police power;" the ordinances must be reconciled with the "general laws" of the state. Here, the lack of a time frame in the City's codified ordinances impermissibly conflicts with the procedures set forth in R.C. 711.09(C). To the extent that this ordinance allows for more than 30 days to approve or disapprove the proposed of division land, that regulation is invalid as conflicting with R.C. 711.09(C). As a result, the remedial procedures set forth in R.C. 711.09(C) are applicable to the City. R.C. 711.09(C) specifically sets forth the plaintiff's remedy, which is a petition in the court of common pleas. Therefore, any remedy plaintiff may have in her R.C. Chapter 2506 appeal does not preclude her from obtaining a declaratory judgment on the basis of R.C. 711.09(C).

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105840 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v TYRONE BENTON

Affirmed.

Anita Laster Mays, J., Mary Eileen Kilbane, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Motion to suppress evidence, probable cause, exigent circumstances, police interrogation.*

The trial court properly denied the appellant's motion to suppress the gun evidence because the appellant signed a consent to search, and the police searched the appellant's vehicle in accordance with a valid search warrant. Even if the police officers did not have a warrant, there were exigent circumstances that existed to provide them probable cause to search the appellant and briefly question him.

105903 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v TIMOTHY WILLIAMS

Affirmed and remanded.

Mary J. Boyle, J., Eileen A. Gallagher, A.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Jail-time credit; R.C. 2967.191; R.C. 2929.19(B)(2)(g)(i); Ohio Adm.Code 5120-2-04(B); R.C. 2953.08(G)(2); R.C. 2929.11; R.C. 2929.12; principles and purposes of sentencing; seriousness and recidivism factors; youth as a mitigating sentencing factor.*

The trial court erred when it failed to calculate the amount of jail-time credit the defendant should receive. The defendant's sentence was not excessive under R.C. 2929.11 and 2929.12. The trial court properly considered the relevant factors when sentencing the defendant.

105910 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
GGNSC LIMA, LLC, ET AL. v LMOP, LLC., ET AL.

Reversed, vacated, and remanded.

Eileen T. Gallagher, P.J., Melody J. Stewart, J., and Sean C. Gallagher, J., concur.

KEY WORDS: *Service; jurisdiction; affidavit; sworn statement; abuse of discretion; vacate; hearing; place of business; complaint; merits; rebuttable presumption; agent; authorized representative;*

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credibility.

A trial court commits reversible error by “summarily overruling a defendant’s motion to set aside a judgment for lack of service, when the defendant submits a sworn statement that she did not receive service of process, without affording the defendant a hearing.” The trial court abused its discretion by denying appellants’ motion to vacate default judgment without holding a hearing.

105914 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v SHAWN A. LADSON

Affirmed.

Mary J. Boyle, P.J., Sean C. Gallagher, J., and Anita Laster Mays, J., concur.

KEY WORDS: Manifest weight of the evidence, credibility, complicit, right to remain silent, prosecutorial misconduct, merger.

The defendant’s convictions were not against the manifest weight of the evidence because, even though the state’s witnesses identifying the defendant as the third suspect gave prior inconsistent statements to police, the jury still found those witnesses to be credible. The court properly denied the defendant’s motion for a mistrial based on the prosecutor’s closing argument because the prosecutor’s comments did not implicate the defendant’s right to remain silent. Instead, the prosecutor commented on the defendant’s demeanor at trial, which is proper under Ohio Supreme Court precedent, and those comments did not prejudice the defendant’s substantial rights. Finally, the defendant’s convictions for aggravated robbery, convictions for aggravated robbery and aggravated murder, convictions for aggravated robbery and aggravated burglary, and firearm specifications were not subject to merger.

105917 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DURRELL FRIZZELL

Affirmed.

Kathleen Ann Keough, J., Eileen T. Gallagher, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: Cross-examination; manifest weight of the evidence; domestic violence; endangering children.

Trial court did not deny defendant his constitutional right to cross-examine a witness against him by instructing defense counsel to move on when defense counsel’s questions were

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irrelevant to the issues in the case; defendant's convictions for domestic violence and endangering children were not against the manifest weight of the evidence where there was evidence that the defendant kicked his 12-year-old daughter as she was on the floor after he hit her, the daughter suffered bruises from the kick, and the discipline was excessive under the circumstances

105938 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
JAMES G. DAWSON, ET AL. v CITY OF RICHMOND HEIGHTS, ET AL.

Affirmed.

Mary Eileen Kilbane, P.J., Anita Laster Mays, J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Motion for summary judgment; administrative search warrant; probable cause; void-for-vagueness; Richmond Heights Codified Ordinances 931.03; not ripe for judicial review; Richmond Heights Codified Ordinances 931.99. Judgment affirmed.*

The trial court's grant of summary judgment was proper when the City's search warrant was based on probable cause. The court's further findings that R.H.C.O. 931.03 is not void for vagueness was proper, and that the plaintiffs' challenge to R.H.C.O. 931.99 was not ripe for judicial review was proper because the plaintiffs have not been charged with any violations of R.H.C.O. 931.03.

105952 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CARMELO GONZALEZ

Affirmed.

Larry A. Jones, Sr., J., Patricia Ann Blackmon, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *R.C. 2929.11/maximum sentence; R.C. 2929.14/consecutive sentence; R.C. 2941.25/imposition of multiple punishments; jail-time credit.*

Appellant's sentences were within the sentencing range and the trial court considered the purposes and principles of felony sentencing and the seriousness and recidivism factors. Appellant's sentence was proper.

Appellant's offenses were separate and not committed by the same conduct and therefore not subject to merger.

The trial court's journal entry stated that appellant was to receive jail-time credit.

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105960 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
DEBORAH J. MICHELSON v VOLKSWAGEN AKTIENGESELLSCHAFT, ET AL.

Affirmed.

Patricia Ann Blackmon, J., Tim McCormack, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Civ.R. 12(B)(6); Ohio Consumer Sales Practices Act; Ohio Deceptive Trade Practices Act; product liability; breach of implied warranty; negligent design; leave to amend complaint.*

The court did not err by dismissing plaintiff's complaint for failure to state claims upon which relief may be granted. As a matter of law, Volkswagen is not liable for an alleged defect in Michelson's vehicle under the Ohio consumer sales practices act. As a matter of law, an individual consumer may not bring a claim under the Ohio deceptive trade practices act. As a matter of law, a plaintiff may not bring a product liability claim under R.C. Chapter 2307 absent a claim for noneconomic damages. As a matter of law, plaintiff cannot plausibly show that the vehicle was defective when it left the manufacturer's hands as she purchased it used from an unnamed party at least seven years after it was manufactured. As a matter of law, common law product liability claims have been abolished by R.C. 2307.71(B).

105968 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEREK C. JACKSON

Affirmed.

Mary J. Boyle, J., Eileen A. Gallagher, A.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Manifest weight of the evidence, obstructing official business, failure to stop after accident.*

The defendant's convictions for obstructing official business and failure to stop after accident were not against the manifest weight of the evidence.

105970 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v KRYAN B. HERRING

Affirmed.

Tim McCormack, P.J., Patricia Ann Blackmon, J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Crim.R. 33; motion for new trial; newly discovered evidence; failure to obtain leave of court; abuse of discretion;*

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evidentiary hearing; findings of fact and conclusions of law.

The trial court did not abuse its discretion in denying Herring's motion for a new trial based on newly discovered evidence. Herring failed to comply with the procedural requirements of Crim.R. 33 by not obtaining leave to file an untimely motion for a new trial, failed to show that he was unavoidably prevented from discovering the new evidence, and failed to show that the result of the trial would have been different. Trial courts are not required to hold evidentiary hearings or make findings of fact or conclusions of law in denying Crim.R. 33 motions.

105997 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RUFUS JACKSON

Affirmed.

Tim McCormack, J., Eileen A. Gallagher, A.J., and Sean C. Gallagher, J., concur.

KEY WORDS: *Plea agreement; State v. Carpenter; State v. Dye; felonious assault; murder; negotiated guilty plea.*

Where the state accepted a negotiated guilty plea to felonious assault without reserving the right to indict the defendant for murder if the victim subsequently dies, it was not error for the trial court to dismiss the state's indictment for murder.

106040 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: M.C.M.

Reversed and remanded.

Mary J. Boyle, P.J., Patricia Ann Blackmon, J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Child support, independent review, abuse of discretion, income determination, voluntarily underemployed, income averaging, R.C. 3119.01, R.C. 3119.05, R.C. 3119.70.*

While the record shows that the juvenile court independently reviewed the magistrate's decision, the juvenile court's income determinations for purposes of child support for the child's mother and father constituted an abuse of discretion. The income determinations for both parties were not supported by the record or by the proper documentation. Specifically, the juvenile court's imputation of an additional \$19,500 to the mother was not supported by the financial documents provided, and the child support worksheet did not include costs for childcare.

Further, the juvenile court's decision to average the father's income

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for the years 2014, 2015, and 2016 was error because the father did not hold his position for the entirety of 2014 and the court's calculations were unsupported by the financial documents submitted. Finally, the juvenile court failed to determine the validity of CJFS-OCSS's child support order.

106060 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MATTHEW MEEKINS v CITY OF OBERLIN, ET AL.

Affirmed in part, reversed in part and remanded.

Eileen A. Gallagher, A.J., Mary J. Boyle, J., and Kathleen A. Keough, J., concur.

KEY WORDS: Motion for summary judgment; Civ.R. 56; political subdivision immunity; R.C. Chapter 2744; state-law claims; Section 1983 claims; alternative arguments for summary judgment; motion to dismiss; Civ.R. 19; failure to join indispensable party.

Trial court properly granted summary judgment in favor of city on plaintiff's state-law false arrest/imprisonment and battery claims based on political subdivision immunity but erred in granting summary judgment in favor of city on plaintiff's Section 1983 claims on that basis because political subdivision immunity does not apply to such claims. Where trial court did not review the evidence presented by the parties on summary judgment and did not consider whether there were genuine issues of material fact with respect to city's liability under 42 U.S.C. 1983, trial court, not appellate court, should determine in the first instance whether genuine issues of material fact exist with respect to city's liability under 42 U.S.C. 1983. Trial court did not err in denying city's motion to dismiss because city did not show that plaintiff's ex-girlfriend was an indispensable party under Civ.R. 19. Case involved city's liability for its own policies and practices and its alleged failure to properly investigate ex-girlfriend's claims, not the actions of ex-girlfriend.

106220 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL P. HANFORD

Affirmed and remanded.

Tim McCormack, J., Eileen A. Gallagher, P.J., and Sean C. Gallagher, J., concur.

KEY WORDS: Guilty plea; Crim.R. 11; jail-time credit; R.C 2967.191; court costs; ineffective assistance; prejudice; excessive bail.

Appellant's guilty plea was knowingly, intelligently, and voluntarily made. The court erred in not crediting the appellant with jail-time credit, and the state concedes the error. Appellant cannot establish

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prejudice to support his claim of ineffective assistance of counsel where he contends that trial counsel failed to move to waive costs at sentencing. The proper procedure for seeking relief for excessive pretrial bail is through habeas corpus proceedings.