The Ohio Supreme Court: A Court at the Crossroads

By David J. Owsiany

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In 2000, then Justice Deborah Cook wrote the following passage in her opinion dissenting from the Ohio Supreme Court's majority decision in *DeRolph v. State II* invalidating for a second time Ohio's system for funding schools:

"I view this court's ill-conceived foray outside its legitimate role to be a most serious affront to individual freedom and democratic ideals. By not abiding by the American form of government, we invite a lessening of public trust in the court as an institution."[1]

Justice Cook's comment summarizes the concern that has surrounded the Ohio Supreme Court for nearly a decade. The Ohio Supreme Court has actively engaged in a series of usurpations of legislative authority in the areas of school funding, tort reform, and workers' compensation reform. The court has rewritten the uninsured/underinsured motorist statute from the bench in order to find insurer liability where neither the parties nor the General Assembly intended coverage, and the court has unilaterally misappropriated a punitive damages award.

In these cases and many others, a four-person majority of the Ohio Supreme Court disregarded the fundamental principle of separation of powers in order to make itself a super-legislature on certain public policy matters. Four members of the court effectively placed themselves above the other branches of government and the Ohio Constitution by abandoning their traditional role as neutral, independent arbiters who interpret the law.[2]

Changes to court personnel over the last two years have permitted the court to begin moving away from its activist past. With four seats on the court up for election in November 2004, however, it is unclear whether this new direction will continue.

I. The Ohio Supreme Court's Activism: 1995-2002

From 1995 to 2002, a consistent four-person majority (out of seven members) of the Ohio Supreme Court engaged in a series of deliberate usurpations of legislative authority that is inconsistent with the Ohio Constitution.

By substituting its own policy preferences for that of the legislature, the four- person majority, made up of Justices Paul Pfeifer, Andrew Douglas, Francis Sweeney, and Alice Robie Resnick, undermined a basic

1 *DeRolph v. State*, 89 Ohio St.3d 1, 58 (2000) (Cook, J., dissenting) [hereinafter *DeRolph II*].

2 *See* David J. Owsiany, *The General Assembly v. The Supreme Court: Who Makes Public Policy in Ohio?*, 32 U. TOL. L. REV. 549 (2001). *See also* Richard Finan & April Williams, *Government is a Three-legged Stool*, 32 U. TOL. L. REV. 517 (2001).

principle of constitutional law – the doctrine of separation of powers. The "gang of four" has blurred the lines between the legislative and judicial branches of government and essentially turned the court into a super-legislature on several major public policy issues in Ohio.[3]

During that time, a consistent three-person minority, made up of Chief Justice Thomas Moyer and Justices Deborah Cook and Evelyn Lundberg Stratton, issued dissenting opinions pointing out the majority's disregard for the constitutional doctrine of separation of powers.

School Funding

Pursuant to the Ohio Constitution, the General Assembly "shall make such provisions, by taxation, or otherwise, as…will secure a thorough and efficient system of common schools throughout the state."[4] Since 1997, the "gang of four" has utilized this clause to attempt to mandate from the bench a particular kind of public school system.

A majority of the Ohio Supreme Court has, on four separate occasions, struck down Ohio's system of school funding. In the first DeRolph v. State case in 1997, the activist majority gave the General Assembly one year to completely overhaul school funding to the court's satisfaction.[5] According to Justice Sweeney's majority opinion, it was "unthinkable" for the court to assert that the case "involves a nonjusticiable political question," rejecting the idea of leaving these policy matters in "the lap of the General Assembly."[6]

Chief Justice Moyer pointed out, in his dissenting opinion in *DeRolph I,* that "under our system of government, decisions such as imposing new taxes, allocating public revenues to competing uses, and formulating educational standards are not within the judiciary's authority."[7] Moyer concluded that the question of what is an appropriate level of funding for schools "is a question of quality that revolves around policy choices and value judgments constitutionally committed to the General Assembly."[8] Moyer highlighted the serious separation of powers questions involved in the school funding litigation when he quoted James Madison in Federalist Paper No. 47 that "were the power of judging joined with the legislative…the judge would then be a legislator."[9]

In 1998, the voters responded to *DeRolph I* by overwhelmingly rejecting a ballot proposal to raise the state sales tax by 1% to fund public schools in order to satisfy the court. The proposal lost in all of Ohio's 88 counties.[10]

In the 2000 *DeRolph v. State II* case, the same four-person majority (Justices Resnick, Sweeney, Pfeifer, and Douglas) again found Ohio's school funding system unconstitutional. After acknowledging the General Assembly's "good faith attempt" to fix the school funding system, Justice Resnick's majority opinion concluded "even more is required."[11]

In dissent, Chief Justice Moyer pointed out that despite recognizing that the "coequal executive and legislative branches of government have acted in good faith to comply with *DeRolph I*, the majority in effect claims veto power over policy determinations made by the General Assembly, thereby reserving to itself ultimate authority over public educational policy within the state."[12]

Justice Deborah Cook in her separate dissenting opinion in *DeRolph II,* drew upon the arguments of Capital University Law Professor David Mayer in analogizing the Ohio Constitution's "thorough and efficient" clause to the clause in the U.S. Constitution that empowers Congress to "provide for the common Defense."[13]

3 *New Job for Justice Cook?*, TOLEDO BLADE, May 15, 2001 (Editors note that they have dubbed Justices Alice Robie Resnick, Andrew Douglas, Paul Pfeifer, and Francis Sweeney as the "Gang of Four" for "their willingness to assume a legislative role in revising Ohio's school funding formula.").
4 OHIO CONST. art. VI, section 2.
5 *See DeRolph v. State,* 78 Ohio St.3d 193, 213 (1997). [hereinafter *DeRolph I*]
6 *Id.* at 198.
7 *Id.* at 270 (Moyer, C.J., dissenting).
8 *Id.* at 265 (Moyer, C.J., dissenting).
9 THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961). *See DeRolph I,* 78 Ohio St.3d at 265 (Moyer, C.J., dissenting).
10 *See School Tax Hammered: Issue II Goes Down Everywhere,* COLUMBUS DISPATCH, May 6, 1998.
11 *DeRolph II,* 89 Ohio St.3d at 35-36.
12 Id. at 49 (Moyer, C.J., dissenting).
13 U.S. CONST. art. I, section 8.

It would be absurd to imagine the federal courts striking down the federal budget because Congress did not, in the court's eyes, satisfy its obligation to appropriately provide for the "common Defense." This would be a clear intrusion by one branch of government into the prerogatives of another. In the school funding case, Justice Cook concluded that the majority of the Ohio Supreme Court had engaged in the same type of intrusion upon the General Assembly's authority to provide for public schools in Ohio.[14]

Moyer's attempt to create a solution to the school funding case failed. Within months of DeRolph III, the Ohio Supreme Court referred the case to a settlement conference, which ultimately failed as well.[19] In December of 2002, the "gang of four" reunited and declared the school funding system again to be unconstitutional in DeRolph v. State IV.[20]

Following *DeRolph II,* the General Assembly increased school funding by $1.4 billion per year in order to satisfy the court.[15] Nonetheless, in the 2001 *DeRolph v. State III* case, the court again struck down the system of school funding contending that the state was still not doing enough.[16]

This time the surprise majority consisted of two of the activists, Justices Pfeifer and Douglas, joined by Chief Justice Moyer and Justice Stratton. Moyer's opinion in *DeRolph III* stated that the four justices in the majority had reached a point where the "greater good" required them to recognize "the necessity of sacrificing" their own opinions "for the sake of harmony."[17] The majority laid out specific modifications it wanted the General Assembly to implement. Moyer concluded that the majority had "created the consensus that should terminate the role of this court" in the school funding matter.[18]

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From 1997 to 2002, the Ohio Supreme Court issued four separate major decisions affecting school funding in Ohio. During that period, the General Assembly was forced to consider various education expenditures and tax schemes to satisfy the court.

As Justice Cook wrote in her dissenting opinion in *DeRolph III*, it is beyond dispute that providing a thorough and efficient system of common schools in Ohio is "a noble and necessary endeavor." But, as Justice Cook pointed out, the same Constitution that directs the General Assembly to provide such a system also constrains the court's role within Ohio's governmental framework.[21]

For more than five years, the majority of the Ohio Supreme Court was at the center of the debate over education policy even though the Ohio Constitution gave the court no such authority. In the process, the court tied the General Assembly's hands when dealing with Ohio's fiscal and education policy issues.

14 *DeRolph II,* 89 Ohio St.3d at 57 (Cook J., dissenting) (citing David N. Mayer, *DeRolph School Funding Ruling Goes Against Bedrock Principles,* TOLEDO BLADE, Sept. 12, 1998, at A11.).
15 *See* Lee Leonard, *New Budget is Still Bigger than Last One,* COLUMBUS DISPATCH, May 4, 2001, at B1.
16 *DeRolph v. State,* 93 Ohio St.3d 309 (2001)[hereinafter *DeRolph III*]
17 *Id.* at 310 (quoting Thomas Jefferson).
18 *Id.* at 311.
19 *See DeRolph v. State,* 93 Ohio St.3d 628 (2001).
20 *DeRolph v. State* (*DeRolph IV*), 97 Ohio St.3d 434 (2002).
21 *DeRolph III,* 93 Ohio St.3d at 380 (Cook, J., dissenting).

Tort Reform

In 1996, the Ohio General Assembly enacted a broad tort reform statute that was signed into law by then Governor George Voinovich. The new law placed caps on non-economic and punitive damages. It reformed the collateral source rule so that juries could be made aware of various sources of compensation available to a personal injury plaintiff. The new law also moved Ohio's civil justice system from joint and several liability toward a system of proportionate liability so that in a case with multiple defendants, each defendant would only be responsible for the portion of the damages award attributable to his or her own fault.

Alternatively, unbalanced and overreaching tort laws can remove good products and services from the marketplace, discourage innovation, limit the supply of necessary medical services, result in loss of jobs, and unduly raise costs to consumers.[31] Accordingly, the policy decisions regarding the formulation of tort law have a significant impact on Ohio's economy, business environment, and consumer choices.

In the 1999 *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* case, the "gang of four" struck down the tort reform law based on two justifications: the one-subject rule and the doctrine of separation of powers.[22]

According to the majority in *Sheward,* the tort reform statute was too broad and encompassed too many different subjects in violation of the Ohio Constitution, which provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in the title."[23]

The majority ignored that the historical purpose of the one-subject rule was to operate on bills as they proceed through the legislative process before the General Assembly. Historically, enforcement of the one-subject rule has been a legislative prerogative.[24]

More recently, some Ohio courts have been willing to perform one-subject rule review of laws when they are passed in "manifestly gross and fraudulent violation" of the rule.[25] This review requires the court to sever offending provisions while leaving the rest of the statute intact.[26]

Even accepting that the court may have a role in enforcing the one-subject rule when legislation is passed in manifestly gross and flagrant violation of the rule, the tort reform statute is clearly related to one overall subject. Justice Stratton pointed out in her dissenting opinion that the majority ignored the fact that all of the provisions of the statute "have a common purpose of addressing the single subject of tort reform."[27]

Further, the majority did not even attempt to sever the allegedly offending provisions from those that were not in violation of the one-subject rule. The court merely reviewed seven provisions of the tort reform law's nearly one hundred provisions and then struck down the new law in its entirety.[28]

The majority also held that the tort reform statute "usurps judicial power in violation of the Ohio constitutional doctrine of separation of powers."[29] The Ohio Constitution does not, however, grant exclusive authority over tort law to the judiciary.

22 *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451 (1999).

23 OHIO CONST. art. II, section 15(D).

24 *See Pim v. Nicholson*, 6 Ohio St. 177 (Ohio 1856). *See also* John J. Kulewicz, *The History of the One-Subject Rule of the Oho Constitution,* 45 CLEV. ST. L. REV. 591 (1997).

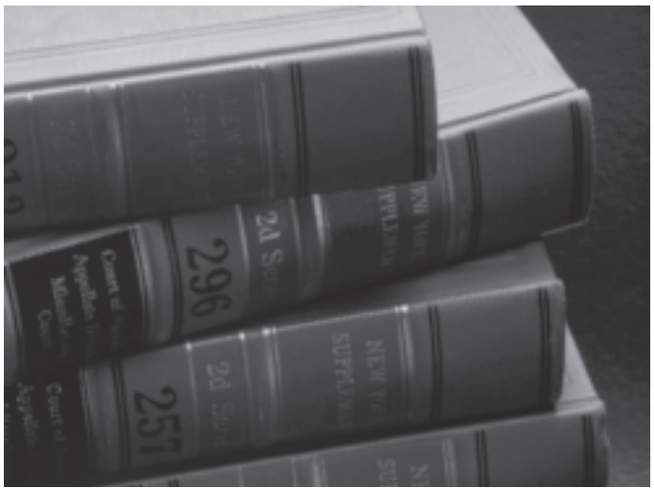
25 *See State ex rel. AFL-CIO v. Voinovich*, *69* Ohio St.3d 225, 229 (1994) (citation omitted). *See also State Tort Reform: Court Strikes Down State General Assembly's Tort Reform Initiative*, 113 HARV. L. REV. 804, 808 (2000) [hereinafter *State Tort Reform*].

26 *See State ex rel. Hinkle v. Franklin County Board of Elections*, 62 Ohio St.3d 145, 149 (1991).

27 *See Sheward*, 86 Ohio St.3d at 539 (Stratton, J., dissenting).

28 *See State Tort Reform*, *supra* note 25, at 805 (finding "Justice Resnick held that seven specific provisions of the enactment were unconstitutional" and "then leveraged her analysis of these specific provisions" to strike down the entire statute.).

29 *See Sheward*, 86 Ohio St. 3d at 494.



The formulation of tort law is the making of public policy. Good tort laws can discourage certain conduct, such as medical malpractice, and help remove truly defective products from the marketplace.[30]

Alternatively, unbalanced and overreaching tort laws can remove good products and services from the marketplace, discourage innovation, limit the supply of necessary medical services, result in loss of jobs, and unduly raise costs to consumers.[31] Accordingly, the policy decisions regarding the formulation of tort law have a significant impact on Ohio's economy, business environment, and consumer choices.

In the American form of government, as reflected in the Ohio Constitution, the legislative branch is charged with the authority to make public policy. By striking down the tort reform statute, the Ohio Supreme Court usurped that authority and severely limited the ability of the General Assembly to address the Ohio's liability crisis, which is inhibiting economic growth and driving health care providers out of the marketplace.[32]

In *Sheward*, the court took the unusual step of accepting original jurisdiction of a complaint seeking a writ of mandamus or prohibition regarding the tort reform statute. Justice Resnick's majority opinion concluded that the party bringing the action in *Sheward* did not have to "show any legal interest or special individual interest in the result" because, as an Ohio citizen, the party is "interested in the execution of the laws of this state."[33]

Chief Justice Moyer, in dissent, questioned the propriety of a mandamus or prohibition hearing since standard trial and appellate avenues were available to those parties challenging the statute.[34] The majority's zeal to strike down the statute is manifested by its taking the extraordinary step to review the statute without allowing the challenge to proceed through the normal trial and intermediate appellate route.

The majority in *Sheward* went to extraordinary lengths to invalidate the tort reform law. They misinterpreted the one-subject clause of the Ohio Constitution, turned the doctrine of separation of powers on its head to make civil law exclusively the province of the judiciary, and unnecessarily took original jurisdiction of the case despite the availability of the traditional trial and intermediate appellate court process.

As Moyer pointed out in his dissent, the majority has "arguably affronted our constitutional system of government" in order to reach its desired public policy outcome.[35]

"We should be concerned by the use of judicial power to advance a particular social philosophy. When judges declare governmental actions unconstitutional based upon a personal distaste for the policies adopted through the legislative process, we cease to be governed by democracy."[37]

30 *See* Victor E. Schwartz et al., *Illinois Tort Law: A Rich History of Cooperation and Respect Between the Courts and the Legislature,* 28 LOY. U. CHI. L.J. 745, 745-46 (1997).
31 *See id.* at 746.
32 *See* Crystal Harden, *Doctors: Costly Insurance Hurts,* CINCINNATI POST, January 4, 2003 (finding that soaring medical malpractice insurance premiums are pushing Ohio doctors out of the state, into early retirement or out of high-risk specialty practices.).
33 *Sheward*, 86 Ohio St.3d at 475.
34 *Id.* at 524 (Moyer, C.J., dissenting).
35 *Id.* at 518-19 (Moyer, C.J., dissenting).

Workers' Compensation Reform

In 1995, the General Assembly amended Ohio's workers' compensation law to restore balance between employers' and employees' rights in the context of workplace injuries. Like most states, the workers' compensation system in Ohio was created entirely through statute in order to provide a system for compensating injured employees outside the traditional tort system. The 1995 reforms redefined and set new standards for establishing an intentional tort claim that would permit action against an employer, outside the workers' compensation system.

In the 1999 *Johnson v. B.P. Chemical Inc.* case, the "gang of four" struck down the workers' compensation reform law because the reforms did not "further the comfort, health, safety, and general welfare of all employees." The majority concluded that the General Assembly could not define the intentional tort exception to the workers' compensation system.[36]

Justice Deborah Cook pointed out in her dissent in *B.P. Chemical Inc.* that the majority merely disagreed with the public policy conclusions the General Assembly expressed in its workers' compensation reform statute. Nothing in the Ohio Constitution prohibits the General Assembly from defining and codifying an intentional tort exception to the workers' compensation system.

Justice Cook outlined the serious constitutional issues raised by the "gang of four's" activism in *B.P. Chemical Inc.:*

"We should be concerned by the use of judicial power to advance a particular social philosophy. When judges declare governmental actions unconstitutional based upon a personal distaste for the policies adopted through the legislative process, we cease to be governed by democracy."[37]

Uninsured/Underinsured Motorist Coverage

In the 1999 *Scott Pontzer v. Liberty Mutual Fire Insurance Company* case, the four-person activist majority of the Ohio Supreme Court rewrote Ohio's uninsured/underinsured motorist statute in order to impose liability on an employer and its automobile liability insurer. The majority used the uninsured/underinsured motorist law to extend coverage of an employer's *commercial* automobile liability insurance policy to an employee who was killed while driving his wife's car on personal errands.[38]

Chief Justice Moyer and Justices Stratton and Cook dissented in *Scott-Pontzer.* Justice Stratton's dissenting opinion pointed out that the result was not what the parties to the insurance policy or the General Assembly intended.[39] Justice Cook's dissent, which Moyer joined, concluded that the result of the *Scott-Pontzer* case was that any employee injured in a car accident, even where the employee was not acting under the scope of employment, had comprehensive coverage as long as the employer was prudent enough to insure itself.[40]

The *Scott-Pontzer* case sent shock waves through the commercial auto liability insurance marketplace in Ohio.[41] Insurers left the market and insurance rates skyrocketed. The General Assembly even passed legislation in an attempt to limit the effect of the *Scott-Pontzer* case.[42]

Alternative Distribution of Punitive Damages

In the 2002 *Dardinger v. Anthem Blue Cross & Blue Shield* case, a health insurer appealed from a decision ordering it to pay $49 million in punitive damages to the estate of a decedent who was allegedly harmed by treatment decisions made by the insurer. The activist majority (Justices Pfeifer, Douglas, Resnick, and Sweeney) of the Ohio Supreme Court reduced the punitive damages award to $30 million and then ordered $20 million of it be paid to The Ohio State University Medical Center to fund cancer research.[43]

While there may be legitimate reasons to divert portions of punitive damages awards to certain parties or the state, such public policy decisions are to be made by the legislative branch, not the judiciary. The court has no authority under statute or the Ohio Constitution to divert such awards. Chief Justice Moyer's dissent in *Dardinger* pointed out that every other American court that has engaged in alternative distribution of punitive damages had done so pursuant to statute.[44]

36 *Johnson v. BP Chemical, Inc.* 85 Ohio St.3d 298, 308 (1999) (citations omitted).
37 *Id.* at 309 (Cook J., dissenting).
38 *See Scott-Pontzer v. Liberty Mutual Fire Insurance Company,* 85 Ohio St.3d 660 (1999) (emphasis added).
39 *See id.* at 669-70 (Stratton, J., dissenting).
40 *See id.* at 667-68 (Cook J., dissenting).
41 *See* Ray Cooklis, *Ohio Court: Running a Reverse,* CINCINNATI ENQUIRER, November 7, 2003 (noting that the *Scott-Pontzer* case opened up "a $1.5 billion can of worms" for insurers and employers).
42 *See* Chiree McCain, *Are We There Yet?,* COLUMBUS BUSINESS FIRST, June 27, 2003 (noting that legislation passed by the Ohio General Assembly in 2001 was intended to reverse the impact of the *Scott-Pontzer* case.).
43 *Dardinger v. Anthem Blue Cross & Blue Shield,* 98 Ohio St. 3d 77, 105 (2002).
44 *Id.* at 107 (Moyer C.J., dissenting).

Again, as with school funding, tort reform, workers' compensation reform, and uninsured/underinsured motorist coverage, the court usurped legislative authority, this time by misappropriating a punitive damages award without statutory authority.

The cumulative effect of all these cases has been a substantial shift in the balance of powers between the branches of government in Ohio. The Ohio Supreme Court has exercised unchecked policymaking authority in areas where the activist majority disagreed with the legislative and executive branches. As Justice Cook pointed out, by usurping legislative authority, the court undermined the traditional representative democratic process in Ohio and invited a lessening of public trust in the court as an institution.[45]

II. Recent Changes in Court Personnel and a Possible New Direction

In Ohio, Supreme Court justices are elected in statewide elections.[46] Because of the court's extreme activism in usurping policymaking authority from the General Assembly, Ohio Supreme Court elections have become expensive and intense. In 2000, a well-funded attempt to defeat Justice Resnick, one of the "gang of four," failed as competing independent groups spent millions of dollars attacking Resnick and her opponent.[47]

In 2002, one of the liberal activists, Andrew Douglas, retired from the court. In a high profile election, again involving significant expenditures from business groups, labor unions, and trial attorneys, then Lieutenant Governor Maureen O'Connor defeated Hamilton County Municipal Judge Tim Black. O'Connor campaigned on a theme of acting with restraint on the bench and respecting the policymaking role of the General Assembly.[48] Black stated that he was running for "labor's seat" on the court.[49]

Justice Deborah Cook, the intellectual leader of the group of three justices who consistently dissented from the court's activist decisions, was appointed to the Sixth Circuit U.S. Court of Appeals by President George W. Bush and confirmed by the U.S. Senate last year. Governor Bob Taft appointed Ohio Court of Appeals Judge Terrence O'Donnell to the Ohio Supreme Court to replace Justice Cook. O'Donnell has also acted with restraint on the bench over his career.[50]

This recent personnel shift, especially with Justice O'Connor replacing former Justice Douglas, may signal a philosophical shift as well. Since 2003, a new four-person majority seems to have emerged that has resisted the temptation to second-guess the General Assembly.

45 *See DeRolph II*, 89 Ohio St.3d at 58 (Cook, J., dissenting).
46 *See* OHIO CONST. art. IV, section 6(A)(1).
47 *See* Catherine Candisky, *High Court Races, Once Dignified, Now Down, Dirty*, COLUMBUS DISPATCH, Nov. 1, 2000 at A1.
48 *See* Cooklis, *supra* note 41.
49 *See* Jim Siegel, *Supreme Court Foes Criticize Ad Focus,* CINCINNATI ENQUIRER, October 30, 2002.
50 *See For Supreme Court*, COLUMBUS DISPATCH, September 26, at E4.

For example, in 2003, Chief Justice Moyer and Justices Stratton, Cook, and O'Connor were joined by Justice Pfeifer in *State ex rel. State of Ohio v. Lewis,* which ended the decade-long school funding litigation. Stratton's majority opinion made clear "[t]he duty now lies with the General Assembly" to establish a thorough and efficient system of common schools.[51] In reality, school funding has always been the General Assembly's responsibility and the court's interference was not warranted by the Ohio Constitution.

Also in 2003, a majority of the Supreme Court made up of O'Connor, Moyer, Stratton, and Ohio Appeals Court Judge Mary DeGenaro, sitting for Justice Cook, limited application of the *Scott-Pontzer* case. Justice O'Connor's majority opinion in *Westfield Insurance Company v. Galatis* pointed out:

"*Scott-Pontzer* ignored the intent of the parties to the contract. Absent contractual language to the contrary, it is doubtful that either an insurer or corporate policyholder ever conceived of contracting for coverage for off-duty employees occupying non-covered autos."[52]

Accordingly, O'Connor's opinion limited application of the *Scott-Pontzer* case to situations "where an employee is within the course and scope of employment."[53]

O'Connor concluded that the doctrine of *stare decisis* (i.e., following court precedent) is a fundamental principle for continuity and predictability in our legal system.[54] However, O'Connor also recognized that under special circumstances overruling previously wrongly decided cases is necessary and appropriate. According to the majority opinion in *Galatis:*

"Limiting *Scott-Pontzer* will restore our legal system by returning to the fundamental principles of insurance contract interpretation. It does no violence to the legal doctrine of stare decisis to right that which is clearly wrong. It serves no valid purpose to allow incorrect opinions to remain in the body of our law."[55]

The recently decided *Thomson v. OHIC Insurance Company* case also indicates a willingness of the new majority to refrain from interfering with clearly defined contractual obligations. In *Thomson*, a health care provider had a "claims made" medical malpractice insurance policy with shared limits of $1,000,000 "Each Person" and $3,000,000 total for claims made during each policy year. The policy expressly required any derivative claims to share in the "Each Person" limit of coverage.[56]

At issue was a loss of consortium claim made by the spouse of the person who was allegedly injured by the negligence of the health care provider. The spouse contended that her loss of consortium claim was a separate claim under the policy.

Justice Stratton's majority opinion, which was joined by Chief Justice Moyer and Justices O'Connor and O'Donnell, held that the spouse's loss of consortium claim was derived from the patient's underlying claim against the health care provider. The court concluded that the malpractice insurance policy "clearly and unambiguously" required derivative claims to

51 *State ex rel. State of Ohio v. Lewis, Judge et al.* 99 Ohio St.3d 97, 104 (2003).
52 *Westfield Insurance Company v. Galatis et al,* 100 Ohio St 3d 216, 225 (2003).
53 *Id.* at 231.
54 *Id.* at 226-27.
55 *Id.* at 231 (citations omitted).
56 *Thomson v. OHIC Insurance Company,* 103 Ohio St.3d 119 (2004).

share in the "Each Person" limit.[57] Justices Pfeifer, Sweeney, and Resnick, the remaining activists on the court, dissented in *Thomson*.[58]

The majority in *Thomson* followed the clear intent of the health care provider and insurer as reflected by the terms of the medical malpractice insurance policy. By doing so, the court refrained from creating a litigation and liability nightmare in the medical malpractice area. This is in stark contrast to the crisis the activist majority created in the commercial automobile liability marketplace via the *Scott-Pontzer* case in 1999.

By limiting *Scott-Pontzer,* ending the school funding case, and acting with restraint on liability and contract issues, the new majority on the Ohio Supreme Court has signaled a return to traditional adjudication. This slim 4-3 majority appears committed to interpreting the law in a neutral manner consistent with the dictates of the Ohio Constitution. Over the last two years, the new majority reversed the court's disturbing willingness to make public policy from the bench as had been the case during the 1990s through 2002. In essence, the new majority is restoring the American form of government in Ohio.

III. 2004 Elections and the Future of the Ohio Supreme Court

In November 2004, four seats on the Ohio Supreme Court will be up for election. Justice Paul Pfiefer, one of the activists, is running unopposed. Justice Francis Sweeney, who is also one of the activists, is retiring from the court and his seat is being actively sought in a contested race. Two justices, Chief Justice Moyer and Justice O'Donnell, face contested elections as well.

In the last two years, the Ohio General Assembly has passed and the governor has signed important legislation that likely will be tested in court. The General Assembly passed a broad medical malpractice reform law to address skyrocketing health care provider malpractice insurance premiums, which are forcing many providers to leave the state.

The General Assembly also passed a law reforming the asbestos litigation system in Ohio, which has paralyzed the court system in certain counties and left some injured parties without recourse. And the General Assembly is also considering broad civil liability reform to improve the state's attractiveness to business activity.

In light of the court's past activism and it's recent new direction, albeit by a slim 4-3 majority, the upcoming elections will have a significant impact on public policy and the law in Ohio. The elections will determine whether the court returns to its activism of the past whereby, in the words of former Justice Cook, the majority ignores the American form of government and threatens individual freedom and democratic ideals by making public policy from the bench. Or the court could continue on its new path returning to its traditional role as a neutral, independent arbiter, interpreting the law pursuant to the Ohio Constitution.

Clearly, the Ohio Supreme Court is a court at the crossroads.

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57 *Id.* at 122-23.
58 *Id.* at 123-24.