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Court of Appeals, Eighth Appellate District

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May 23, 2019

105769	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JEIMIL HUNT			

Affirmed. Decision en banc.

Sean C. Gallagher, J.; Mary Eileen Kilbane, A.J., Patricia Ann Blackmon, Mary J. Boyle, Frank D. Celebrezze, Jr., Eileen A. Gallagher, Eileen T. Gallagher, Raymond C. Headen, Larry A. Jones, Sr., Kathleen Ann Keough, Anita Laster Mays, and Michelle J. Sheehan, JJ., concur.

KEY WORDS: *En banc; guilty plea; capital case; delayed appeal; unavailable transcript; settling the record; consequences of nonproduction; presumption of regularity.*

The original panel decision is vacated. Under State v. Green, 81 Ohio St.3d 100, 105, 1998-Ohio-454, 689 N.E.2d 556, the three-judge panel must hear evidence in order to determine whether the accused is guilty of aggravated murder after taking a guilty plea. In addition, in a delayed appeal, and one in which the record is not kept beyond the period prescribed by R.C. 2301.20, the defendant is considered to be "at fault" for nonproduction of the record.

105981	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JAMES AUSTIN			

Affirmed.

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

KEY WORDS: *Postrelease control; plea agreement; guilty; sentence; Crim.R. 11; prejudice; substantial compliance; breach; maximum penalty; nature of the charges; voluntary; knowing; intelligent.*

Defendant's guilty pleas were knowingly, intelligently, and voluntarily made. The trial court substantially complied with the nonconstitutional requirements of Crim.R. 11(C)(2)(a). The record does not support the defendant's position that the trial court's imposition of postrelease control breached a term of his plea agreement with the state.

107094	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
DEBRA K. LACEY v LENOX CREEK CONDOMINIUM ASSOCIATION, ET AL.			

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Affirmed.

Anita Laster Mays, P.J., Eileen A. Gallagher, J., and Michelle J. Sheehan, J., concur.

KEY WORDS: *Ohio Condominium Act; R.C. Chapter 5311; business invitee; negligence; premises liability; open-and-obvious doctrine; attendant circumstances; condominium association; R.C. 5311.08(M); managing agent liability.*

Summary judgment was properly granted in favor of appellees condominium owners association and the condominium managing agent based on the open-and-obvious doctrine. Appellant failed to establish that appellees breached a duty of care to appellant. Appellant admitted that her attention was averted when she tripped and fell due to a pothole. The condominium's managing agent was not an independent contractor and was thus entitled to invoke the open-and-obvious defense.

107117	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MICHAEL WILLIAMSON			
107162	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MICHAEL WILLIAMSON			
107916	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v MICHAEL WILLIAMSON			

Affirmed.

Patricia Ann Blackmon, P.J., Frank D. Celebrezze, Jr., J., and Eileen A. Gallagher, J., concur.

KEY WORDS: *Crim.R. 33; motion for a new trial; petition for postconviction relief.*

Trial court properly denied motion for leave to file a motion for a new trial where Williamson's "newly discovered evidence" was considered and rejected in direct appeal; trial court properly denied successive petition for postconviction relief where claim was untimely and did not entitle him to relief.

107231	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ANTHONY J. HAYNESWORTH			

Reversed; conviction vacated.

Mary Eileen Kilbane, A.J., Eileen A. Gallagher, J., and Michelle J. Sheehan, J., concur.

KEY WORDS: *Motion to suppress; fourth amendment; citizen's consensual encounter; investigative stop or Terry stop; and anonymous tip.*

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Judgment reversed and conviction vacated. The trial court erred when it denied defendant's motion to suppress when the facts demonstrate that the defendant felt he could not have declined to engage in the interaction with the police and proceed on his way to his intended destination and the officers did not possess a reasonable and articulable suspicion of criminal activity, before initiating a Terry stop.

107315	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v THOMAS HOSKIN			

Affirmed.

Mary J. Boyle, P.J., Kathleen Ann Keough, J., and Raymond C. Headen, J., concur.

KEY WORDS: R.C. 2911.02(A)(3); robbery: sufficiency of the evidence; manifest weight; Evid.R. 901; Crim.R. 16; due process.

The defendant's robbery conviction was supported by sufficient evidence and was not against the manifest weight of the evidence. The trial court properly permitted the state to submit the officer's body camera recording of a hotel's surveillance footage into evidence. The officer's testimony satisfied the parameters of Evid.R. 901. Finally, the state's failure to preserve the actual surveillance footage did not violate the defendant's due process rights or Crim.R. 16.

107344	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
JAMES E. PIETRANGELO, II v CORRINNE HUDSON			

Affirmed.

Eileen A. Gallagher, J., Sean C. Gallagher, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: R.C. 2317.02; Civ.R. 26; physician-patient privilege; discovery; medical records; medical authorization; causally or historically related; record on appeal.

Where the record on appeal fails to contain information required to decide an assignment of error, the appellant fails to meet his burden of showing an error. Where the record does not contain the authorizations in question or any basis to conclude that they will cause impermissible production of information, the bare assertion that a court order to sign medical authorizations is overbroad is insufficient to establish an error on appeal.

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107359	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
MONTEFIORE HOME v FAYE FIELDS			

Reversed and remanded.

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

KEY WORDS: *Civ.R. 56; summary judgment; initial burden.*

Summary judgment is appropriate where the evidence, properly submitted, shows that there is no genuine dispute as to any material fact that the moving party is entitled to judgment as a matter of law. Where the defendant moves for summary judgment on the plaintiff's claims, but fails to meet her initial burden of identifying specific facts in the record that demonstrate she was entitled to summary judgment, the trial court erred by granting her motion. Summary judgment is not appropriate when the moving party fails to inform the trial court of the basis for its motion and identify the portions of the record demonstrating the absence of a genuine issue of fact as to a material element of the nonmoving party's claim.

107422	CLEVELAND MUNI.	G	CIVIL MUNI. & CITY
CITY OF CLEVELAND v CAPITALSOURCE BANK, FBO AEON FINANCIAL LLC, ET AL.			

Affirmed.

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

KEY WORDS: *Titled owner; security interest; "FBO" or "for the benefit of"; deed; foreclosure; nuisance; abatement.*

Judgment affirmed. Summary judgment in favor of the City was proper. Defendant was liable to the City for costs it incurred for the nuisance abatement of four properties. CapitalSource Bank, which is now known as PacWest, is considered an owner under C.C.O. 3103.09(k)(2) because they have a legal or equitable interest in the properties.

107492	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
CRYSTAL HESTER v CASE WESTERN RESERVE UNIVERSITY			

Affirmed.

Eileen A. Gallagher, J., Patricia Ann Blackmon, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Civ.R. 56; R.C. 2305.11; R.C. 2305.09; summary*

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judgment; defamation; tortious interference; statute of limitations.

Summary judgment is appropriate for the defendant on plaintiff's defamation claim where the undisputed evidence shows that the plaintiff failed to bring the claim within the one-year statute of limitations. Plaintiff's tortious interference claim fails where it was based on the same alleged conduct as her time-barred defamation claim.

107498 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
FERENC VUCSKO, ET AL. v CLEVELAND UROLOGY ASSOCIATES INC., ET AL.

Reversed and remanded.

Sean C. Gallagher, P.J., Frank D. Celebrezze, Jr., J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Summary judgment; medical claim; R.C. 2305.113(C); statute of repose; R.C. 2305.113(D)(2); exception; foreign object; mesh; hernia; sound medical reasons; genuine issues; circumstances; independent negligence.

Trial court's decision to grant summary judgment in favor of defendants-appellees upon finding that plaintiffs-appellants' claims were barred by the statute of repose under R.C. 2305.113(C) and that the foreign-object exception set forth under R.C. 2305.113(D)(2) did not apply was reversed. Several factual issues remained in dispute over whether mesh allegedly used during a hernia surgery was a foreign object under the circumstances presented. Additionally, summary judgment was not warranted on other claims presented.

107539 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
KARY MYLES v RAYCOM MEDIA, INC., ET AL.

Affirmed.

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

KEY WORDS: Civ.R. 56/summary judgment.

Where the trial court determined that the news reports were not defamatory, appellant failed to establish a claim for intentional infliction of emotional distress. The trial court's granting appellee's motion for summary judgment was proper.

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107552	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JUSTIN LEWIS			

Affirmed.

Michelle J. Sheehan, J., Eileen T. Gallagher, P.J., and Raymond C. Headen, J., concur.

KEY WORDS: *Guilty plea; Crim.R. 11 plea colloquy; right to a bench trial.*

Appellant claims his guilty plea was invalid because the trial court did not advise him that he could choose to be tried in a bench trial. Appellant's claim lacks merit as it has been well settled in Ohio that the lack of advisement from the trial court regarding a defendant's option to be tried without a jury does not invalidate an otherwise knowing, intelligent, and voluntary plea.

107581	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JABRELLE ALLEN			

Affirmed.

Patricia Ann Blackmon, P.J., Frank D. Celebrezze, Jr., J., and Eileen A. Gallagher, J., concur.

KEY WORDS: *Theft; sufficiency of the evidence; manifest weight of the evidence; ineffective assistance of counsel.*

Defendant's theft conviction affirmed. Victim's testimony was sufficient for conviction. Defendant's testimony that he did not know his friend was going to steal the cell phone did not render conviction against the weight of the evidence.

107603	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
JEREMY SHADD v CLEVELAND CIVIL SERVICE COMMISSION, ET AL.			

Affirmed.

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

KEY WORDS: *Civil service commission; R.C. 124.34; R.C. 119.12(I); R.C. 2506.01; R.C. 2506.02; just cause.*

The common pleas court's decision is affirmed. The common pleas court did not abuse its discretion when it construed the commission's brief in opposition as motion for leave to file an untimely record and subsequently granted leave to the commission. Because appellant filed his notice of appeal with the common pleas court "pursuant to R.C. 119.12 and R.C. 124.34 and,

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alternatively, R.C. 2506.01,” the common pleas court did not abuse its discretion in granting the commission leave to file an untimely record because the commission believed it had 40 days to file the record under R.C. 2506.02. Further, based on our limited scope of review, the record before us demonstrates that the common pleas court did not abuse its discretion in affirming the commission’s decision to uphold the city’s termination of appellant. The city established by reliable, probative, and substantial evidence that appellant created a major safety hazard when he jumped on a front-end loader while it was running, with several people standing near it. Appellant also failed to follow his supervisor’s instructions by (1) not reporting to his job site, (2) working in the yard and taking over another employee’s job, and (3) continuing to load trucks after his supervisor told him to stop.

107624	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
DANIEL HALL v CITY OF ROCKY RIVER, ET AL.			

Affirmed.

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

KEY WORDS: *Exhaustion of administrative remedies.*

The exhaustion of administrative remedies doctrine requires that where an administrative remedy is available, relief must be sought by exhausting the remedy before a court will act.

Because Hall did not avail himself of the total administrative process, before seeking court intervention, the trial court lacked subject matter jurisdiction. As a result, the trial court was without power to grant the requested relief and thus, the trial court did not err when it granted summary judgment to the City.

107632	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JONATHAN ALBRIGHT			

Affirmed.

Eileen A. Gallagher, J., Eileen T. Gallagher, P.J., and Raymond C. Headen, J., concur.

KEY WORDS: *Crim. R. 11(C)(2); knowing, intelligent and voluntary guilty pleas; agreed aggregate sentencing range; allied offenses of similar import; R.C. 2941.25(A); defense counsel’s estimation of sentence; Alford plea; R.C. 2953.08(D)(1); sentence authorized by law; waiver; self-defense.*

Defendant’s guilty pleas were not unknowing, unintelligent or involuntary due to trial court’s failure to advise defendant regarding

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the possible merger of offenses for sentencing. At time of his guilty pleas, defendant was aware of, and understood that, as part of plea agreement, there would be no merger of offenses and that defendant would receive an aggregate sentence in an agreed range for the offenses to which he pled guilty. Defendant's claim that he was "misled" into entering his guilty pleas by his counsel's pretrial statement regarding what defendant's aggregate sentence might be was unsupported by the record; defense counsel's statement was, at most, a good faith estimate of his potential sentence and related to the state's pretrial plea offer, not the plea offer defendant accepted in the middle of trial. Defendant's guilty pleas were not Alford pleas; defendant did not state his innocence on the record when entering his guilty pleas. Defendant waived the application of R.C. 2941.25(A), and his sentences were not subject to review where he agreed, as part of the plea agreement, that offenses would not merge for sentencing. By pleading guilty, defendant waived his right to claim that his actions were in self-defense.

107634	CLEVELAND MUNI.	C	CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v MARCIA CLARK			

Affirmed.

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

KEY WORDS: *Dog nuisance statute.*

The statute imposes strict liability upon the owner, keeper, or harbinger of a dog for any injury, death, or loss to person or property that is caused by the dog unless the injured individual was trespassing or committing a criminal offense other than a minor misdemeanor on the property. As a result, and contrary to Clark's present assertions, no mens rea is required.

107641	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v BRETT MORRIS			

Affirmed.

Patricia Ann Blackmon, P.J., Frank D. Celebrezze, Jr., J., and Eileen A. Gallagher, J., concur.

KEY WORDS: *Felony sentencing.*

Defendant's sentence affirmed. Sentence was within statutory range and was not contrary to law. Court considered all required factors and the record supports the court's findings.

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107655	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JESSIE MARCH			

Reversed, vacated, and remanded.

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

KEY WORDS: *Having weapons while under disability, R.C. 2923.13(A)(1), fugitive from justice, Crim.R. 29, sufficiency.*

Following the Second District's definition in State v. Cherry, 171 Ohio App.3d 375, 2007-Ohio-2133, 870 N.E.2d 808 (2d Dist.), we define "fugitive from justice" in R.C. 2923.13(A)(1) as a person who "(1) [has] incurred guilt - i.e., be guilty of having committed some offense; (2) [was] aware that he is being sought by police in connection with that offense; and (3) being aware that he is being sought by police, [took] some affirmative action to elude detection by police." Given that definition, there was insufficient evidence to establish that the defendant was a "fugitive from justice" because the state presented no evidence establishing that the defendant took an "affirmative action to elude detection by police[.]" such as leaving the jurisdiction or fleeing from the police when they showed up at his residence.

107669	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
PURUSHEALTH LLC v DAY KETTERER LLP, ET AL.			

Affirmed.

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

KEY WORDS: *Motion to dismiss for failure to state a claim upon which relief can be granted, legal malpractice, breach of fiduciary duty, Civ.R. 15, R.C. 2305.19.*

Because the appellant failed to comply with Civ.R. 15(D), neither Civ.R. 15(C)'s relation-back provisions nor R.C. 2305.19, the savings statute, apply, and the appellant's legal malpractice claim is barred by the statute of limitations against the individual-attorney defendants. The appellant's claim for breach of fiduciary duty against the individual-attorney defendants is subsumed into its claim for legal malpractice, which is barred under the statute of limitations. The appellant's claim for breach of fiduciary duty against the law firm defendant was properly dismissed because the claim was actually one for legal malpractice, and a law firm can only be held liable for malpractice when one or more of its attorneys is also liable.

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107733	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
GRAND ARCADE CONDOMINIUM OWNERS' ASSOCIATION, INC. v GA 130, LLC, ET AL.			

Reversed and remanded.

Raymond C. Headen, J., Anita Laster Mays, P.J., and Michelle J. Sheehan, J., concur.

KEY WORDS: *Foreclosure; mortgage; condominium association; R.C. 5311.18; abuse of discretion; priority; motion to appoint a receiver.*

The trial court's denial of the condominium owners' association's motion to appoint a receiver was an abuse of discretion where the association was entitled to a receivership upon commencing a foreclosure action pursuant to R.C. 5311.18. A first mortgage lienholder's priority does not negate this statutory entitlement.

107887	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JERMONE J. CARRINGTON			

Affirmed.

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

KEY WORDS: *Affirmed; final appealable order; firearm specifications; nunc pro tunc; void sentence.*

The entry of a nunc pro tunc order upon remand does not create a new right to appeal, and a trial court has no jurisdiction to correct a void sentence that has been served.

107907	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v WILLIE S. BURRAGE			

Affirmed.

Michelle J. Sheehan, J., Mary J. Boyle, P.J., and Sean C. Gallagher, J., concur.

KEY WORDS: *Res judicata; void sentence; final appealable order; R.C. 2505.02; Crim.R. 32(C); judgment of conviction; fact of conviction; guilty plea.*

Where the court sentenced the appellant in 1992 in accordance with the sentencing statutes in effect at the time of sentencing, the sentence was authorized by law and not void. Because appellant could have but did not challenge his sentence upon direct appeal, res judicata bars his present claim. Additionally, the trial court's

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sentencing entry includes all R.C. 2505.02 requirements. The appellant's guilty plea itself satisfied the "fact of conviction" requirement. The trial court's sentencing entry is therefore a final appealable order.

108059	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
ROBERT T. RODGERS v CITY OF ROCKY RIVER, ET AL.			

Affirmed.

Kathleen Ann Keough, J., Mary Eileen Kilbane, A.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Civ.R. 60(B); excusable neglect; local rules; meritorious defense; political subdivision; workers' compensation; R.C. 4123.512(F).

Trial court did not abuse its discretion in denying the city's Civ.R. 60(B) motion for relief from judgment because the city failed to show that its failure to respond to the motion was excusable neglect. The city admitted it timely received the motion, but assumed it had longer to respond under the Civil Rules of Procedure. The trial court's local rules establish a shorter time frame to respond, which the city did not recognize. The city did not establish that it had a meritorious defense to present because pursuant to R.C. 4123.512(F), the contesting employer is responsible for attorney fees and costs if the employee's participation in the fund is established; the section does not differentiate between public and private employers.