

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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July 29, 2021

<b>109320</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JONATHAN RODRIGUEZ			

Affirmed.

Eileen A. Gallagher, P.J., Mary Eileen Kilbane, J., and Eileen T. Gallagher, J., concur.

**KEY WORDS:** *Sufficient evidence; manifest weight of the evidence; prosecutorial misconduct; impeachment; character evidence; other acts evidence.*

*A conviction for attempted rape is not based on insufficient evidence where the evidence strongly corroborates the defendant's criminal attempt and constitutes a substantial step towards the act. The defendant's act of entering the victim's bedroom while she was in bed, and unsuccessful attempt at removing a comforter covering her constitutes a substantial step towards rape where the evidence otherwise establishes that he had successfully done the same multiple times previously before proceeding to digitally penetrate the victim.*

*Considering evidence pertaining to counts of the indictment for which the defendant is ultimately found not guilty for purposes of establishing a sexually violent predator specification does not cause the conviction to be based on insufficient evidence.*

*A sexually violent predator specification that is in part based on evidence pertaining to counts in the indictment for which the defendant is ultimately found not guilty is not against the manifest weight of the evidence where the defendant fails to identify any conflicting evidence that in resolving the jury lost its way and created a manifest miscarriage of justice.*

*A defendant's convictions are not against the manifest weight of the evidence because there are minor conflicts in witness testimony where there is no inconsistency in the evidence pertaining to the crimes charged. Where the victim of sexual abuse was a child at the time of the abuse and where there was some inconsistency in her recollection of her age at the time of the abuse as well as how many times the abuse occurred, but where her testimony is otherwise clear that the crimes of conviction did occur, the convictions are not against the manifest weight of the evidence.*

*A defendant cannot establish a prosecutorial misconduct claim based on the prosecutor's argument that the jury could consider evidence pertaining to counts of the indictment for which he was found not guilty.*

*A defendant cannot establish a prosecutorial misconduct claim based on the prosecutor's reference to his incarceration where the defendant merely suggests that the reference could have caused prejudice, and where the defendant references his incarceration himself and where he is acquitted of most counts.*

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**A defendant cannot establish a prosecutorial misconduct claim on the basis that the prosecutor referred to his past sexual activity during cross-examination where the defendant discussed that topic during his direct examination.**

**A defendant may not properly cross-examine an alleged victim with a prior consistent statement pursuant to Evid.R. 801(D)(2) as an admission by a party-opponent because the alleged victim is not a party to the case.**

**A trial court does not abuse its discretion by prohibiting a defendant from cross-examining the victim with her statement to police that contains no material difference where the defendant otherwise fails to develop any argument on appeal in support of his claim.**

**A trial court does not abuse its discretion by prohibiting a defendant from cross-examining the victim regarding her police interview after her testimony included topics into which the police did not discuss during her interview.**

**Evid.R. 106 is not implicated where a party makes specific reference to a recorded statement where the adverse party does not subsequently seek to introduce an additional portion of the statement.**

**Pursuant to Evid.R. 404(A)(1), where a defendant elicits testimony regarding his good character as a romantic partner and puts his character at issue, the state has the opportunity to rebut that testimony. Where a defendant introduces several photographs of him with his family as evidence of his good character, the court does not abuse its discretion by permitting the state to introduce photographs that the defendant posted to social media depicting scantily clad women to rebut the claim.**

**Pursuant to Evid.R. 613 and 616, a party may impeach a witness by contradiction. Where a defendant testifies to having had minimal and not serious police interactions, the state may examine him regarding his conduct that is inconsistent with his testimony as well as facts that contradict his testimony.**

**To the extent that Evid.R. 616(C) did not permit the introduction of a video containing still photographs of the defendant holding firearms to show bias, prejudice, interest or motive to misrepresent, any resulting error would be harmless where the video was not prejudicial.**

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Affirmed.

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

**KEY WORDS:** *Custody; domestic relations; postdecree; shared parenting plan; relocation; best interest of the child; motion in limine; abuse of discretion; R.C. 3109.04; attorney fees.*

*The domestic relations court did not abuse its discretion in granting plaintiff's motion in limine seeking to limit the introduction of evidence of predecree facts and circumstances. The issue was repeatedly addressed throughout trial, the court appropriately considered the evidentiary arguments, and the court's rulings were not unreasonable, arbitrary, or unconscionable. The court did not abuse its discretion in denying defendant-appellant's motion to modify the shared parenting plan because there had been no change in circumstances pursuant to R.C. 3109.04(E)(1). Finally, the trial court did not abuse its discretion in awarding plaintiff-appellee \$5,000 in attorney fees and litigation expenses.*

<b>109430</b>	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
AKIVA HERSH v RABBI YISRAEL GRUMER, ET AL.			

Reversed and remanded.

Lisa B. Forbes, J., and Kathleen Ann Keough, J., concur; Sean C. Gallagher, P.J., dissents with separate opinion.

**KEY WORDS:** *Motion to dismiss, motion for judgment on the pleadings, defamation per se, defamation per quod, false light, intentional infliction of emotional distress, negligent infliction of emotional distress.*

*The trial court erred by granting the defendants' motions to dismiss and motions for judgment on the pleadings on the plaintiff's defamation claims, false light claim, and intentional infliction of emotional distress claim. The trial court did not use the proper standard of review for the motions filed and did not convert the motions into summary judgment motions. Accepting all factual allegations as true, the plaintiff sufficiently pled four of his claims and they survive the defendants' motions to dismiss and motions for judgment on the pleadings.*

<b>109501</b>	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
LEWIS A. ZIPKIN, ET AL. v FIRSTMERIT BANK, N.A.			

Affirmed in part, reversed in part, and remanded.

Emanuella D. Groves, J., and Sean C. Gallagher, P.J., concur; Mary Eileen Kilbane, J., concurs in part and dissents in part (with separate opinion attached).

**KEY WORDS:** *Statutory interpretation; R.C. 5805.06; revocable trust; settlor; trustee; beneficiary; 2012 guaranty; setoff provision.*

*When reviewing questions of statutory interpretation, our standard of review is de novo. A court's main objective when interpreting a statute is to determine and give effect to the legislative intent. We first look to the language of the statute itself to determine the intent of the General Assembly. When a statute's meaning is clear and unambiguous, we apply the statute as written.*

*In general, a "trust" is defined as "the right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another." When construing the provisions of a trust, the court's primary duty is to ascertain, within the bounds of the law, the intent of the settlor. If the language of the trust agreement is unambiguous, the settlor's intent can be determined from the trust's express language. "The words in the trust are presumed to be used according to their common, ordinary meaning."*

*Article I of plaintiff's exhibit No. 25, the restatement of the trust agreement, stated in relevant part that: "Grantor reserves the power to revoke this Trust Agreement, in whole or in part, or to amend any of its provisions. Grantor may withdraw any insurance policy, security or other property belonging to the trust estate. This Trust Agreement shall become irrevocable upon the death of the Grantor." The restatement document lists Appellee as the Grantor or Settlor. A settlor of a trust has, under most circumstances, unfettered discretion to dispose of her or his assets as the settlor so chooses. The restatement also lists Appellee as the Trustee, as well as the sole Beneficiary. Based on the plain reading of the restatement document, we determine that the instrument was a revocable trust.*

*R.C. 5805.06 provides in pertinent part as follows: (A) Whether or not the terms of a trust contain a spendthrift provision, all of the following apply: (1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.*

*Having determined, based upon the plain reading of the restatement document, as well as Appellee's own testimony that the instrument represented was a revocable trust and that Appellee was the settlor, we conclude the plain reading of R.C. 5805.06 allows creditors to reach the assets of the trust.*

*The 2012 Guaranty stated in pertinent part that: "Lender reserves a right of setoff in all Guarantor's accounts with Lender (whether checking, savings, or some other account). \* \* \* However, this does not include any IRA or Keough accounts, or any trust accounts for which setoff would be prohibited by law." A plain reading of the setoff provision, as it pertains to trusts, only exempts "any trust for which setoff would be prohibited by law."*

*Because it is well accepted that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living, the*

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**account, at issue, was not of the type where a setoff was prohibited by law. As such, Appellant did not act improperly when it set off the account in the name of the Revocable Trust and there was no breach of contract.**

<b>109762</b>	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v MIKE NICHOLSON			

Affirmed.

Eileen A. Gallagher, P.J., Michelle J. Sheehan, J., and Eileen T. Gallagher, J., concur.

**KEY WORDS:** *Postsentence motion to withdraw guilty pleas; Crim.R. 32.1; manifest injustice; res judicata; Crim.R. 11(C); knowing, intelligent, and voluntary guilty pleas; mandatory prison term; judicial release.*

*Trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty pleas. Defendant's claims that his guilty pleas were not entered knowingly and intelligently due to the trial court's alleged failure to inform him that his seven-year prison sentence for trafficking was mandatory and that he was ineligible for judicial release could have been raised on direct appeal or in his prior postconviction motions and were, therefore, barred by res judicata. Further, there is no requirement that a trial court provide information regarding eligibility or ineligibility for judicial release prior to accepting a defendant's guilty pleas. The record showed that the trial court informed defendant before he entered his guilty pleas that whatever sentence was ultimately imposed on the trafficking count would be a mandatory prison term. Even if defendant received misinformation regarding his eligibility for judicial release after sentencing, it could not have impacted the knowing, intelligent or voluntary nature of his guilty pleas.*

<b>109787</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ANTROINE WELLS			

Affirmed and remanded.

Eileen T. Gallagher, J., Sean C. Gallagher, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Sufficiency; manifest weight; credibility; allied offense; speedy trial; constitutional; toll; plain error; consecutive sentence; findings; clearly and convincingly; seriousness; danger posed to the public.*

*Defendant's convictions for retaliation, intimidation of a crime victim or witness, and tampering with evidence is supported by sufficient evidence and is not against the manifest weight of the*

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**evidence. The offenses were committed with a separate animus and are not allied offenses of similar import. Defendant's statutory and constitutional rights to a speedy trial were not violated due to delays caused by defendant's own motions and conduct. The trial court made the necessary findings for imposing consecutive sentences and the sentence is supported by the record.**

<b>109806</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ALISIA REINDL			

<b>109807</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ALISIA REINDL			

<b>109808</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ALISIA REINDL			

Affirmed.

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

**KEY WORDS: Consecutive sentence; concurrent; findings; reasons; clear and convincingly; supported; record; recidivism; seriousness; contrary to law.**

**The trial court made the necessary findings for imposing consecutive sentences pursuant to R.C. 2929.14(C)(4) and the findings are not clearly and convincingly unsupported by the record.**

<b>109831</b>	DOMESTIC RELATIONS	F	CIVIL C.P.-JUV, DOM, PROBATE
DAVID J. BRIDGELAND v TERRESITA P. BRIDGELAND			

Affirmed.

Eileen T. Gallagher, J., Eileen A. Gallagher, P.J., and Michelle J. Sheehan, J., concur.

**KEY WORDS: Civil contempt; purge; dissolution; marriage; abuse of discretion; court order; manifest weight; credibility; clear and convincing; competent and credible.**

**The trial court's contempt decision was not against the weight of the evidence, and the trial court did not abuse its discretion in finding Wife in contempt.**

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<b>109873</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ALBERT BERRY			

Affirmed.

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

**KEY WORDS:** *Motion to dismiss indictment; commencement of criminal prosecution; former R.C. 2901.13(E); statute of limitations; former R.C. 2901.13(A)(3)(c); Crim.R. 4(D)(3); reasonable diligence; former R.C. 2901.13(G); avoiding prosecution.*

*Trial court did not err in granting defendant's motion to dismiss based on the statute of limitations where the state did not meet its burden of establishing that it exercised reasonable diligence in executing the summons or warrant or that the statute of limitations was tolled due to defendant's purposeful efforts to avoid prosecution.*

<b>109883</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JAMAHL DRAKE			

<b>109884</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JAMAHL DRAKE			

Reversed and remanded.

Mary Eileen Kilbane, J., Larry A. Jones, Sr., P.J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Agreed sentence; mandatory sentence; contract principles; judicial release; ineligible; plea agreement.*

*Defendant did not qualify as an eligible offender because the terms of his plea agreement were explicit whereby defendant agreed to serve a five, six, or seven year mandatory prison term. The trial court's failure to include the term "mandatory" in its sentencing journal does not invalidate the plea agreement, which is governed by contract law and must be upheld.*

<b>109934</b>	ROCKY RIVER MUNI.	E	CIVIL C.P.-NOT JUV,DOM OR PRO
CITY OF WESTLAKE v JACOB M. DUNN			

<b>109935</b>	ROCKY RIVER MUNI.	E	CIVIL C.P.-NOT JUV,DOM OR PRO
CITY OF WESTLAKE v JACOB M. DUNN			

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Affirmed.

Lisa B. Forbes, J., Eileen A. Gallagher, P.J., and Mary Eileen Kilbane, J., concur.

**KEY WORDS:** *Postconviction relief, abuse of discretion, newly discovered evidence, findings of fact and conclusions of law. The trial court did not abuse its discretion by denying the petitioner's postconviction relief motion.*

*Testimony from a hearing at which the petitioner was present does not constitute newly discovered evidence. The trial court made findings of fact and conclusions of law in accordance with R.C. 2953.21(H).*

<b>109976</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MAURICE ROBINSON			

Affirmed.

Sean C. Gallagher, J., Mary J. Boyle, A.J., and Larry A. Jones, Sr., J., concur.

**KEY WORDS:** *R.C. 2903.21; R.C. 2903.12; aggravated menacing; aggravated assault; weight of the evidence; Evid.R. 804(B)(6); Confrontation Clause; Evid.R. 803(2).*

*Defendant's conviction for aggravated menacing stemming from his attempts to stab the victim with a knife is not against the weight of the evidence, and there is no merit to defendant's claim that the trial court erred by overruling a motion in limine because the state never introduced the disputed material at trial.*

<b>109993</b>	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
IVAN SOSIC, ET AL. v STEPHEN HOVANCSEK & ASSOCIATES, INC., ET AL.			

Reversed and remanded.

Eileen T. Gallagher, J., Eileen A. Gallagher, P.J., and Mary Eileen Kilbane, J., concur.

**KEY WORDS:** *Dismiss; pleading; allegations; claims; elements; factual support; duty; third party; negligence; supervision; surveyor; reliance.*

*Construing the material allegations of the complaint in favor of the nonmoving party as true, the trial court erred by finding, beyond doubt, that the plaintiffs could prove no set of facts in support of their claim that would entitle them to relief.*



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**110103** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
THOMAS NIEBERDING, ET AL. v PAUL BARRANTE, ET AL.

Affirmed.

Mary J. Boyle, A.J., Sean C. Gallagher, J., and Larry A. Jones, Sr., J., concur.

**KEY WORDS:** *summary judgment; Civ.R. 56; residential property disclosure form; seawall; fraud; material defect; caveat emptor; “as is” clause; Ohio’s Consumer Sales Practices Act.*

*The trial court did not err in granting the sellers’ and the realtors’ motions for summary judgment. The holes in the property’s seawall were not material defects, and the sellers did not commit fraud by failing to disclose them. The buyers’ claims were also barred by the doctrine of caveat emptor and the “as is” clause in the purchase agreement. The buyers’ claims against the realtors for violations of the Ohio Consumer Sales Practices Act lack merit because the Act does not apply to pure real estate transactions.*

**110364** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE J.J., ET AL.

Affirmed.

Lisa B. Forbes, J., Larry A. Jones, Sr., P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Permanent custody, best interest of the children, clear and convincing evidence.*

*Juvenile court’s decision to terminate Mother’s parental rights and award custody of the children to the agency is supported by clear and convincing evidence in the record. Specifically, there is overwhelming evidence that Mother’s cognitive delays resulted in her not appreciating the severity of her children’s special needs and not being able to properly provide for her children’s basic needs.*