

**R E L E A S E**

**DECEMBER 21, 2001**

**ASHTABULA**

2000-A-0043 WAYNE NIEMINEN, et al., Plaintiffs-Appellants v. CLAUDIA M. LEEK, Defendant-Appellee.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (O'NEILL) (GRENDALL)

**CIVIL/EVIDENCE:**

In order to set aside a jury award as against the manifest weight of the evidence, a reviewing court must determine that the jury verdict is so disproportionate as to shock reasonable sensibilities and indicates that the jury lost its way in assessing compensatory damages.

Under Ohio law, outside of the arena of physicians testifying as to the standard of care for a specialist in a medical malpractice case, any doctor licensed to practice medicine is competent to testify on medical issues and the doctor's specialty bears upon the weight, not the admissibility, of the evidence.

2001-A-0042 STATE OF OHIO, Plaintiff-Appellee v. TERANCE LAMONT CLARK, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [GRENDALL] (FORD) (NADER)

**CRIMINAL/SENTENCING:**

A trial court is not required to accord a prisoner duplicate credit for each day that prisoner spent in detention just because he or she is convicted of multiple offenses whose sentences are ordered to run consecutively.

**GEAUGA**

2000-G-2311,  
2000-G-2312, and

2000-G-2313 MARCIA A. MAYER, et al., Plaintiffs-Appellees/Cross-Appellants v. MILADEN MEDANCIC, et al., Defendants-Appellants, A-CUSTOM BUILDERS, INC., et al., Defendant-Appellant/Cross-Appellee.

Judgment affirmed in part; reversed in part, and remanded. Grendell, J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [CHRISTLEY] (FORD) (GRENDSELL)

**JUDGMENTS:**

The right of setting off judgments is permitted only where it will not infringe on another right of equal grade.

**PREJUDGMENT INTEREST:**

The underlying purpose of prejudgment interest involving breach of contract claims is to make the aggrieved party whole. In order to make the aggrieved party whole, the party is compensated for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court.

2001-G-2378 THOMAS EDWARD HOLSCHUH, II, Plaintiff-Appellant v. MONICA MELISSA HOLSCHUH, Defendant-Appellee.

Upon the request of Appellant, the appeal is hereby dismissed. See Judgment Entry.

**LAKE**

97-L-142 STATE OF OHIO, Plaintiff-Appellee v. MICHAEL E. KOCH, Defendant-Appellant.

Judgment affirmed in part; reversed and remanded in part. Christley, J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [NADER] (FORD) (CHRISTLEY)

**CRIMINAL LAW:**

At a sexual predator determination hearing, an offender has the right to be made aware of prejudicial evidence, contained in a victim impact statement, upon which the court intends to rely, within the spirit of the rules. Thus, when a victim impact statement does not contain new material facts, the trial court does not abuse its discretion in refusing to allow the offender to view it.

Pursuant to R.C. 2929.14(B), a first time offender shall be sentenced to the shortest prison term, unless the court states on the record that it would demean the seriousness of the offender's conduct or would not adequately protect the public from future crime.

Additionally, R.C. 2929.14(C) provides the maximum sentence shall be imposed only upon the offenders enumerated within the statute. Further, pursuant to R.C. 2929.19(B)(2), the trial court must express its reasons for imposing the maximum sentence.

97-L-254      STATE OF OHIO, Plaintiff-Appellee v. DAVID L. SWICK, Defendant-Appellant.

Judgment affirmed in part; reversed in part and remanded. See Opinion and Judgment Entry. [CHRISTLEY] (FORD) (NADER)

**POST-RELEASE CONTROL:**

Because post-release control is part of the original sentence, a violation of a condition of post-release control, and any subsequent sanction, is part of the punishment for the original criminal conduct.

98-L-049      STATE OF OHIO, Plaintiff-Appellee v. GEORGE SWANK, Defendant-Appellant.

Judgment affirmed in part; reversed in part and remanded. See Opinion and Judgment Entry. [CHRISTLEY] (FORD) (NADER)

**CRIMINAL LAW/CONSTITUTIONAL:**

R.C. 2967.11, Ohio's bad time statute, is unconstitutional as it violates the separation of powers doctrine.

The imposition of post-release control, pursuant to R.C. 2967.28, after a defendant has served his full sentence does not violate his right to be free from double jeopardy. Rather, the imposition of post-release control is part of the original sentence.

**CRIMINAL LAW/SEXUAL PREDATOR HEARING:**

At a sexual predator hearing, a defendant has the opportunity to attack the evidence that contains statements not subject to cross-examination by furnishing his own evidence or presenting his own experts and/or witnesses, including himself, and those people who produced the documentary evidence.

It is within the trial court's discretion whether to make a victim impact statement available to a defendant.

99-L-114      STATE OF OHIO, Plaintiff-Appellee v. TYRON R. WOTRING, Defendant-Appellant.

Judgment reversed and remanded. Grendell, J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [O'NEILL] (FORD) (GRENDSELL)

**INEFFECTIVE ASSISTANCE OF COUNSEL:**

Counsel's representation fell below an objective standard of reasonable representation when counsel failed to request additional medical evaluations to determine if his client qualified for the defense of not guilty by reason of insanity. This was because of the initial findings of medical experts: that the defendant was sane when he killed his roommate by beating him with a fire extinguisher, but was insane when he cut the victim's brain out of his head and froze it in the hope that the victim could be cloned, were inconsistent. This made the defendant's guilty plea involuntary, because he did not have the possibility of using the not guilty by reason of insanity defense, which was his initial plea.

2000-L-020 MARY JANE COLE, ADMINISTRATRIX OF THE ESTATE OF JoANNE C. KOPAITICH, DECEASED, et al., Plaintiffs-Appellants v. PINE RIDGE APARTMENTS COMPANY II, et al., Defendants-Appellees.

Judgment affirmed. Grendell, J., dissents with Concurring/Dissenting Opinion. See Opinions and Judgment Entry. [FORD] (NADER) (GRENDSELL)

**WRONGFUL DEATH:**

For a wrongful death action based on negligence, a plaintiff must show there was a duty owed to the decedent, a breach, and proximate cause between the breach of duty and death. The existence of a duty depends on the injury's foreseeability, and the test is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. A security company's duty to a person injured by criminal activity on the premises depends on the terms of the security company's contract with the owner of the premises.

2000-L-049 STATE OF OHIO, Plaintiff-Appellee v. TYRONE J. LAVENDER, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (O'NEILL) (CHRISTLEY)

**CRIMINAL LAW/PLEAS:**

In order to demonstrate ineffective assistance of counsel in the context of a guilty plea conviction, the defendant must demonstrate that the trial counsel's performance was deficient and the defendant was prejudiced by the deficient performance in that it precluded the defendant from entering the plea knowingly and voluntarily.

Crim.R.11(C)(2) creates two sets of requirements for a court to accept a guilty plea in a felony case. The first set is constitutional and must be strictly complied with. The second set is nonconstitutional and requires substantial compliance.

2000-L-119 WILLIAM E. ROBINSON, Plaintiff-Appellant v. NATIONWIDE MUTUAL INSURANCE COMPANIES, et al., Defendants-Appellees.

Judgment affirmed. O'Neill, P.J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [NADER] (O'NEILL) (GRENDALL)

**EMPLOYMENT RELATIONS:**

Age discrimination may be proved directly or indirectly. To establish a prima facie case of age discrimination directly, an employee must show that an employer was more likely than not motivated by discriminatory intent. Alternatively, such a claim can be proven indirectly by showing an employee was: (1) a member of a statutorily-protected class; (2) discharged; (3) qualified for the position; and (4), replaced by, or the discharged permitted the retention of, a person not belonging to the protected class.

An at-will employee discharged in violation of public policy may bring a separate age discrimination suit based on public policy. However, the employee still must fully comply with the statute.

Additionally, regardless of whether the employee has fully complied with the statute, a wrongful discharge suit can be based on a source of public policy separate from the statute.

2000-L-130 STATE OF OHIO, Plaintiff-Appellant v. MERLE A. FORD, Defendant-Appellee.

Judgment affirmed. See Opinion and Judgment Entry. [O'NEILL] (FORD) (CHRISTLEY)

**CRIMINAL/SEARCH & SEIZURE:**

In order to conduct an investigative detention of an individual, an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant seizing the person. If, upon the initial investigation, reasonable suspicion is dispelled, the person should be free to continue on their way without having to produce their driver's license or identification, absent some specific and articulable facts establishing that the further detention is reasonable. Officers may not conduct what, in the absence

of reasonable suspicion, amounts to random detentions of individuals for the purposes of conducting identity checks.

2000-L-211 GENERAL ELECTRIC COMPANY, LIGHTING DIVISION, Plaintiff-Appellant v. AMERICAN MECHANICAL CONTRACTORS CORP., Defendant-Appellee.

Judgment affirmed. O'Neill, P.J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [NADER] (O'NEILL) (CHRISTLEY)

**MISCELLANEOUS:**

A fixture is an item of property which was a chattel but has been so affixed to the realty for a combined functional use that it has become part and parcel of it.

Such a determination is made by applying the following: (1) whether there was actual annexation to the realty; (2) the purpose for which that part of the fixture was annexed to the realty; and, (3) whether the party making the annexation intended to make a permanent accession to the freehold.

2000-L-212 STATE OF OHIO, Plaintiff-Appellee v. THOMAS S. HARRISON, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [O'NEILL] (CHRISTLEY) (NADER)

**CRIMINAL/EVIDENCE:**

To obtain a conviction for DUI under R.C. 4511.19(A)(1), it is not necessary for the state to present evidence constituting a chemical test establishing the presence of intoxicants in the defendant.

2001-L-013 IN THE MATTER OF: THE GUARDIANSHIP OF EDNA MAE OWEN

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (FORD) (GRENDLELL)

**PROBATE:**

Pursuant to R.C. 2111.121, a person may nominate in writing another person to be the guardian of the nominator's person, estate, or both; however, the probate court shall appoint such named person only if that person is competent, suitable, and willing to accept the appointment.

In the absence of an express nomination, an appellate court's review is limited to a determination of whether the probate court abused its discretion.

2001-L-214 STATE OF OHIO, Plaintiff-Appellee v. FRANKLIN J. TAYLOR, Defendant-Appellant.

Upon the request of Appellant, the appeal is hereby dismissed. See Judgment Entry.

**PORTAGE**

98-P-0131 MIDWEST FIREWORKS MFG. CO., INC., Appellant v. DEERFIELD TOWNSHIP BOARD OF ZONING APPEALS, et al., Appellees.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (O'NEILL) (FORD)

**ZONING:**

In an R.C. 2506.04 appeal, a reviewing court is required to affirm the decision of the court of common pleas, unless it finds, as a matter of the law, that the decision is not supported by a preponderance of reliable, probative and substantial evidence.

2000-P-0037 STATE OF OHIO, Plaintiff-Appellee v. ANTHONY M. DEFABIO, Defendant-Appellant.

Judgment affirmed. Ford, P.J., dissents with Concurring/Dissenting Opinion. See Opinions and Judgment Entry. [GRENDALL] (FORD) (CHRISTLEY)

**CRIMINAL LAW/SENTENCING:**

Trial court need not give its reasons for determining that a minimum sentence will demean the seriousness of the offender's conduct or will not protect the public from future crime. Trial court sufficiently explained its reasoning for finding appellant committed the worst form of the offense of involuntary manslaughter. Trial court finding appellant was likely to commit an offense again is supported by the record.

2000-P-0073 BRUCE MESSINA, Plaintiff-Appellee v. LISA SCHNEIDER, Defendant-Appellant.

Judgment reversed and remanded. See Opinion Upon Reconsideration and Judgment Entry. [NADER] (O'NEILL) (GRENDALL)

**DOMESTIC RELATIONS/SPOUSAL SUPPORT:**

Under R.C. 3105.18(H), the trial court must: (1) ascertain whether the other party has the ability to pay the requesting party's attorney fees; and (2) consider whether either party will be prevented from fully litigating his or her rights and adequately protecting his or her interests if it does not award reasonable attorney fees. Additionally, the court must consider the factors enumerated in R.C. 3105.18(B).

When making spousal support awards, R.C. 3105.18 requires that the trial court review the statutory factors in R.C. 3105.18(B) that support such an order and indicate the

basis for awarding spousal support in sufficient detail to facilitate adequate appellate review.

2001-P-0055 STATE OF OHIO, Plaintiff-Appellee v. MATTHEW D. BROWN, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [CHRISTLEY] (NADER) (GRENDALL)

**CRIMINAL LAW/PLEAS:**

A plea of guilty operates as a waiver of any error of the trial court concerning the suppression of evidence.

**TRUMBULL**

97-T-0109 STATE OF OHIO, Plaintiff-Appellee v. ROBERT D. ESHBAUGH, JR., Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (FORD) (GRENDALL)

**CRIMINAL LAW/PLEAS:**

The Supreme Court of Ohio has held that the registration requirements of R.C. 2950 are not punishment. Therefore, in this case, the trial court was under no obligation to inform a defendant of the registration requirements when he entered his plea.

2000-T-0033 STATE OF OHIO, Plaintiff-Appellee v. GEORGE FOSTER, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (FORD) (VUKOVICH-7<sup>TH</sup>)

(Vukovich, J., Seventh Appellate District, sitting by assignment.)

**CRIMINAL LAW:**

When reviewing *Miranda* warnings, the inquiry is whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.

Further, if the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. But, if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect reinitiates conversation.

In deciding whether a defendant's confession was involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length,



intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.

2000-T-0036 MICHAEL IBERIS, Plaintiff-Appellant v. MAHONING VALLEY SANITARY DISTRICT, et al., Defendants-Appellees.

Judgment affirmed in part; reversed in part, and remanded. See Opinion and Judgment Entry. [GRENDALL] (O'NEILL) (CHRISTLEY)

**CONTRACTS:**

A sanitary district, organized under R.C. Chapter 6115, can enter into an employment contract with an employee for the position of director as long as the contract recognizes the employee is at-will. The parties can provide for severance provisions in the contract.

**EMPLOYER/EMPLOYEE/EMPLOYMENT RELATIONS:**

Employee alleged sufficient facts in his complaint to bring wrongful discharge claim. Employee does not have to succinctly articulate the public policy at issue in the complaint as long as the court can infer such from the pleadings.

2000-T-0086 STATE OF OHIO, Plaintiff-Appellee v. TOM DAMA, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [NADER] (FORD) (VUKOVICH-7<sup>TH</sup>)

(Vukovich, J., Seventh Appellate District, sitting by assignment.)

**CRIMINAL LAW:**

A trial court may find an offender to be a sexual predator even if only one or two of the factors enumerated in R.C. 2950.09(B)(2) are present, so long as the totality of the relevant circumstances provides clear and convincing evidence that the offender is likely to commit a future sexually-oriented offense.

2000-T-0104 STATE OF OHIO, Plaintiff-Appellee v. RODERICK DAVIE, Defendant-Appellant.

Judgment affirmed. See Opinion and Judgment Entry. [O'NEILL] (FORD) (GRENDALL)

**CRIMINAL LAW/CONSTITUTIONAL:**

Failure to raise at the trial court level the issue of the constitutionality of a statute or its application constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal. However, an appellate court retains

the discretion to review the constitutionality of statutes for the first time on appeal.

R.C. 2953.23(A)(2), as currently enacted, does not violate the Supremacy Clause of the United States Constitution, the Doctrine of Separation of Powers, nor the “due course of law” or “open courts” provisions of the Ohio Constitution.

**CRIMINAL LAW/OTHER HEARINGS:**

The criteria set forth in R.C. 2953.23 are mandatory, and a trial court does not have the discretion to consider a second, successive petition for post-conviction relief that does not meet those requirements.

2000-T-0138 STATE OF OHIO, Plaintiff-Appellee v. DAVID LOWE, Defendant-Appellant.

Judgment reversed and remanded. Grendell, J., dissents. See Opinion and Judgment Entry. [FORD] (NADER) (GRENDLELL)

**CRIMINAL LAW/ARREST:**

Police must administer field sobriety tests in strict compliance with standardized procedures in order for those tests to serve as a significant basis of probable cause for an arrest for driving under the influence.

**INEFFECTIVE ASSISTANCE OF COUNSEL:**

A failure on the part of trial counsel to move to suppress field sobriety tests that were not conducted in strict compliance with standardized procedures constituted ineffective assistance of counsel when those field sobriety tests constituted a significant basis of probable cause for an arrest for driving under the influence.

2000-T-0144 IN THE MATTER OF: THE ADOPTION OF LAUREN MARIE TUCKER

Judgment affirmed. Ford, J., concurs in judgment only with Concurring Opinion. See Opinion and Judgment Entry. [GRENDLELL] (O'NEILL) (FORD)

**PROBATE:**

No contact orders issued by domestic relations court and criminal court did not constitute justifiable reason for not communicating with child for a period of one year. Appellant pled guilty to sexually abusing the child and agreed to the provision that he not contact his daughter for five years. Therefore, appellant willingly agreed to forgo

contact with his child for far more than the one-year period called for in R.C. 3107.07(A).

2001-T-0004 CYNTHIA DICLAUDIO, ADMINISTRATRIX OF THE ESTATE OF JOSHUA LANDIS, DECEASED, Plaintiff-Appellee v. PROGRESSIVE INSURANCE CO., Defendant-Appellant.

Judgment affirmed. Grendell, J., dissents with Dissenting Opinion. See Opinions and Judgment Entry. [CHRISTLEY] (NADER) (GRENDSELL)

**INSURANCE:**

The test to be applied in cases where an unidentified driver's negligence causes injury is the corroborative evidence test, which allows the claim to go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident.

2001-T-0016 and

2001-T-0017 STATE OF OHIO, Plaintiff-Appellant v. REGGIE L. POTTS, Defendant-Appellee.

Judgment reversed and remanded. See Opinion and Judgment Entry. [O'NEILL] (CHRISTLEY) (BATCHELDER-9<sup>TH</sup>)

(Batchelder, J., Ninth Appellate District, sitting by assignment.)

**CRIMINAL LAW/EXPUNGEMENT:**

Crimes occurring years apart and involving different facts and circumstances are not counted as the same and, thus, the person who commits them is not a first offender. Once it is demonstrated that the applicant is not a first offender, the court is deprived of jurisdiction to consider the attributes of the applicant and the expungement must be vacated.

2001-T-0102 MAACO AUTO PAINTING, Plaintiff-Appellee, v. GEORGE LUMPP, Defendant-Appellant.

Appeal dismissed. See Memorandum Opinion and Judgment Entry. [GRENDSELL] (FORD) (CHRISTLEY)

**APPELLATE PROCEDURE:**

A trial court judgment that bears a rubber stamp in lieu of a trial court judge's actual signature is not acceptable and is invalid for purposes of appeal.

2001-T-0104 LINDA J. KARLEN, Plaintiff-Appellant v. JOHN F. STEELE, M.D., et al., Defendants-Appellees.

Appeal dismissed. See Memorandum Opinion and Judgment Entry. [GRENDALL]  
(FORD) (CHRISTLEY)

**APPELLATE PROCEDURE:**

App.R. 4(A) requires that a notice of appeal be filed within thirty days of the later of entry of judgment or order appealed. An appeal filed beyond this time will be dismissed *sua sponte*. The filing of a motion for reconsideration in the trial court does not extend the time for filing a notice of appeal. Such a motion is a nullity, and a judgment denying the motion is not a final appealable order.