

**December 20, 2018**

**106308** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v ROGERS T. HENDERSON

Affirmed in part, reversed in part, and remanded.

Mary J. Boyle, J., Mary Eileen Kilbane, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Jail-time credit; R.C. 5145.01; R.C. 2967.191.*

*The trial court incorrectly calculated the defendant's jail-time credit. The judgment is reversed for the trial court to issue a new judgment reflecting the proper amount of jail-time credit. The trial court had jurisdiction, however, to resentence the defendant to impose the proper sentence for murder because the original sentence was contrary to law. Further, the trial court could correct defendant's improper sentence because it was not void under R.C. 5145.01.*

**106317** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v ANIKA GEORGE

Affirmed.

Anita Laster Mays, J.; Tim McCormack, P.J., and Kathleen Ann Keough, J., concur in judgment only.

**KEY WORDS:** *R.C. 2945.71; speedy trial; R.C. 2945.72; tolling of speedy trial calculation; Evid.R. 806(3); business records hearsay exception; ineffective assistance of counsel; R.C. 2929.14; consecutive sentences.*

*Appellant's right to a speedy trial was not violated where the record reflects that the numerous continuances in the case were at the defendant's request, multiple periods of time were attributable to mental competency determinations and treatments, appellant refused to communicate with or otherwise cooperate with counsel resulting in four separate appointments of counsel up to the date of trial.*

*Counsel was not ineffective for failing to file a frivolous motion to sever where the video and photographic evidence as well as the testimony of the minor victims strongly supported the sexual abuse charges against appellant. The prison telephone records were properly admitted as business records under Evid.R. 806(3) and were authenticated by a custodian or qualified person pursuant to the rule. The trial court made the proper findings for the imposition of consecutive sentences on the record as well as the journal entry.*

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**106394** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v NATHAN FORD

Affirmed.

Tim McCormack, P.J., Melody J. Stewart, J., and Patricia Ann Blackmon, J., concur.

**KEY WORDS:** *Rape; kidnapping; gross sexual imposition; sexually violent predator; aggravated robbery; aggravated burglary; robbery; ineffective assistance of counsel; motion to suppress; joinder; severance; photo identification; Evid.R. 404(B); other acts; mistrial.*

*Trial counsel's failure to file a motion to suppress and failure to request separate trials did not amount to ineffective assistance of counsel. The trial court did not abuse its discretion in admitting 404(B) evidence. The trial court did not abuse its discretion in failing to declare a mistrial as a result of several comments made by 404(B) witnesses.*

**106448** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
RICHARD EDVON v ALEJANDRO MORALES, ET AL.

Reversed and remanded.

Kathleen Ann Keough, J., and Larry A. Jones, Sr., J., concur; Mary J. Boyle, P.J., dissents with separate opinion.

**KEY WORDS:** *Civ.R. 56; police officers; immunity; malicious prosecution; probable cause; aggravated menacing; child endangering.*

*Plaintiff's claim for malicious prosecution failed as a matter of law because probable cause existed to arrest and charge the plaintiff with aggravated menacing and child endangering. Accordingly, the police officer defendants were entitled to summary judgment on their individual immunity claims; thus the trial court erred in denying the officers' motion for summary judgment in its entirety.*

**106571** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v CHARLES WALKER

Affirmed.

Larry A. Jones, Sr., J., Eileen A. Gallagher, A.J., and Eileen T. Gallagher, J., concur.

**KEY WORDS:** *Right to confrontation; hearsay exception; Evid.R. 803(2)/excited utterance; R.C. 2923.03/complicity; aiding and*

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**abetting instruction; ineffective assistance of counsel; sufficiency; motion for acquittal; manifest weight; R.C. 2929.14(C)(4)/consecutive sentences.**

**The witness's statements were determined to be nontestimonial and excited utterances and fell under the hearsay exception.**

**Security videos and appellant's behavior before and after the crime established appellant's complicity to commit the crime. The trial court's aiding and abetting instruction to the jury was proper.**

**Appellant failed to show that other evidence existed outside of what was presented at trial; appellant's counsel zealously represented appellant both pretrial and during trial. Appellant's counsel's performance did not fall below an objective standard of reasonable representation.**

**Appellant was shown to be an aider and abettor and was complicit in the crime. The state provided sufficient evidence that appellant acted in concert with the shooters. Additionally, appellant failed to comply with the requirements for maintaining his CCW license. Sufficient evidence supported appellant's carrying a concealed weapon conviction.**

**The jury, as trier of fact, was aware of the witness's criminal records, however, the jury found their testimony credible. Appellant's convictions were not against the manifest weight of the evidence.**

**The trial court made the necessary sentencing findings for consecutive sentences and also corrected on the record its misstatement of the total number of years appellant must serve. Appellant's consecutive sentences are not contrary to law.**

<b>106601</b>	<b>COMMON PLEAS COURT</b>	<b>A</b>	<b>CRIMINAL C.P.</b>
<b>STATE OF OHIO v DORJAN M. SHIVERS</b>			

Affirmed.

Tim McCormack, J.; Melody J. Stewart, J., concurs in judgment only; Mary Eileen Kilbane, P.J., dissents (with separate opinion attached).

***KEY WORDS: Rape; R.C. 2907.02(A)(1)(c); substantial impairment; knows or has reasonable cause to believe; sufficiency; voluntary intoxication; prosecutorial misconduct; closing argument; gesture; right to silence; mistrial; discovery violation; sanction; joinder; simple and direct; jury polling; R.C. 2945.77; Crim.R. 31(D); abuse of discretion; assent to the verdict; pressure; prior testimony; entire transcript; cross-examination.***

***The state presented sufficient evidence that the victim was substantially impaired and the appellant knew or had reasonable cause to believe she was impaired. The evidence demonstrated the***

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**victim was extremely intoxicated and her intoxication was readily observed by all who encountered the victim on the night in question, including the appellant.**

**The prosecutor's comment during closing argument when the appellant shook his head to indicate "no," under the circumstances, was not manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the appellant's failure to testify. Even if improper, the error was harmless in light of the overwhelming evidence of the appellant's guilt. The prosecutor's comment did not permeate the atmosphere of the entire trial such that it deprived the appellant of a fair trial.**

**The trial court did not err in denying the appellant's motion for mistrial when it discovered that the victim made a prior statement and that statement was not disclosed by the state. The court engaged in a thorough inquiry into the circumstances, the appellant conceded the failure to disclose was not willful, the appellant conceded he had an opportunity to cross-examine the victim on the statement while she was still on the stand, and the trial court offered a less severe sanction of calling the victim back to the stand for recross-examination, and the trial court determined that the victim's statement contained no material inconsistencies.**

**The trial court did not err when it denied the appellant's motion to sever. The evidence of each crime was simple and direct, the appellant presented no evidence of jury confusion, and the jury demonstrated that it considered each offense separately in finding the appellant guilty of substantial impairment rape of one victim and not guilty of gross sexual imposition by force or threat of force of another victim.**

**The trial court did not abuse its discretion in not sending the jury back for further deliberations where the record demonstrated during jury polling that the juror followed the law in finding the appellant "guilty" and she assented to the verdict.**

**The trial court did not abuse its discretion in allowing the state to submit the entire transcript of the victim's prior statement. We affirm the convictions.**

**106612** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v NICHOLAS KRAUSE

Affirmed.

Anita Laster Mays, J., Eileen A. Gallagher, A.J., and Mary Eileen Kilbane, J., concur.

**KEY WORDS: Jail-time credit, moot.**

**An appeal of a jail-time credit denial is moot where the defendant-appellant has completed his prison sentence. The issue**

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**of jail-time credit is moot once the sentence has been served because this issue relates only to the length of the sentence and not the underlying conviction.**

**106656** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: B.H.

Affirmed.

Tim McCormack, P.J., Anita Laster Mays, J., and Kathleen Ann Keough, J., concur.

**KEY WORDS: Juvenile court; planned permanent living arrangement; R.C. 2151.011; R.C. 2151.353; best interest of the child; clear and convincing evidence.**

**The juvenile court's granting of the agency's motion for a planned permanent living arrangement was supported by clear and convincing evidence.**

**106678** PROBATE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: ESTATE OF LOUISE J. DEMSEY

Affirmed.

Melody J. Stewart, J., Eileen A. Gallagher, A.J., and Mary J. Boyle, J., concur.

**KEY WORDS: Civ.R. 41(B)(3); res judicata; dismissal with prejudice; adjudication on the merits.**

**Prior involuntary dismissal with prejudice operated as an adjudication on the merits and was thus final, meaning that a party's attempt to make the same claim in a different proceeding is res judicata.**

**106759** CLEVELAND HTS. MUNI. G CIVIL MUNI. & CITY  
J. ALEX MORTON v W. CHRISTOPHER MURRAY, II, ET AL.

Affirmed.

Melody J. Stewart, J., Mary Eileen Kilbane, P.J., and Tim McCormack, J., concur.

**KEY WORDS: Unjust enrichment; R.C. 5715.22; overpayment of taxes; directed verdict; opening statement.**

**Attorney could not seek reimbursement of unpaid legal fee against**

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**a client's overpayment of property taxes on a theory of unjust enrichment because R.C. 5715.22 provides that only the person who made the overpayment is entitled to the refund.**

**Attorney had no claim of unjust enrichment against the purchaser of a tax lien because no taxes had been paid for the tax year in question that generated an overpayment and because the attorney failed to show that he and the persons who allegedly made the tax overpayment had an attorney-client relationship.**

**106833** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v NATASHA JOHNSON

Affirmed.

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

**KEY WORDS: Sentence authorize by law; consecutive sentences.**

***Appellant's sentence is not contrary to law because the record does support the imposition of maximum and consecutive sentences. The trial court made the statutory findings required for consecutive sentences at the sentencing hearing and incorporated those findings into its sentencing journal entry.***

**106845** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
HELENE FRUM PINCUS v ARLENE PINCUS, ET AL.

Affirmed.

Anita Laster Mays, J., Eileen A. Gallagher, A.J., and Larry A. Jones, Sr., J., concur.

**KEY WORDS: Doctrine of absolute privilege; defamation; invasion of privacy; false light; intentional infliction of emotional distress; abuse of process; motion for judgment on the pleadings; Civ.R. 12(C).**

***The trial court did not err by granting appellees' motion for judgment on the pleadings pursuant to Civ.R. 12(C). Appellant's claim that appellee counsel's provision of a copy of a complaint filed in a pending case to a news publication was defamatory, an invasion of privacy, depicted appellant in a false light, constituted the intentional infliction of emotional distress and was an abuse of process is barred by the doctrine of absolute privilege. The doctrine provides that a defamation action will not lie for statements made by a party to a court proceeding, in a pleading filed in such proceeding, where the defamatory statement is material and relevant to the issue in the case. The lawsuit was not subject to a gag order or seal.***

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**The holding further supports the public policy underlying the doctrine of absolute privilege by protecting the public's constitutionally protected, legitimate interest in judicial proceedings where the article contains information that educates and informs the public about a case and to prevent the chilling effect on the truth-seeking process and zealous legal representation that would result from a contrary finding.**

**106855** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
BRENDA HOOPES v PRESTON L. HOOPES

Affirmed.

Melody J. Stewart, J., Tim McCormack, P.J., and Patricia Ann Blackmon, J., concur.

**KEY WORDS: Spousal support; remarriage; R.C. 3105.18(E); change of circumstances; spousal support; distributive award; division of marital assets.**

***There is no statutory requirement that remarriage terminate spousal support, nor is there any public policy that spousal support should terminate upon a payee spouse's remarriage. Remarriage is, however, a ground for showing a change of circumstances warranting modification of spousal support under R.C. 3105.18(E), provided that the court specifically retains jurisdiction to modify spousal support consistent with R.C. 3105.18(E).***

***Trial court did not abuse its discretion by refusing to make a distributive award to either party in a divorce action because both parties engaged in misconduct by violating a restraining order on marital assets.***

**106906** CLEVELAND MUNI. C CRIMINAL MUNI. & CITY  
CITY OF CLEVELAND v L. K. P.

Reversed and remanded.

Patricia Ann Blackmon, J., Tim McCormack, P.J., concurs; Melody J. Stewart, J., dissents with separate opinion attached.

**KEY WORDS: Insufficient evidence; violation of a protection order; lack of service to defendant.**

***Defendant's conviction for violation of a protection order vacated because the city failed to prove that the protection order was served on the defendant prior to the alleged violation.***

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**106910** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
U.S. BANK NATIONAL ASSOCIATION, TRUSTEE v COLUMBIA PARK EAST MHP LLC, ET AL.

Affirmed.

Melody J. Stewart, J., Tim McCormack, P.J., and Patricia Ann Blackmon, J., concur.

**KEY WORDS:** *Receiver; title commitment; judicial endorsement; R.C. 2329.191(C); Loc.R. 24.0 of the Cuyahoga County Court of Common Pleas, General Division; fixture.*

*Loc.R. 24.0 of the Cuyahoga County Court of Common Pleas, General Division, which requires a foreclosure plaintiff to file a preliminary judicial report, cannot prevent a foreclosure plaintiff from filing a title commitment as allowed by R.C. 2329.191(C).*

*Trial court could properly consider a wastewater treatment plant located on a mortgaged property and built solely to serve the mortgage property as a fixture and thus within the purview of a receiver appointed to manage mortgaged property during a foreclosure.*

**106935** PARMA MUNI. C CRIMINAL MUNI. & CITY  
CITY OF PARMA v GURVINDER SINGH

Affirmed.

Eileen T. Gallagher, P.J., Anita Laster Mays, J., and Frank D. Celebrezze, Jr., J., concur.

**KEY WORDS:** *Domestic violence; physical harm; bench trial; manifest weight; credibility; trier of fact; conviction.*

*Deferring to the trial court's assessment of the witnesses' credibility, the defendant's domestic violence convictions are not against the manifest weight of the evidence.*

**106937** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
FIREMAN'S FUND INSURANCE COMPANY v HYSTER-YALE GROUP, INC.

Affirmed.

Patricia Ann Blackmon, J., Tim McCormack, P.J., and Melody J. Stewart, J., concur.

**KEY WORDS:** *Insurance; duty to defend.*

*Trial court properly applied Ohio law to insurance dispute; trial court could look beyond the allegations of the complaint in determining the duty to defend where insurer obtained extrinsic*



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**evidence in discovery that injury/occurrence did not occur during the policy period.**

**106992** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
JACINDA ANDERSON v THE OHIO BELL TELEPHONE COMPANY

**107399** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
JACINDA ANDERSON v OHIO BELL COMPANY

Affirmed.

Sean C. Gallagher, J., Mary Eileen Kilbane, P.J., and Patricia Ann Blackmon, J., concur.

**KEY WORDS: Opinion testimony; fact witness; disability; R.C. 4112.02; Civ.R. 54(D); R.C. 2303.21; tax costs; deposition transcripts.**

***Trial court did not err in excluding expert opinions rendered by fact witnesses, and the defense verdict upon the disability discrimination claims was not against the weight of the evidence. The trial court did not err in taxing deposition transcripts as costs under Civ.R. 54(D) and R.C. 2303.21.***

**107074** SHAKER HTS. MUNI. G CIVIL MUNI. & CITY  
THE MONTEFIORE HOME v KAREN O'DONNELL

Affirmed.

Larry A. Jones, Sr., J., Mary J. Boyle, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS: Civ.R. 23/class action status.**

***Appellant failed to show that the alleged class may be maintained as a class action thus failing to meet the requirements of Civ.R. 23.***

**107083** BOARD OF TAX APPEALS H ADMIN APPEAL  
CITY OF LYNDHURST v JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

Affirmed.

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

**KEY WORDS: R.C. 5717.02(B).**

***The BTA properly dismissed the appellant's appeal because the appellant failed to follow R.C. 5717.02(B) by not sending a copy of***

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**the notice of appeal to the tax commissioner.**

<b>107329</b>	COURT OF CLAIMS	I	COURT OF CLAIMS
WILLIAM B. SHEIL v JOHN HORTON			

Affirmed in part and reversed in part.

Patricia Ann Blackmon, J., Mary Eileen Kilbane, P.J., and Sean C. Gallagher, J., concur.

**KEY WORDS:** *R.C. 2743.75 appeal; R.C. 149.011; R.C. 149.43; public entity; functional equivalence test; R.C. 1333.61; trade secret.*

***Court of claims order granting objections to special master's report and concluding that Tri-C Foundation was not functionally equivalent of a public office was erroneous where test was met; Tri-C Foundation's contract with speaker at fund-raiser was not a protected trade secret.***