

ORIGINAL

IN THE SUPREME COURT OF OHIO

Interstate Petroleum Company

Appellant

v.

Maurice R. Young, et al.

Appellees

CASE NO. **13-1034**

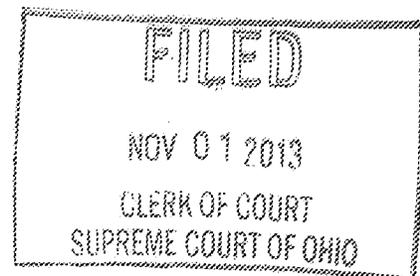
On Appeal from the Trumbull
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. 2011-T-0090

APPELLANT INTERSTATE PETROLEUM COMPANY'S
MOTION FOR RECONSIDERATION

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INTERSTATE PETROLEUM COMPANY'S
MOTION FOR RECONSIDERATION

Pursuant to S. Ct. Prac. R. 11.2, Appellant Interstate Petroleum Company requests this honorable Court to reconsider its denial of Jurisdiction in the case of *Interstate Petroleum Company v. Maurice Young, et al*, Case No 2013-1034. In its entry, the court cited to S. Ct. Prac. R. 7.08(B)(4) for a list of reasons to deny jurisdiction. That list states as follows:

- (a) The appeal does not involve a substantial constitutional question and should be dismissed;
- (b) The appeal does not involve a question of great general or public interest;
- (c) The appeal does not involve a felony;
- (d) The appeal does involve a felony, but leave to appeal is not warranted.

The list provided in the rule gives a basis for inferring the court's actual reason for denial. Interstate Petroleum did not request Supreme Court jurisdiction based on a substantial constitutional question. The case is a civil case, so there is no felony involved. The Court must therefore have decided that the case did not involve a question of great general or public interest.

Since this appeal was placed before the Ohio Supreme Court, there has been much comment in the press concerning the increase in oil and gas litigation. The Ohio Supreme Court has recognized the interest in shale oil drilling in eastern Ohio, and particularly in Carroll, Trumbull, and other eastern Ohio counties. This case came from Trumbull County.

The Court News Ohio website, written by the Ohio Supreme Court, published an article in July of 2013 in which it described the oil and gas boom.¹ The court stated that Chief Justice Maureen O' Connor had assigned three retired judges to handle Carroll County oil and gas

¹ "Shale Boom Includes a Rise in Lease Litigation" CNO [Court News Ohio] Review, July 2013. P. 6, 7. Attached hereto as Exhibit 1.

leasing cases.² Judge Richard B. Reinbold, Jr., one of the judges assigned to handle the oil and gas litigation boom, said:

“[There’s] not a lot of established law out there.” And even cases from the 1960s and 70s under prior law didn’t have as much money at stake as today’s cases.”³

Judge Richard Markus, another of the judges assigned to the Carroll County backlog, said:

[M]any of the cases involve multiple litigants filing jointly asserting the same claims”⁴

On August 13, 2013, the News-Herald of Mentor, Ohio wrote an article concerning Justice Sharon Kennedy and her reflections on her eight months of tenure on the Ohio Supreme Court. She spoke of the things that she viewed as important and the types of cases that would become important. The article said:

During the next 10 years, Kennedy anticipates the state Supreme Court will start to see an explosion of oil and gas cases because of the drilling for the natural resources in eastern Ohio.

“The oil and gas of eastern Ohio is going to bring about new litigation in a world we haven’t explored.” She said. “I think that there will be questions over legitimacy of deeds. The legitimacy over whether mineral rights are secured; rights of use of the land.”⁵

Judge Reinbold’s comment concerning lack of established law and inapplicability of established precedent for the 1960s and 1970s is particularly applicable to this case. The prejudice that resulted to Interstate Petroleum was as a result of an inadequate jury instruction

² Id at P.6.

³ Id.

⁴ Id.

⁵ Mentor, Ohio News Herald, “Ohio Supreme Court Justice Sharon Kennedy Reflects on Her First Eight Months On The Bench,” by John Arthur Hutchison, August 13, 2013. Attached hereto as Exhibit 2.

based on precedent for over 30 years ago, that may no longer apply. Equity's abhorrence of forfeiture was compromised due to the inadequate jury instruction, at *infra*, P.4.

Judge Reinbold's comment concerning lack of precedent are echoed by the Supreme Court's Judicial and Court Services Director Milt Nuzum, a former Marietta Municipal Court judge whose family has worked in the oil and gas industry. Nuzum says that Ohio has a history of oil and gas production that stretches back more than 100 years, but case law from the recent shale drilling boom and subsequent litigation is not as developed in Ohio as in other states. This suggests that the Supreme Court should accept jurisdiction in this case because of the lack of instruction on how to determine when there is "no adequate remedy at law" to allow a lease forfeiture.⁶

Justice Kennedy also recognizes the necessity of the Supreme Court assisting in creating the body of law necessary to provide consistent interpretations of law and procedures to prevent results such as what happened in this case.

This case is a case where the lack of established law on jury instructions where there is a case of violation of an implied lease covenant led to severe prejudice against appellant Interstate. In this case, the jury answered a jury question, finding that there was a violation of an "express or implied" covenant of the oil lease. Since the jury made no finding that would assist in determining whether there was a violation of only an express covenant of the lease or only an implied covenant of the lease, it must be assumed that the jury found that both an express covenant of the lease and an implied covenant of the lease were violated. This means that the jury found that an implied covenant of the lease was violated. *Mid-Ohio Mechanical v.*

⁶ "Shale Boom Includes a Rise in Lease Litigation" CNO [Court News Ohio] Review, July 2013. P.7

Eisenmann Corp., 2009-Ohio-5804, ¶80, citing *Nott v. Homan* (1992), 84 Ohio App. 3d 372, 378.

The jury also found that the lease was no longer valid, effectuating a forfeiture. (Jury Interrogatory Number 1) The jury, however, could not effectuate forfeiture unless it also found that there was “no adequate remedy at law.” The court gave no instruction to guide the jury to determine whether there was an adequate remedy at law. Instead, the court instructed the jury as follows:

If you find from the evidence that Interstate Petroleum Company has failed, without justification, to comply with the aforementioned implied covenants imposed by operation of law and a mere damage award to the defendants would not be adequate, then you may order forfeiture of the oil and gas leases for breach of the implied covenants.

Trial transcript (Tp) p. 473. The jury, however, was left entirely to its own devices to determine whether or not an award of damages would be “adequate.” The jury ultimately made that finding without deciding whether or not Interstate’s oil well could be put back into production, and without deciding that Plaintiff Interstate could not respond in damages. The jury thus ordered forfeiture without any instruction on how to determine whether an award of damages would be inadequate. Given the boom in oil litigation that has been recognized by this court, there is a need for this court to give instructions to provide a uniform standard to determine when a violation of an implied covenant results in a forfeiture.

CONCLUSION

This court should grant reconsideration for the following reasons:

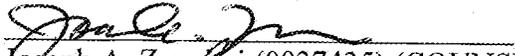
1. The courts of Eastern Ohio have been inundated with oil and gas litigation. Justice Kennedy has spoken about the approaching tsunami of oil and gas litigation. To the extent that the

Supreme Court can get a head start before that approaching tsunami, the Court should do so by undertaking this case.

2. Judge Reinbold's comment about the lack of established law is particularly appropriate to this case. Interstate Petroleum Company was prejudiced due to the lack of an adequate jury instruction on how to determine whether there is "no adequate remedy at law" to allow a forfeiture of a lease. The value of the lease could be in millions of dollars.
3. Judge Markus's comment about multiple litigants filing jointly to assert the same or similar claims is also appropriate to this case. There are a group of landholders who have owned the property involved in the lease over different time periods, and those same landholders assert the same claims.
4. And, finally, the Memorandum In Support of Jurisdiction filed by Interstate Petroleum was unopposed and remains unopposed. Defendant's counsel, who represents the multiple landholders in this litigation, also represents an additional unnamed party in interest, a holding company that holds a "top lease" which, in effect, overcomes even the landholders' interest in the mineral rights. This hidden party will stand to gain the major share of the mineral rights that will be inequitably forfeited by Interstate if this Court does not grant jurisdiction. The Court should grant jurisdiction to help create law that will protect the rights of all real parties in interest to oil and gas leases.

WHEREFORE, Plaintiff-Appellant Interstate Petroleum Company requests the Ohio Supreme Court to grant reconsideration in this case.

Respectfully submitted,


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Counsel of Record for Appellant

Interstate Petroleum Company

CERTIFICATION OF SERVICE

A copy of the above Motion for Reconsideration was sent by regular U. S. Mail to the following persons.

Clerk of Courts
Trumbull County Court of Appeals
Eleventh District Court of Appeals
111 High Street, NE
Warren, OH 44481

Bruce E. Smith
Geiger, Teeple, Smith & Hahn P.L.L.
1844 West State Street, Suite A
Alliance, Ohio 44601-2415

this 1 day of November, 2013. In addition the Motion for Reconsideration was delivered by hand to the Ohio Supreme Court.

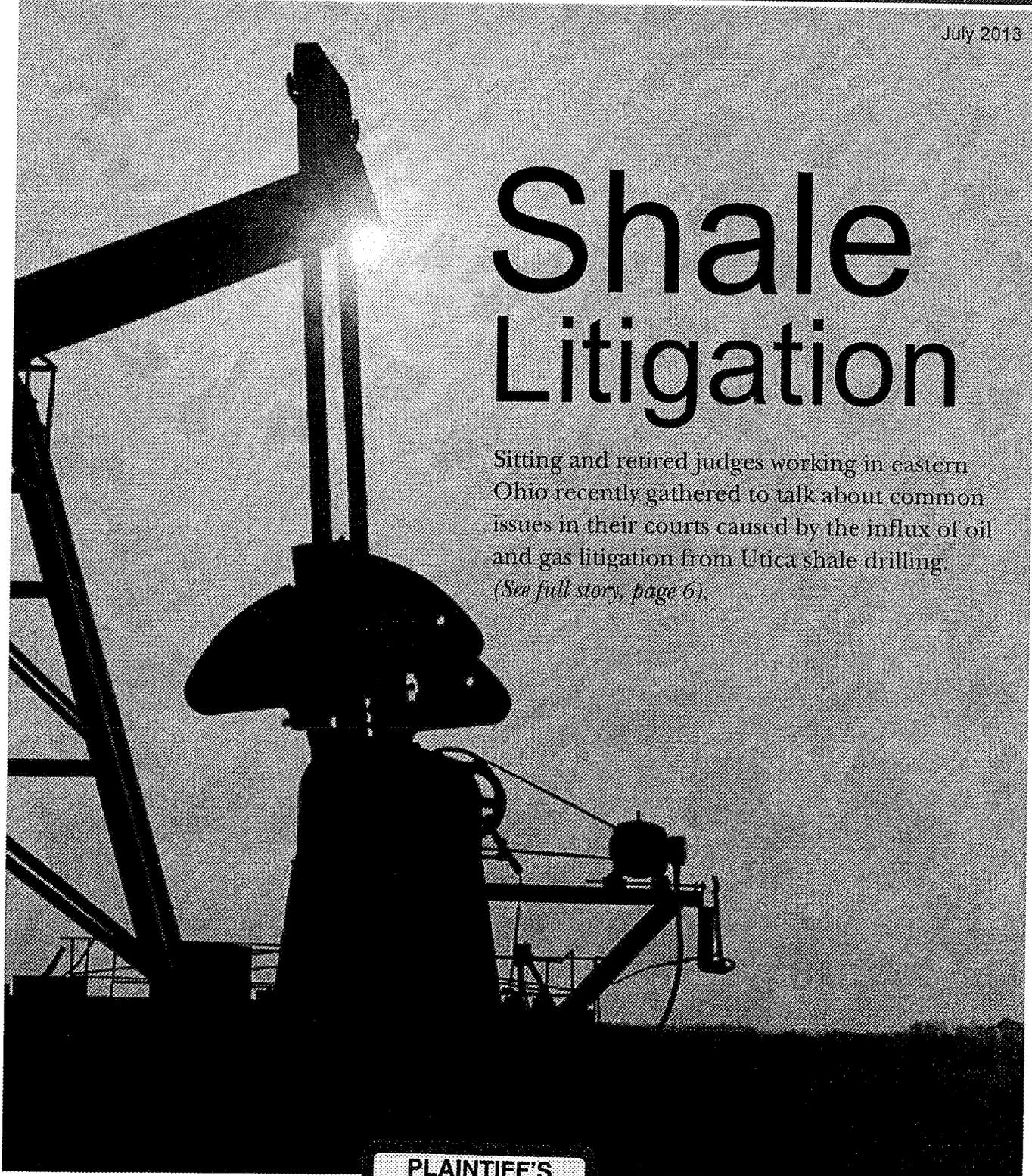

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Counsel of Record for Appellant
Interstate Petroleum Company

Family Receives \$500,000 Settlement from University Hospital in Cincinnati (p. 3)

Probate Judges Elected to Leadership Positions (p. 8)

CNO REVIEW

July 2013



Shale Litigation

Sitting and retired judges working in eastern Ohio recently gathered to talk about common issues in their courts caused by the influx of oil and gas litigation from Utica shale drilling. *(See full story, page 6).*

PLAINTIFF'S
EXHIBIT

1

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SHALE BOOM

INCLUDES RISE IN LEASE LITIGATION

By any measurement, Carroll County is at the heart of the oil and gas production boom related to Utica shale drilling in eastern Ohio.

The latest Ohio Department of Natural Resources statistics show that Carroll County boasts nearly half the producing wells in the state and more than half of the oil and almost two-thirds of the natural gas produced from Utica wells.

As with any emerging and rapidly expanding industry, there are far-reaching impacts to a community. An April 28 story in *The (Canton) Repository* summarized the situation currently in Carroll County.

“Sales tax collections are up, and the unemployment rate is down. Fleets of heavy trucks run up and down the roads hauling equipment, water, and other drilling supplies. New companies, such as Rex Energy, have established offices in Carrollton (the county seat). Farmers have become millionaires.”

The oil and gas boom also affects the Carroll County court system. Oil and gas companies have reached agreements with thousands of landowners to lease land for drilling. These agreements have also spawned litigation.

Carroll County Common Pleas Court Judge **Dominick E. Olivito Jr.** said the court has seen more litigation in this area of law recently, even though a conflict prevents him from hearing the cases.

“I have a unique situation,” he said. “My wife and I own 53 acres with the oil and gas lease assigned to Chesapeake. I recuse myself from current oil and gas lease litigation due to my more than de minimis interest

in oil and gas lease interpretation litigation.”

Chief Justice **Maureen O’Connor** assigned three retired judges to handle the Carroll County oil and gas cases and assist in other counties: **Linton D. Lewis Jr.**, **Richard M. Markus**, and **Richard D. Reinbold Jr.**

Retired Stark County Common Pleas Court Judge Reinbold hears specific cases in Carroll County and has a blanket assignment in Columbiana County Common Pleas Court.

Reinbold said he needed a “crash course” on oil and gas and real estate matters as he had not had any experience in these areas of law when he served as a sitting judge. After handling his share of oil and gas cases, however, the language and terms are much more familiar.

He said there’s “not a lot of established law out there” and even cases from the 1960s and 70s under prior law didn’t have as much money at stake as today’s disputes.

Another challenging issue concerns the logistics of running a docket from afar, Reinbold said. He values the work of magistrates and office managers now more than ever because he doesn’t have access to them as a retired assigned judge. As a sitting judge, he could delegate the day-to-day work of managing the number of cases, drafting motions, and maintaining the pending calendar. He’s had to rely on the support staff of clerks’ offices and judges’ offices, which he labeled as “very helpful and cooperative.”

Reinbold said he communicates with the clerk’s offices and attorneys by e-mail and allows service through e-mail. He said he also issues orders by email, which relieves the clerk’s office from having to print orders and mail them. He types a copy of an order and sends it to the clerk for the file. The clerk’s office, in turn, scans and e-mails any new orders in a case.

Reinbold said he’s also tried to make it as easy as possible for opposing counsel to attend pre-trial conferences. He checks the location of the defense and plaintiffs’ attorneys and designates a half-way meeting spot. He said he’s also tried to accommodate out-of-state attorneys by minimizing their need to come to Ohio.

Retired Eighth District Court of Appeals and Cuyahoga County Common Pleas Court Judge Markus has specific case assignments and a blanket assignment in Carroll County. He said many of the cases involve multiple litigants filing jointly asserting the same claims.

Even with all the moving parts in these cases, Markus said “no one has complained that we’re slowing them down” and that he’s “moving as fast, if not faster, than counsel wants. They have to be ready.”

Retired Perry County Common Pleas Court Judge Lewis has specific case assignments in Carroll County too, as well as specific cases in Jefferson County. He also has blanket assignments in Belmont and Harrison counties.

Just like Reinbold, Lewis spoke of the importance of

keeping everything straight.

“As an assigned judge, I find that it is very important to make sure all the filings are sent to me as soon as possible,” he said. “With the number of parties involved in the oil and gas cases there are numerous filings that need to be addressed. The courts and clerks do an excellent job of keeping me up to date.”

In addition, Lewis said he’s adopted other strategies to administer justice efficiently.

“In order to keep these cases moving along, it’s important to get a scheduling order and trial date established as early in the proceedings as possible,” he said. “I also keep my own list of filings that are due, so I can monitor the case as it moves forward. In that there are oftentimes numerous attorneys and parties involved, I try to be as flexible as possible with my schedule.”

Lewis, Reinbold, Olivito, and more attended a judges’ roundtable meeting in May hosted by Guernsey County Common Pleas Court Judge **David A. Ellwood** and the Ohio Judicial Conference. The group of sitting or retired judges assigned to handle oil and gas cases came together to talk about common issues in their courts caused by the influx of oil and gas litigation.

Mark Schweikert, executive director of the Ohio Judicial Conference, pointed to the value of the meeting.

“All of the judges who attended the roundtable should be commended for their interest in coming together to share their experiences and legal perspectives as they confront similar challenges with these matters,” he said. “Their work at this meeting and continuing communications will help ensure quality and uniformity in the application of law throughout the state.”

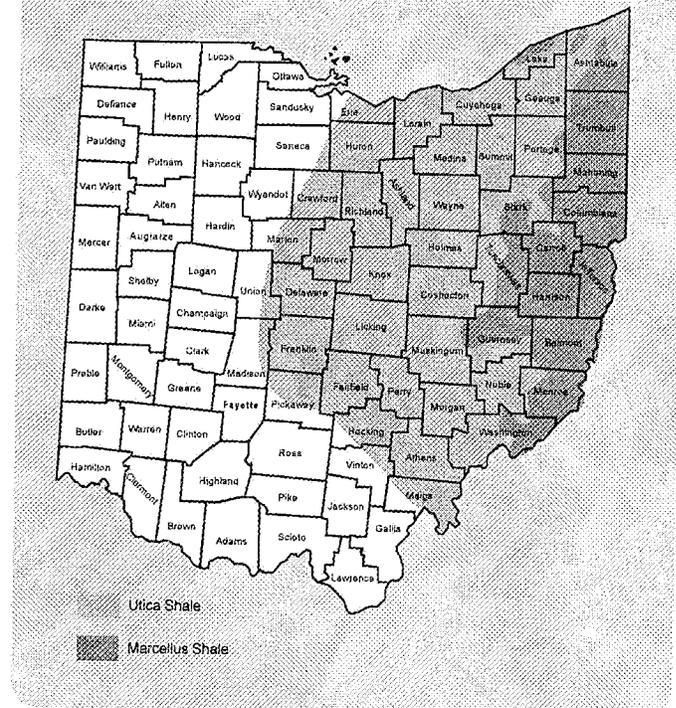
At the meeting, the judges also heard a presentation by Judge Ellwood, who adopted a case management plan a year ago to move these cases along in his court.

In a May 24 story in *The (Cambridge) Daily Jeffersonian* about the roundtable, Ellwood cited the complexity and the variety of issues raised in the cases.

“Initially, the cases were landowner cases often attempting to recover severed mineral rights or to void older oil and gas leases,” Ellwood told the newspaper. “The cases now pending before the court have become more complicated and are involving the oil and gas producing companies with issues such as unitization/pooling agreements.

“There is not one case or issue that is emblematic of the legal process today,” Ellwood continued. “The overriding issue with the oil and gas cases coming before the court is to have a case management plan or procedure in place so the case can be timely processed, heard and decided by the court.”

Utica and Marcellus Shale Regions



Besides cases that deal directly with leases or other issues, Judge Olivito said his court, which also includes domestic relations jurisdiction, has experienced oil and gas “collateral litigation” raised in domestic relations and foreclosure cases.

Supreme Court Judicial & Court Services Director **Milt Nuzum** attended the roundtable discussion as an observer. He said Noble County Common Pleas Court Judge **John W. Nau** also spoke of the ripple effect in his county where rental property prices have increased to house out-of-state workers and left some longtime residents without a place to stay.

Nuzum, a former Marietta Municipal Court judge whose family has worked in the oil and gas industry, said Ohio has a history of oil and gas production that stretches back more than 100 years, but case law from the recent shale drilling boom and the subsequent litigation is not as developed in Ohio compared to other states. Consequently, judges have been embarking on a lot of legal research in order to decide cases.

Nuzum also praised Judge Ellwood for taking a “public servant attitude” in managing an accelerated docket so oil and gas companies have timely decisions and know where to invest their resources.



Ohio Supreme Court Justice Sharon L. Kennedy

By John Arthur Hutchison

Posted: 08/14/13, 12:00 AM EDT]

New Ohio Supreme Court Justice Sharon L. Kennedy recently reflected on her first eight months on the bench during a visit to Lake County.

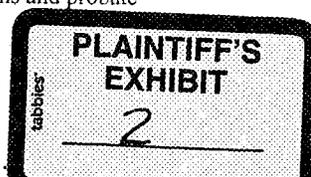
Kennedy, a Republican who lives in Butler County located to the north of Cincinnati, appeared Monday at a Willoughby Rotary Club meeting and was part of a roundtable discussion with the Lake County Bar Association.

She later spoke with The News-Herald about a variety of topics that come into play as an Ohio Supreme Court Justice.

Kennedy also confirmed she will seek re-election next year for a six-year term on the bench after winning an election in November 2012 to fill an unexpired term that concludes Dec. 31, 2014.

"Honestly, it's the greatest thing I've ever done," Kennedy said about becoming the state's 154th Justice and the ninth female in court history. "The reading is fantastic and you have to like to read."

The majority of what the court reads is 51 percent criminal cases, she said. Nineteen percent is juvenile/domestic relations and probate related, 19 percent is traditional civil work, followed by 6 percent involving grievances with lawyers and judges.



Ohio Supreme Court Justice Sharon Kennedy reflects on her first eight months on the ben...

Kennedy also has a different perspective than most justices as she began her career in the justice system as a police officer in Butler County.

She had a private legal practice and eventually became a domestic relations judge in Butler County before she was elected to the Ohio Supreme Court.

"I still believe being a lawyer is honorable position," Kennedy said. "You have the ability to help people at their most trying times and give them sound advice at whatever time they are at a crossroads in their lives."

During the next 10 years, Kennedy anticipates the state Supreme Court will start to see an explosion of oil and gas cases because of the drilling for the natural resources in eastern Ohio.

"The oil and gas of eastern Ohio is going to bring about new litigation in a world we haven't explored," she said. "I think there will be questions over legitimacy of deeds. The legitimacy over whether mineral rights are secured; rights of use of the land."

Kennedy said the most common question people asked her during her campaign last year involved the issue of school funding and the DeRolph vs. Ohio case in 1997.

The state Supreme Court ruled in the decision that the way the state funds education is unconstitutional because it relies too heavily on property taxes.

Since that time, state lawmakers have tried to find a way to comply with the ruling.

Kennedy would explain to people that it's not the role of the court to write a funding plan that is constitutional because it's up to state legislators to write the laws.

"You don't want the judge to be an activist and take an issue and shove it down the pipe of everybody," Kennedy said. "Your voice should be lobbying with your representative or state senator."

She said the Ohio General Assembly passed a state budget that contained a school funding plan and it was signed by Gov. John Kasich.

"They believe it meets the constitutionality test that was originated in DeRolph," Kennedy said.

As a sitting justice, she is prohibited from discussing specific cases that could come before her in court, but she thinks it's likely someone will file litigation to dispute the new school funding plan's constitutionality.

"I think eventually someone will challenge it and we'll end up taking a look at it," Kennedy said. "Obviously, knowing what I know, it will come to me and I can't comment on it."

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