

IN THE SUPREME COURT OF OHIO

ROSE KAMINSKI, : Case No. 2008-0857
: :
Plaintiff-Appellee, : :
: :
v. : :
: :
METAL & WIRE PRODUCTS : :
COMPANY, *et al.*, : :
: :
Defendants-Appellants. : :

**AMICUS CURIAE BRIEF OF OHIO ASSOCIATION OF CIVIL TRIAL
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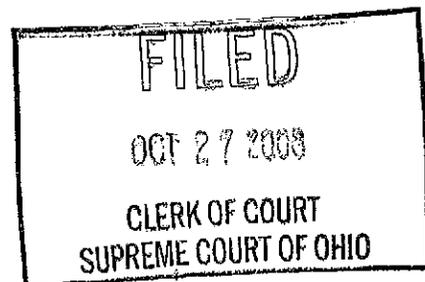


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PRELIMINARY STATEMENT

This is an appeal from the Seventh District Court of Appeals regarding (1) whether this Court's *Galatis* test allows this Court to overturn a precedent in constitutional law that is "demonstrably wrong," regardless of whether it satisfies all of the *Galatis* factors; (2) whether R.C. 2745.01 violates Section 34 or Section 35 of Article II of the Ohio Constitution; and (3) whether the Court of Appeals exceeded its jurisdiction in addressing issues that were not part of the Respondent's appeal.

Amicus curiae the Ohio Association of Civil Trial Attorneys ("OACTA") agrees with Appellant's argument on the second question, i.e., that *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 1999-Ohio-267, 707 N.E.2d 1107, grossly misinterpreted Sections 34 and 35 of Article II of the Ohio Constitution and unconstitutionally usurped the legislature's policymaking role. This brief, however, is directed to the first question, regarding the flexibility of this Court's *Galatis* test.

OACTA respectfully submits that this Court should apply the doctrine of stare decisis, including the *Galatis* test, in a manner that always allows it to correct past judicial misconstruction of the Ohio Constitution. The Court should not apply its *Galatis* test as a "super-constitutional" standard of review.

THE INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a statewide organization whose 600+ members consist of attorneys and supervisory or managerial employees of insurance or other corporations who devote a substantial portion of their time to the defense of civil damage suits. OACTA’s mission includes promoting the consistent and predictable administration of justice in the State of Ohio and preserving the appropriate roles of both the legislature and the judiciary. Accordingly, OACTA takes a strong interest in both the appropriate application of stare decisis principles and unswerving fidelity to the Constitution. This case involves a question at the intersection of those two values.

LAW AND ARGUMENT

I. This Court should apply the *Galatis* test in a manner that allows it to correct past judicial overreaching.

In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, this Court recognized that “stare decisis is the bedrock of the American legal system” and established criteria that the Court would apply when urged to depart from precedent.

But some have argued that strict compliance with these criteria unduly restricts the Court’s ability to correct injustice. For example, in her recent concurring opinion in *Groch v. General Motors Corp.*, Justice Lanzinger stated that this Court’s jurisprudence following *Galatis* had become “unworkable.” She agreed with Justice Pfeifer that it gave a “hopelessly random and formulaic approach to overruling precedent” – in effect, a “legalistic straightjacket * * * [which prevents] overruling wrongly decided cases when it is necessary.” 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶221-222 (Lanzinger, J., concurring) (quoting *State ex rel. Shelly Materials v. Clark County Bd. of Commissioners*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 59, ¶50 (Pfeifer, J., dissenting) and *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St. 3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶19 (Pfeifer, J., dissenting)).

OACTA agrees with the necessity of principles designed to preserve “stability and reliability,” but respectfully submits that *Galatis* need not be applied as a “legalistic straightjacket.” Rather, it can be applied as its progenitors intended: as a statement of policy, not a rigid test that perversely prevents this Court from correcting previous acts of extreme judicial overreaching in constitutional cases. To apply *Galatis* as a standard for reviewing constitutional precedent would elevate stare decisis above the Constitution.

A. In *Galatis*, this Court adopted the Michigan standard for stare decisis.

In establishing stare decisis standards for Ohio, this Court looked to a test the Michigan Supreme Court had recently established for itself, which considers: “(1) whether the decision was wrongly decided, (2) whether the decision defies practical workability, (3) whether reliance interests would cause an undue hardship, and (4) whether changes in the law or facts no longer justify the questioned decision.” *Galatis* at ¶47 (quoting *Pohutski v. Allen Park* (2002), 465 Mich. 675, 694, 641 N.W.2d 219).

This Court then adopted a “modified version” of the Michigan Supreme Court’s test, holding that “in Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Id.* at ¶48. Ohio’s test does not truly alter the Michigan test, but rather states it more clearly by combining parts (1) and (4) into a single element. *See id.*

B. The Michigan standard is a policy, not an inflexible rule.

The *Galatis* opinion did not quote or discuss the Michigan case from which it took its stare decisis standard, *Pohutski*, at any length. And because *Galatis* involved a question of statutory interpretation, there was no need to elaborate on how the test might apply to a review of constitutional precedent.

In *Pohutski*, however, the Michigan Supreme Court **did** elaborate upon its rule – and specifically emphasized that its stare decisis criteria would not prevent the Michigan Court from overturning an earlier act of judicial overreaching. At the outset, the court noted that “stare decisis is a principle of policy, not an inexorable command. Stare decisis

should not be applied mechanically to prevent this Court from overruling erroneous decisions regarding the meaning of a statute.” *Pohutski*, 465 Mich. at 694.

The Michigan Court explained in detail why a flexible rule of stare decisis was consistent with – indeed, is a necessary component of – a policy of judicial restraint:

This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in a society, including the courts. In fact, should a court confound these legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. ***When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court’s misconstruction.*** The reason for this is that ***the court in distorting the statute was engaged in an act of judicial usurpation*** that runs counter to the bedrock principle of American constitutionalism, *i.e.*, that the lawmaking power is reposed in the people as reflected in the legislature and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people’s representatives.

Pohutski, 465 Mich. at 694-95 (quoting *Robinson v. Detroit* (2000), 462 Mich. 439, 467-68, 613 N.W.2d 307 (emphasis added)).

Thus, the Court concluded, “while too rapid a change in the law threatens judicial legitimacy, ***correcting past rulings that usurp legislative power restores judicial legitimacy.***” *Id.* (quoting *Robinson*, 462 Mich. at 472-73 (Corrigan, J., concurring) (emphasis added)). As one justice noted, “if a prior decision of this court reflects an abuse of judicial power at the expense of the legislative authority, a failure to recognize and correct that excess, even if done in the name of stare decisis, would perpetuate an unacceptable abuse of judicial power.” *Robinson*, 462 Mich. at 473 (Corrigan, J., concurring).

A leading authority on tort law has noted that, in overturning erroneous precedents while following this policy, the Michigan court has nonetheless shown “appropriate respect for the value of stability in the legal system.” Schwartz, *A Critical Look at the Jurisprudence of the Michigan Supreme Court* (2006), 85 Mich. Bar. J. 38, 42. To reject past “policymaking from the bench” is not to adopt a “flavor of the month” approach to jurisprudence – rather, it shows respect for both the principle of stare decisis and the constitutional limits of the judiciary’s power. *Id.*

Thus, this Court should take the same approach in applying *Galatis* that the Michigan Supreme Court has taken in applying the rule from which *Galatis* was derived, always considering the factors as a matter of policy, but never doing so in a manner that prevents the Court from correcting a previous decision that usurped the legislature’s power or incorrectly construed the Constitution.

II. The Constitution always trumps precedent.

Michigan’s example demonstrates that the Court can and should overturn precedents that misread or misconstrue a statute. Still, some may argue that stability requires preserving precedent even in matters of statutory interpretation because the legislature can easily respond with a corrective statute. In constitutional cases, however, fidelity to the Ohio Constitution must always trump adherence to precedent.

A. This Court must overturn decisions that misinterpret the Ohio Constitution because this Court has an obligation to uphold the Constitution itself, not its own precedents.

This Court can and must overturn any precedent that misinterprets the Ohio Constitution because the Court’s first and foremost duty is to uphold the Constitution – not its own precedents, or even the “bedrock” principles embodied in stare decisis.

This Court stated, pre-*Galatis*:

A judge looking at a constitutional decision may have strong feelings to revere the past and accept what was once written. However, each judge remembers above all that she or he has sworn to support and defend the Constitution — not as someone else has interpreted it but as the judge deciding the case at bar interprets it. Section 7, Article XV of the Ohio Constitution states: “Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office.” R.C. 3.23 provides: “The oath of office of each judge of a court of record shall be to support the constitution of the United States and the constitution of this state * * * according to the best of his ability and understanding. * * *”

Rocky River v. State Employment Relations Bd. (1989), 43 Ohio St.3d 1, 6-7, 539 N.E.2d 103.

And, over a century ago, this Court considered the limits of stare decisis and held that “stare decisis will not be allowed to interfere with the overruling of a decision upon a constitutional question when such former decision is clearly erroneous and it does not appear that such decision has been acted upon as a rule of property, or that rights have vested under it so that more injury would follow if it were overruled than if it were allowed to stand.” *State ex rel. Guilbert v. Lewis* (1903), 69 Ohio St. 202, 69 N.E. 132, paragraph one of the syllabus. In reaching that conclusion, this Court cited with approval a case in which the Supreme Court of Texas stated that “it cannot be seriously insisted” that stare decisis controls cases relating to “the structure of government [and] the limitations upon legislative and executive power * * *.” *Id.* at 210 (quoting *Willis v. Owen* (1875), 43 Tex. 41, 49).

Finally, perhaps this Court put it best in 1885:

While it is important that this court should be consistent, it is also important that it should be right; especially upon all

questions involving the constitution, which the people have ordained for our guidance and their protection. There is no rule of stare decisis which exacts of this court a blind and sullen adherence to a palpable wrong! For if it be true that in the past — bowing to the clamors of expediency or of some special exigency — we have broken through the limitations and departed from the plain provisions of the constitution, we can not return too soon.

State v. Pugh (1885), 43 Ohio St. 98, 123-24, 1 N.E. 439.

Galatis did not overrule or even address this Court's explicit holding in *Guilbert*, nor did it consider the Court's sound reasoning in *Pugh*. And *Galatis* did not and could not have altered this Court's first and foremost duty to uphold the U.S. Constitution and the Ohio Constitution. This Court, therefore, should recognize that *Galatis* expresses an important policy that respects precedent wherever it is possible to do so — but rejects precedent where that precedent conflicts with the Constitution.

B. This Court must overturn decisions that misconstrue the Ohio Constitution because the democratic process cannot correct errors in constitutional interpretation as easily as it can correct errors in statutory interpretation.

Another reason why this Court should overturn cases that misconstrue the Ohio Constitution is because it is far more difficult for the people and the legislature to correct an error of constitutional interpretation than a rule of statutory interpretation. As Justice Louis Brandeis famously noted:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right * * * This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decision.

Burnet v. Coronado Oil & Gas Co. (1932), 285 U.S. 393, 405-06 (Brandeis, J., dissenting). Though first given in a dissent, Brandeis's view that stare decisis should apply less strongly in constitutional cases has become the United States Supreme Court's long-standing policy. See *Smith v. Allwright* (1944), 321 U.S. 649, 665; Hardy, Note, Has Mighty Casey Struck Out?: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis (2007), 34 *Hastings Const. L.Q.* 591, 593 & fn.14 (collecting recent examples).

Before *Galatis*, this Court expressed its agreement with this view:

[T]he doctrine of stare decisis is less important in the constitutional context than in cases of either pure judge-made law or statutory interpretation. * * *

[I]t is generally beyond the power of the legislature to change or 'correct' judicial interpretation of the Constitution. This is the main justification for taking a more flexible attitude toward overruling precedent in such cases. The doctrine of judicial supremacy in constitutional interpretation is widely and generally conceded. Given the inability of the legislature to override judge-made law in this area, it is clear that when an earlier decision is demonstrably wrong * * * it is incumbent on the court to make the necessary changes and yield to the force of better reasoning.

Rocky River, 43 Ohio St.3d at 6; see, also, *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, 863 N.E.2d 591, ¶128 (citing Justice Brandeis's view that stare decisis is especially important in cases involving *statutory* interpretation).

In Ohio, the General Assembly cannot correct the courts' constitutional errors; the most it can do is place a constitutional amendment on the ballot through a three-fifths vote of each house. Section 1, Article XVI, Ohio Constitution. Otherwise, voters must place a constitutional amendment on the ballot through petitions containing signatures from ten percent of the number of people who voted in the previous gubernatorial election. Sections 1a-1g, Article II, Ohio Constitution. This process is expensive – by some estimates, the

petition process alone costs more than \$600,000. See Ballot Issues – Ohio Citizen Action, <http://www.ohiocitizen.org/about/training/ballotconsiderations.html>. In addition, it costs approximately \$1.5 million to adequately publicize a ballot issue for it to pass, bringing the total cost of democratically correcting a constitutional ruling to at least \$2 million – and many ballot-issue campaigns cost millions more than that. *Id.* And all of this assumes that voters are sufficiently informed and understanding of this Court’s constitutional decisions to begin the amendment process in the first place.

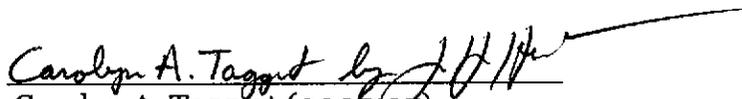
The public should not bear the burden of undertaking the costly – perhaps *prohibitively* costly – process of passing a constitutional amendment simply to make their Constitution conform to *what it said in the first place*. It is far more appropriate for the Court to correct its own mistakes when it recognizes them.

Thus, the burden of the constitutional amendment process requires a flexible application of stare decisis principles in constitutional cases.

CONCLUSION

For the reasons given above, stare decisis should not bind this Court – or the people of Ohio – to the mistaken constitutional construction in *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 1999-Ohio-267, 707 N.E.2d 1107.

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The undersigned hereby certifies that a copy of the foregoing Amicus Curiae Brief of the Ohio Association of Civil Trial Attorneys in Support of Respondents was served by regular U.S. Mail, postage prepaid, this twenty-seventh day of October, 2008, on the following:

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