

April 28, 2022

**109742** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
REVOLAZE, LLC v DENTONS US LLP, ET AL.

Affirmed.

Emanuella D. Groves, J., Eileen A. Gallagher, P.J., and Eileen T. Gallagher, J., concur.

**KEY WORDS:** *Civ.R. 50(B)(1); judgment notwithstanding the verdict (JNOV); Civ.R. 38(B); legal malpractice; proximate cause; case-within-a-case doctrine, disqualification; International Trade Commission (ITC); general exclusionary order (GEO).*

*Civ.R. 50(B)(1) allows a party to serve a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the parties' motion. A motion for JNOV is used to determine whether the evidence is totally insufficient to support the verdict. A motion for JNOV raises a question of law because the motion examines the materiality of the evidence, as opposed to the conclusions to be drawn from the evidence.*

*To establish a cause of action in Ohio for legal malpractice based upon negligent representation, a plaintiff must demonstrate: (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty and a failure to conform to the standard required by law, and (3) a causal connection between the conduct complained of and the resulting damages or loss. Because the elements of a legal malpractice claim are stated in the conjunctive, the failure to establish any one element of the claim is fatal.*

*In this matter, at the heart of appellants' contention that the trial court erred by not granting it motion for JNOV, is that appellees failed to present sufficient evidence that it would have succeeded in obtaining the GEO, were it not for Appellants' disqualification and thus failed to satisfy the case-within-a-case doctrine as outlined in *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173. As enunciated in *Environmental*, under the case-within-a-case doctrine, the plaintiff must establish that he would have been successful in the underlying matter.*

*However, contrary to appellants' contention, appellee presented evidence that satisfied the case-within-a-case burden by presenting testimony, including appellants' own admissions, going to the very heart of the evidence that would have been presented in the ITC to secure the GEO. Thus, after construing the evidence most strongly in favor of appellee, we find the evidence presented was legally sufficient to satisfy the case-within-a-case burden of proving by a preponderance of the evidence that appellee would have been successful in obtaining a GEO had appellant not been disqualified.*

## CASE DECISION LIST

**110208** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MICHAEL FERRICCI

Reversed and remanded.

Kathleen Ann Keough, P.J.; Michelle J. Sheehan, J., concurs in judgment only (with separate opinion); Eileen T. Gallagher, J., concurs with the separate concurring in judgment only opinion.

**KEY WORDS:** *Retrial; prejudice; testimony; irrelevant; expert; retain; closing arguments; credibility.*

*The state committed prejudicial error during retrial by improperly eliciting testimony from its expert witness that the witness had originally been retained by the defense in the first trial. The state's exploitation of that fact at its closing argument resulted in substantial prejudice to appellant under the circumstances, where there was no corroborating physical evidence or eyewitnesses and the question of appellant's guilt hinged entirely on the credibility of the child's initial disclosure.*

**110442** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
ARIELLE SHARP v M3C INVESTMENTS LLC, ET AL.

Reversed and remanded.

Emanuella D. Groves, J., Michelle J. Sheehan, P.J., and Mary Eileen Kilbane, J., concur.

**KEY WORDS:** *Civ.R. 55(A); default judgment; Civ.R. 38(B); demand for jury trial; hearing on damages; and CSPA violations.*

*Civ.R. 55(A), which governs the entry of default judgment and the necessity of a hearing on damages, gives the trial court the discretion to conduct a hearing following an entry of default judgment in order to determine the measure of damages. We recognize that the discretion accorded the trial court, under Civ.R. 55(A), is tempered with a party's constitutional and substantial right to a jury trial.*

*In this respect, the Constitution provides that the right to a trial by jury shall be inviolate.*

*In order to invoke the right to a jury trial, a party must take affirmative action. Under Civ.R. 38(B), any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefore at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. \* \* \*. The failure to timely serve and file a demand for a jury trial constitutes a waiver of the right to a trial by jury Civ.R. 38(D). Moreover, a demand for a trial by jury made in accordance with the rules may not be withdrawn without the consent of the parties.*

## CASE DECISION LIST

(Case 110442 continued)

**In this matter, appellant alleged CSPA violations, where the resultant damages were all “triable issues” under the rules. Appellant also demanded a jury trial in her complaint, renewed that demand in her motion for default judgment, and never abandoned her demand. Although the trial court granted appellant’s motion for default judgment, it erred in not allowing the issues of damages to be tried to the jury. Accordingly, we sustain Appellant’s assignment of error.**

**110548** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
FABRIZI RECYCLING, INC. v CITY OF CLEVELAND

Vacated and remanded.

Lisa B. Forbes, J., Frank Daniel Celebrezze, III, P.J., and Mary J. Boyle, J., concur.

**KEY WORDS: *Municipal competitive bidding, declaratory judgment, injunctive relief, R.C. 2721.12(A).***

***The trial court erred by declaring a contract between a municipality and a contractor void when that contractor was not a party to the case.***

**110565** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v RAFAEL HARRIS

Affirmed.

Emanuella D. Groves, J., Frank Daniel Celebrezze, III, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS: *R.C. 2929.41; multiple sentences; presumption; concurrent sentences; consecutive sentences; ambiguity in pronounced sentence.***

***Under R.C. 2929.41(A), the presumption in Ohio is that sentences are to run concurrently, unless where the trial court makes the R.C. 2929.14(C)(4) findings for consecutive sentences.***

***In this matter, at the heart of appellant’s challenge to the imposed sentence is the notion that the trial court should have made specific findings relative to Counts 4 and 10. As framed, appellant asserts he is unable to discern whether he is to serve 10 years or 12 and a half years. However, pursuant to R.C. 2929.41(A), defendant’s sentences are presumed to run concurrently as a matter of law if the trial court’s sentencing entry is silent as to whether the sentences are to be served consecutively or concurrently. Further, any sentencing ambiguities are resolved in favor of the defendant. Accordingly, we overrule appellant’s sole assignment of error.***

## CASE DECISION LIST

**110592** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MICHAEL VIROSTEK

Affirmed.

Frank Daniel Celebrezze, III, J., Sean C. Gallagher, A.J., and Anita Laster Mays, J., concur.

**KEY WORDS:** *Sufficiency of the evidence; rape; substantial impairment; spousal element; ability to resist or consent; intoxication; vertigo; knowledge of substantial impairment; state not required to elect offense the jury will consider; manifest weight of the evidence; ineffective assistance of counsel; prejudice to defendant; failure to object to jury instructions; invited error; trial strategy; speedy trial; R.C. 2945.71; prima facie; burden shift; R.C. 2945.72; continuances; toll; closing argument; trial tactics; prosecutorial misconduct; Reagan Tokes Act; unconstitutionality.*

*Appellant's convictions were supported by sufficient evidence and not against the manifest weight of the evidence. In addition, the state did not engage in prosecutorial misconduct, and appellant was not denied the effective assistance of counsel. Finally, appellant's sentence under the Reagan Tokes Act was proper and did not violate his constitutional rights.*

**110658** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DAVID ANTIO

Affirmed.

Eileen T. Gallagher, J., Kathleen Ann Keough, P.J., and Lisa B. Forbes, J., concur.

**KEY WORDS:** *Ineffective assistance of counsel; felonious assault; suppress; consent; warrantless; prejudice; identity.*

*Defense counsel did not render ineffective assistance of counsel by failing to file a motion to suppress. Suppression of text messages retrieved from the defendant's cell phone would not have affected the outcome of trial.*

**110660** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v AMANDO SMITH

**110694** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v AMANDO SMITH

## CASE DECISION LIST

Affirmed in part, vacated in part, and remanded.

Lisa B. Forbes, P.J., Emanuella D. Groves, J., and Cornelius J. O'Sullivan, J., concur.

**KEY WORDS:** *Having weapons while under disability; guilty plea; insufficient evidence; Crim.R. 11(C)(2); knowing; intelligent; voluntary; nature of the charges; maximum penalty.*

*A victim was shot and killed inside of his vehicle. Following a jury trial, appellant was found not guilty of aggravated murder, murder, felonious assault, and voluntary manslaughter for the death of the victim. A charge for having weapons while under disability was tried to the bench, and the judge found the appellant guilty for that charge. On appeal, we find that the conviction for of having weapons while under disability was supported by insufficient evidence. The testimony relied on by the state is appellant's alleged motive for committing the murder, and cell phone records placing his phone within the vicinity of the crime. No evidence was presented that appellant possessed a firearm on the date of the victim's death. Accordingly, the conviction for having weapons while under disability is vacated.*

*Appellant further argues that his guilty plea in a separate case was not made knowingly, intelligently, or voluntarily because the court did not properly explain the penalty he faced in violation of Crim.R. 11(C)(2). Upon review, we find that the trial court complied with Crim.R. 11(C)(2) when it explained the nature of the charges against him and the maximum penalty he faced.*

<b>110721</b>	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
KOBLENTZ & PENVOSE, LLC v JAMES MELVIN			

Affirmed.

Sylvia A. Hendon, J.,\* Eileen T. Gallagher, P.J., and Emanuella D. Groves, J., concur.

\*(Sitting by assignment: Sylvia A. Hendon, J., retired, of the First District Court of Appeals.)

**KEY WORDS:** *Motion for summary judgment; unopposed motion; collection case; Civ.R. 56; trial court's docket; abuse of discretion; pro se litigant.*

*Where the appellee presented evidence to establish it was entitled to payment for legal services rendered and appellant filed no brief in opposition to the motion, the trial court correctly granted appellee's motion for summary judgment.*

## CASE DECISION LIST

**110723** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
DIGITALIGHT SYSTEMS, INC. v CLEVELAND CLINIC FOUNDATION

Affirmed.

Frank Daniel Celebrezze, III, J., Sean C. Gallagher, A.J., and Anita Laster Mays, J., concur.

**KEY WORDS:** *Summary judgment; breach of contract; unjust enrichment; account; promissory estoppel; Civ.R. 56; consideration; donation; gratuitous promise; material term; R.C. 1302.10; additional terms; acceptance; R.C. 1302.64; battle of the forms; quantum meruit; equitable claim.*

*The trial court properly granted summary judgment in favor of defendant-appellee. Appellant failed to demonstrate that genuine issues of material fact existed that precluded judgment as a matter of law in favor of defendant-appellee on appellant's claims for breach of contract, unjust enrichment, promissory estoppel, and action on an account.*

**110724** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MONIQUE SWANSON-REED

Affirmed.

Emanuella D. Groves, J., Eileen A. Gallagher, P.J., and Mary J. Boyle, J., concur.

**KEY WORDS:** *Sufficiency of the evidence; weight of the evidence; bench trial.*

*Appellant's conviction for theft was supported by sufficient evidence where the state presented testimony in support of every element of the offense such that if believed the trier of fact could find appellant guilty beyond a reasonable doubt. Appellant's conviction was supported by the greater weight of the evidence where the complaining witness testified as to every element of the offense and her testimony was corroborated by a 911 call and appellant's testimony. Finally, appellant was not prejudiced by the state's reference to her "violent history. During a bench trial, the trial court is presumed to only consider reliable, relevant, and competent evidence.*

*Sufficiency of the evidence; weight of the evidence; bench trial.*

*Appellant's conviction for theft was supported by sufficient evidence where the state presented testimony in support of every element of the offense such that if believed the trier of fact could find appellant guilty beyond a reasonable doubt. Appellant's conviction was supported by the greater weight of the evidence where the complaining witness testified as to every element of the offense and her testimony was corroborated by a 911 call and*

## CASE DECISION LIST

(Case 110724 continued)

**appellant's testimony. Finally, appellant was not prejudiced by the state's reference to her "violent history. During a bench trial, the trial court is presumed to only consider reliable, relevant, and competent evidence.**

**110740** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v GLEN A. OLSEN

Affirmed.

Frank Daniel Celebrezze, III, J., Sean C. Gallagher, A.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS: Financial penalties; restitution; plea hearing; failure to inform defendant; prejudice; Crim.R. 11; Reagan Tokes Law; due process; felony sentencing review; R.C. 2953.08(G)(2); prison term; contrary to law; consecutive sentences; clear and convincing; R.C. 2929.14(C); statutory findings.**

**The trial court did not err in not informing appellant at the plea hearing as to the amount of restitution that would be ordered or in imposing consecutive sentences. Further, appellant's sentence was not contrary to law and was proper under the Reagan Tokes Law.**

**110816** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
OHIO PATROLMEN'S BENEVOLENT ASSOCIATION v CITY OF CLEVELAND, OHIO

Affirmed.

Eileen T. Gallagher, J., Kathleen Ann Keough, P.J., and Lisa B. Forbes, J., concur.

**KEY WORDS: The Ohio Arbitration Act; R.C. 2711.13; application to vacate arbitration award; service; counsel of record; complaint; motion; Civ.R. 5(B).**

**Trial court properly dismissed complaint to vacate arbitration award and confirmed the arbitration award where plaintiff failed to serve the defendant in accordance with the requirements of R.C. 2711.13.**

**110839** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v KEVIN WALKER, JR.

Affirmed.

Cornelius J. O'Sullivan, Jr., J., Lisa B. Forbes, P.J., and Emanuella D. Groves, J., concur.

**KEY WORDS:** *Reagan Tokes Law.*

**Appellant's sentence is constitutional pursuant to the Reagan Tokes Law.**

**110917** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v HOWARD L. DRAKE

Vacated and remanded.

Sean C. Gallagher, A.J., Frank Daniel Celebrezze, III, J., and Lisa B. Forbes, J., concur.

**KEY WORDS:** *Conceded error; motion for judicial release; R.C. 2929.20; hearing.*

**The trial court erred by not holding a hearing prior to granting defendant-appellee's motion for judicial release because it was required to hold a hearing before granting the motion pursuant to R.C. 2929.20.**

**110936** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: G.T.

Affirmed.

Mary J. Boyle, J., Sean C. Gallagher, A.J., and Eileen T. Gallagher, J., concur.

**KEY WORDS:** *R.C. 2151.03(A)(2); neglected child; R.C. 2151.04; dependent child; clear and convincing evidence; manifest weight of the evidence; CCDCFS.*

**The juvenile court's adjudicating the child neglected and dependent was not against the manifest weight of the evidence. The record contained clear and convincing evidence that at the time of the complaint, Mother was unemployed and without government assistance; had been involved in a domestic altercation for which she was jailed; had no clear means of providing for her child's basic needs after her release from jail; lacked stable housing; had threatened to take her child's life and twice threatened to take her own life; discontinued mental health counseling; and refused CCDCFS's safety plan.**



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**110960** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: D.W.

Affirmed.

Frank Daniel Celebrezze, III, J., Sean C. Gallagher, A.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Adjudication of delinquency; gross sexual imposition; R.C. 2907.05; sufficiency; manifest weight; venue; sexual contact; R.C. 2907.01; plain error.*

**Appellant's adjudication of delinquency for gross sexual imposition was supported by sufficient evidence and was not against the manifest weight of the evidence.**

**111240** CLEVELAND MUNI. C CRIMINAL MUNI. & CITY  
CITY OF CLEVELAND v GREGORY KOPIKCHAK

Dismissed.

Eileen A. Gallagher, J., Kathleen Ann Keough, P.J., and Lisa B. Forbes, J., concur.

**KEY WORDS:** *Domestic violence; violation of community control; denial of bail; R.C. 2937.222(D); jurisdiction; final, appealable order.*

**Appeal dismissed. R.C. 2937.222(D)(1) did not apply to municipal court order denying bail following alleged violation of community control on misdemeanor domestic violence offense. Even if R.C. 2937.222(D)(1) applied, R.C. 2937.222(D)(2) would require dismissal of appeal because order denying bail was set aside and defendant was released on personal bond during pendency of appeal.**