

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

Page: 1 of 7

November 15, 2018

105699 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
VIOREL MURGU, ET AL. v LAKEWOOD CITY SCHOOL DISTRICT, BD. OF EDUCATION

Affirmed.

Anita Laster Mays, J., Eileen T. Gallagher, P.J., and Mary J. Boyle, J., concur.

KEY WORDS: *Political subdivision immunity, summary judgment, leave to file a motion for summary judgment.*

The trial court did not abuse its discretion in disallowing defendant-appellant Lakewood City School District, Board of Education from presenting its political subdivision immunity defense in summary judgment proceedings. The trial court did not abuse its discretion by not allowing Lakewood leave to file a motion for summary judgment on political subdivision immunity.

106017 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CHRISTOPHER HILL

Affirmed.

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

KEY WORDS: *Involuntary manslaughter; R.C. 2903.04; R.C. 2925.03; predicate offense; R.C. 2923.03; complicity; proximate cause; reasonably foreseeable.*

Appellant's conviction for involuntary manslaughter was affirmed where the state provided sufficient evidence of appellant's participation in drug trafficking, and the violence that resulted and caused the death of another was reasonably foreseeable.

106284 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ELIZABETH TOMCHO, ET AL. v ALTL, INC., ET AL.

106562 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ELIZABETH TOMCHO, ET AL. v ALTL, INC., ET AL.

Reversed and remanded.

Larry A. Jones, Sr., J.; Kathleen Ann Keough, J., concurs with separate opinion; Sean C. Gallagher, P.J., dissents with separate opinion.

KEY WORDS: *Civ.R. 55(A)/default judgment; Civ.R. 60 (B)/motion to vacate judgment.*

CASE DECISION LIST

(Case 106562 continued)

The default judgment was not rendered moot by appellant's answer to the amended complaint because at the time appellant answered the complaint there were no pending claims against him.

Appellees failed to show that they had personal service over appellant where the evidence showed that appellant never received the complaint. The trial court abused its discretion in denying appellant's motion to vacate default judgment.

Appellees failed to show that appellant was properly notified of the default judgment hearing when the trial court had ordered appellees to notify defendant and they sent the notice to his old address.

Cases should be decided on their merits.

106563	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v REGINALD D. WILLIAMS			

Affirmed.

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

KEY WORDS: Trafficking in persons; compelling prostitution; commercial sexual depiction of a minor; unlawful sexual conduct; possession of criminal tools; evidence; abuse of discretion; text message; hearsay; authenticate; Evid.R. 901; redacted; harmless error; sufficient evidence; manifest weight; ineffective assistance; defense counsel; motion in limine; trial strategy; futile; reliability; expert; experience; specialized knowledge.

Defendant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Text message conversations between the victim and the defendant were properly authenticated by the victim's testimony at trial. Defense counsel did not render ineffective assistance of counsel. Text messages sent by the defendant to the victim are not hearsay because they are statements by a party opponent under Evid.R. 801(D)(2). Trial counsel's tactical decision to forego a motion in limine and a challenge to the reliability and accuracy of the report generated by the Cellebrite program was the product of trial strategy.

106572	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
DARLENE CASE v CLARK INDUSTRIAL INSULATION, ET AL.			

Affirmed.

Anita Laster Mays, J., and Eileen T. Gallagher, P.J., concur; Mary J. Boyle, J., concurs in judgment

CASE DECISION LIST

only.

KEY WORDS: *Civ.R. 12(B), affirmative defenses, personal jurisdiction, Civ.R. 12(H)(1), waiver, asbestos docket, Cuyahoga County Common Pleas Court Loc.R. 16, Cuyahoga County Common Pleas Court Standing Order No. 7.*

*The trial court properly determined that appellee did not waive the right to challenge personal jurisdiction shortly before trial by participating in the case proceedings. Appellee complied with Cuyahoga County Common Pleas Court Loc.R. 16(C)(1) and Standing Order No. 7 promulgated for management of the trial court's specialized asbestos docket. Pursuant to those directives, appellee's filing of a notice of appearance constituted a denial of all averments in the complaint and an allegation of all affirmative defenses. Civ.R. 12(H)(1) describes the two ways that a party waives the right to challenge personal jurisdiction: (1) by filing certain motions prior to pleading, or (2) failing to raise the defense in a responsive pleading. *Gliozzo v. Univ. Urologists of Cleveland, Inc., 8th Dist. Cuyahoga No. 86371, 2006-Ohio-1726.**

106574 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
JULIUS BRAXTON, ET AL. v ASHLEY KILBANE

Affirmed.

Eileen T. Gallagher, J., Eileen A. Gallagher, A.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Evidence; relevancy; credibility; motivation.*

Trial court was within its discretion to allow defense counsel to question plaintiff about his child support obligation where such evidence was relevant to plaintiff's age claim and motivation for not seeking employment.

106623 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
KIM BURNELL, ET AL. v CLEVELAND MUNICIPAL SCHOOL DIST. BD. OF ED., ET AL

Reversed and remanded.

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

KEY WORDS: *R.C. 3311.81(C), hearing, remedial, statutory interpretation.*

The board of education provided an adequate hearing under R.C. 3311.81(C) to the teachers whose contracts it did not renew.

CASE DECISION LIST

106628 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
DARIS A. JOHNSON v NEW DIRECTION IRA FBO KING C LAM, ET AL.

Affirmed and remanded.

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

KEY WORDS: *Express easement; modification of easement; termination of easement; statute of frauds; R.C. 1335.04; R.C. 1335.05; recording of instruments; constructive notice; R.C. 5301.01; bona fide purchaser for value; R.C. 5301.25; forfeiture deed; R.C. 5723.12; Civ.R. 54(D); fees and costs; compensatory damages for trespass.*

The trial court did not abuse its discretion in finding the existence of an express easement appurtenant in favor of appellee. Appellee, owner of the dominant estate, sued appellant, owner of the servient estate, for constructing a fence across the shared driveway that provided the sole source of ingress and egress to appellee's landlocked property. Appellee is a bona fide purchaser for value under R.C. 5301.25 who purchased the property without knowledge of an unrecorded notice of termination of the easement that stemmed from an invalid agreement attempting to modify the easement to provide a termination right. Prior transfer of the parcel by forfeiture deed did not terminate the easement pursuant to R.C. 5723.12.

A presumption in favor of costs exists under Civ.R. 54(D) and the award of costs is within the sound discretion of the trial court. The owner of a dominant estate is entitled to compensatory damages from the owner of the servient estate for easement interference.

106697 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
PATRICK W. CANTLIN, ET AL. v SMYTHE CRAMER CO.

Affirmed.

Patricia Ann Blackmon, J., Tim McCormack, P.J., and Sean C. Gallagher, J., concur.

KEY WORDS: *Class certification; rigorous analysis; fraud; unjust enrichment; unearned real estate transaction fees; identifiability; typicality; predominance.*

New class definition after remand satisfies the Civ.R.23(B) class certification requirements. At issue is a \$225 real estate transaction fee that plaintiffs (certain home buyers and sellers) allege is unearned by defendant (real estate brokers and agents). Class certification is favored when plaintiffs allege fraud concerning the defendant's form contracts. The class is identifiable, and the definition is unambiguous. The claims of the named-plaintiffs are typical of the claims of the entire class, and common questions of law or fact predominate over individual issues.

CASE DECISION LIST

106728 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CHARLES CROSS

Affirmed.

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

KEY WORDS: *R.C. 2929.14(C)(4)/consecutive sentences.*

Evidence in the record supported the trial court's finding that consecutive sentences were required and that consecutive sentences were not disproportionate to the seriousness of appellant's conduct or the danger appellant poses to the public.

106737 ROCKY RIVER MUNI. G CIVIL MUNI. & CITY
BRANDON J. HENDERSON v SPEEDWAY LLC

Affirmed.

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

KEY WORDS: *Motion to compel discovery; Civ.R. 56/summary judgment; objections to magistrate's decision.*

Appellant's motion to compel failed to designate which of appellee's responses were deficient. The trial court did not abuse its discretion in denying appellant's motion to compel. There also was no error by the trial court where it did not compel depositions of additional witnesses where appellant agreed to limit his depositions to key witnesses only.

Appellant failed to preserve the gasoline he is claiming to have damaged his vehicle and therefore cannot show that the gasoline was contaminated, and without evidence that the gasoline was contaminated appellant cannot show that the gasoline was the cause of the damage to his vehicle. The trial court's grant of summary judgment was proper.

Because appellant failed to file a transcript or affidavit of the evidence for the trial court record with his objections, this court under a plain-error review find no error in the trial court's overruling appellant's objections to the magistrate's decision.

106743 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v YACHIRA M. RUIZ

Reversed and remanded.

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

KEY WORDS: *Sufficient evidence; aggravated menacing; subjective fear; serious physical harm; court costs.*

A conviction for aggravated menacing is not supported by sufficient evidence where there is no proof that the victim had subjective fear of serious physical harm. It is harmless error where trial court imposes court costs outside of sentencing because the court retains jurisdiction over the issue of waiving the payment of court costs at any time.

106744 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v NAVI SANDERS

Affirmed.

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

KEY WORDS: *Witness intimidation; R.C. 2921.04(B)(2); criminal act; prosecutorial misconduct.*

State did not have to prove beyond a reasonable doubt that a person had been murdered in order for the death to be considered a criminal act for purposes of witness intimidation. The state need only prove beyond a reasonable doubt that the defendant believed that a criminal act occurred and attempted to intimidate a witness to that criminal act.

Statement that defendant's attempt to intimidate the witnesses did not stop those witnesses from coming to court and "telling you the truth" was not a statement vouching for the credibility of the witnesses.

106917 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
KENNETH DABNEY v METRO APPRAISAL GROUP, INC.

Affirmed.

Frank D. Celebrezze, Jr., J., Eileen A. Gallagher, A.J., and Eileen T. Gallagher, J., concur.

KEY WORDS: *Motion to dismiss; Civ.R. 12(B)(6); breach of contract; contractual relationship; negligence; duty; appraisal.*

Appellant can prove no set of facts to support his breach of contract and negligence claims that would entitle him to relief. Accordingly, the trial court properly granted appellee's motion to dismiss.

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

Page: 7 of 7

107041 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v KOLBY CLARK

Affirmed.

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

KEY WORDS: *R.C. 2929.11 and 2929.12/maximum sentence; R.C. 2929.14(C)(4)/consecutive sentences.*

The trial court's imposition of a maximum term was proper where it was not outside the statutory range and the seriousness and recidivism factors were considered. There was no error in the trial court's imposition of consecutive sentences where it was found that consecutive sentences were required to protect the public from future crime, to punish appellant, and that the consecutive sentences were not disproportionate to the seriousness of appellant's conduct or the danger appellant poses to the public.

107080 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: K.A.

Affirmed.

Frank D. Celebrezze, Jr., J., Mary Eileen Kilbane, P.J., and Mary J. Boyle, J., concur.

KEY WORDS: *Serious youthful offender; R.C. 2152.13; indictment.*

The juvenile court did not err in dismissing a serious youthful offender indictment where the state failed to comply with the notice requirements set forth in R.C. 2152.13(A).