September 1, 2022

110187 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob
SHERWIN WILLIAMS COMPANY v CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL.

Reversed and remanded.

Mary J. Boyle, P.J., and Lisa B. Forbes, J., concur; Anita Laster Mays, J., dissents.

KEY WORDS: Civ.R. 56; summary judgment; declaratory judgment; first impression; insurance coverage; damages; public nuisance abatement fund; lead paint; knowledge; intentional acts; collateral estoppel; People v. ConAgra Grocery Prods. Co., 17 Cal.App.5th 51, 227 Cal.Rptr.3d 499 (2017) (Santa Clara Action); Certain Underwriters at Lloyd's London v. NL Industries, Inc., 2020 NY Slip Op. 34331(U) (Sup.Ct.) (NL Action).

Judgment reversed and remanded. The trial court's decision granting summary judgment in favor of the Insurers is reversed. The $101 million that Sherwin-Williams was ordered to pay in the California lead based paint public nuisance action (Santa Clara Action) is damages under the insurance policies at issue.

We find that collateral estoppel is applicable to the findings in the Santa Clara Action that were not reversed, remain intact, and are final. We also find that the meaning of damages - more specifically, whether the sums that Sherwin-Williams was ordered to pay into the abatement fund are covered as damages under the policies - was not actually and directly litigated in the Santa Clara Action.

While the Santa Clara Action established that Sherwin-Williams had intentionally and affirmatively promoted lead paint for interior residential use with actual knowledge of the public health hazard, we find the New York Court reasoning in the NL Action more persuasive. The abatement fund, in the instant case and in the NL Action serve the same purpose - reimbursing the government's costs in responding to the lead paint hazard. Although the abatement fund is technically injunctive relief, this relief serves substantially the same purpose as reimbursing the government's costs in responding to the lead paint hazard since the California government lacks the necessary resources to remediate the problem. The abatement fund was not strictly intended to prevent harm, but was monies paid to the government, depleted by its ongoing efforts to remediate the longstanding contamination of houses and buildings by lead paint in California. As a result, the monies Sherwin-Williams was ordered to pay into the abatement fund qualifies as damages under the policies.

Furthermore, because of the distinction between knowledge of the risk of hazardous consequences of Sherwin-Williams' actions and the intention to cause harm, the Insurers failed to meet their burden, on summary judgment, to exclude coverage on the basis of "expected or intended harms" and failed to make a prima facie case that Sherwin-Williams' conduct is uninsurable under policies containing the exclusion. While the Santa Clara Action found that

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Sherwin-Williams had actual knowledge of the hazards of lead paint and knew that it would deteriorate and cause serious injury, they also found that Sherwin-Williams' acts posed a serious risk of harm or significant risks of harm that would pose a public health hazard. This is not a clear finding that Sherwin-Williams either expected or intended to harm any person or property.

110728 SHAKER HTS. MUNI. G Civil Muni. & City

CITY OF UNIVERSITY HEIGHTS v UNIVERSITY REALTY USA, LLC

Affirmed.

Anita Laster Mays, P.J., and Michelle J. Sheehan, J., concur; Eileen T. Gallagher, J., concurs in judgment only.

KEY WORDS: Abuse of discretion; sentence contrary to law; R.C. 2929.22.

The trial court did not abuse its discretion by imposing fines on the appellant because the sentence was not contrary to law and within the statutory limits, and therefore, the trial court is presumed to have considered the sentencing factors set forth in R.C. 2929.22.

110830 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob

UNITED STATES SPECIALTY SPORTS ASSOCIATION, INC. v CLIFFORD MAJNI, ET AL.

Affirmed in part, dismissed in part, and remanded.

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

KEY WORDS: Motion to compel; grant; deny; final appealable order; protective order; electronically stored information.

The trial court did not abuse its discretion in granting appellee's motion to compel the production of appellants' software and database. Appellants argue the software and database are not protected under the protective order because they are not "documents." However, under the terms of the protective order in place, the definition of documents encompasses the electronically stored information. Further, the trial court's journal entry denying appellants' motion to compel the deposition of appellee's IT director was not a final appealable order. Accordingly, we are without jurisdiction to rule on appellants' second assignment of error. Appeal is affirmed in part, dismissed in part, and remanded to the trial court for proceedings consistent with this opinion.

111067 BEDFORD MUNI. C Criminal Muni. & City
CITY OF BEDFORD HEIGHTS v JOSHUA W. SMITH

Affirmed.

Eileen T. Gallagher, J., and Lisa B. Forbes, P.J., concur; Emanuella D. Groves, J., concurs in judgment only.

KEY WORDS: Manifest weight of the evidence; sufficiency of the evidence; domestic violence.

Defendant's domestic violence conviction was not against the manifest weight of the evidence where the victim's testimony was consistent with her prior statement and was corroborated by the objective testimony of a third-party witness.

111099 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v CAMERON PUGH

Affirmed and remanded.

Sean C. Gallagher, A.J., Lisa B. Forbes, J., and Eileen T. Gallagher, J., concur.

KEY WORDS: Burglary; felonious assault; second-degree felony; judgment entry; clerical error; indictment; plea agreement; amended; count; offense; nunc pro tunc; plain error; standard; review; limited power; Crim.R. 52(B); burden; substantial rights; exceptional circumstances; manifest miscarriage of justice; judicial economy; allied offenses; merger; conduct; animus; import; firearm; shooting; victims; harm; sentencing; mistake; offense; Reagan Tokes Law, due process; constitutional.

Crim.R. 52 affords appellate courts "limited power" to correct plain errors. Trial court did not commit plain error by failing to merge all offenses, which included a burglary offense and two felonious assault offenses, because appellant failed to show there was a reasonable probability that the convictions are in fact for allied offenses of similar import committed with the same conduct and without a separate animus. Testimony was presented that appellant completed the burglary upon entry and then separately committed the felonious assaults while remaining inside. Also, the felonious assault offenses were committed against two victims and resulted in distinct harm. Notice of plain error was not warranted when appellant was properly sentenced on the burglary charge to which he pled, no manifest miscarriage of justice occurred by the trial court's reference to the count as originally indicted at sentencing, the mistake could easily have been corrected if it were raised in the trial court, and judicial economy would be thwarted. The case was remanded for the issuance of a nunc pro tunc judgment entry to correct a clerical error. Appellant failed to demonstrate plain error by the trial court's imposition of an

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indefinite sentence under the Reagan Tokes Law when his constitutional due-process challenge has previously been rejected by the en banc appellate court.

111140	COMMON PLEAS COURT	E	Civil C.P.-Not Juv,Dom Or Prob

CYNTHIA SHUSTER v ROSALIND SPODEK, ET AL.

Affirmed.

Mary Eileen Kilbane, J., Anita Laster Mays, P.J., and Frank Daniel Celebrezze, III, J., concur.

KEY WORDS: Civ.R. 60(B); motion for summary judgment; direct appeal; lacks jurisdiction; App.R. 12, App.R. 16, decline to review assignment of error.

Following the trial court's ruling that granted appellees' motion for summary judgment, appellant did not seek a direct appeal but sought relief through a Civ.R. 60(B) motion. Upon the trial court's denial of appellant's Civ.R. 60(B) motion, appellant filed a timely appeal. However, because appellant's arguments on appeal relate solely to the summary judgment rather than the Civ.R. 60(B) motion, this court declines to review the assignment of error.

111161	COMMON PLEAS COURT	A	Criminal C.P.

STATE OF OHIO v ELI NIEVES, JR.

Affirmed.

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

KEY WORDS: Post-arrest silence; Miranda rights; hearsay; cross-examination; invited error; prosecutorial misconduct.

Prosecutor could properly cross-examine defendant about his post-arrest silence where the record contained nothing indicating he was advised of his Miranda rights during the time he remained silent. Appellant's statement in a text about what happened was an admission by a party-opponent. Appellant could not challenge as hearsay testimony defense counsel elicited from the state's witness on cross-examination. The prosecutor's comment during cross-examination that defendant was lying and questions whether defendant or the state's witnesses were lying were improper but did not permeate the entire trial so as to deny defendant a fair trial, and defendant did not demonstrate a reasonable probability that he would have been acquitted but for the improper comments.

111181 PARMA MUNI. G Civil Muni. & City

SOLA PROFESSIONAL GROUP, LLC v HALA MALEK

Affirmed in part and modified in part.

Cornelius J. O'Sullivan, Jr., J., Lisa B. Forbes, P.J., and Mary J. Boyle, J., concur.

KEY WORDS: Rental contract; magistrate's decision; Civ.R. 53; de novo review; Civ.R. 54(C); prayer for relief; damages award; return of damage deposit.

Our review of a contract is de novo, even when reviewing a trial court's decision to adopt a magistrate's decision regarding a contract. In this case, appellant-landlord is barred from increasing its demand for damages without amending its complaint pursuant to Civ.R. 54(C). Pro se appellee did not breach the terms of her rental contract. The trial court did not err in awarding damages in the amount of $220. The appellee is entitled to return of her damage deposit.

111198 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob

TAX EASE OHIO, LLC v HARIVEL AGENCY LLC, ET AL.

Vacated and remanded.

Cornelius J. O'Sullivan, Jr., J., Lisa B. Forbes, P.J., and Mary J. Boyle, J., concur.

KEY WORDS: Civ.R. 60(B) motion to set aside confirmation of sale; tax certificate foreclosure; R.C. 5721.30; redemption; deficiency to be paid to county treasurer prior to confirmation of sale; abuse of discretion.

The trial court abused its discretion in granting plaintiff's motion to set aside the judgment confirming the foreclosure sale because the defendant failed to follow R.C. 5721.25 which required that the funds for redemption be paid to the county treasurer prior to confirmation of the sale.

111241 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob

HSBC BANK USA, NATIONAL ASSOCIATION v ANDERSON BANKS, ET AL.

Affirmed.

Cornelius J. O'Sullivan, Jr., J., Frank Daniel Celebrezze, III, P.J., and Emanuella D. Groves, J., concur.

KEY WORDS: Confirmation of sale; foreclosure; default judgment;

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12 C.F.R. 1024.41; promissory estoppel; unclean hands; appraisal.

Appellant failed to appeal from the final decree of foreclosure and therefore has waived the issues with the decree he now raises. Nonetheless, the issues are without merit.

The default judgment taken against him was proper because he was served with a copy of the foreclosure complaint, he failed to file an answer throughout the pendency of the action, and a copy of the motion for default and hearing notice were served on him 14 days prior to the hearing.

Appellant failed to perform under an agreement on a loss mitigation option and therefore appellee did not violate 12 C.F.R. 1024.41 in pursuing foreclosure.

Appellant failed to raise the affirmative defenses of promissory estoppel and unclean hands at the trial-court level and the issues he raises relative to them are waived on appeal.

Appellant failed to object to any alleged irregularities with the appraisal despite having ample opportunity to do so.

111300 ROCKY RIVER MUNI. C Criminal Muni. & City

CITY OF WESTLAKE v PARKER GOODMAN

Affirmed.

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

KEY WORDS: Suppress; OVI; reasonable suspicion, field sobriety tests; accident; probable cause; arrest; totality of the circumstances.

Trial court's decision denying appellant's motion to suppress evidence following an arrest for OVI is upheld where the officer had reasonable suspicion to conduct field sobriety tests after finding the motorist crashed on a pile of rocks on an early weekend morning; had bloodshot, glassy eyes; and stumbled over his words. During the administration of the HGN test, the officer smelled an odor of alcohol; and following this interaction, the appellant unsuccessfully submitted to a portable breath test. Based on the totality of the circumstances, the officer had probable cause to arrest appellant for OVI.