The Beauty of the Law in the Moyer Years 1987-2010

The Written Legacy of Ohio Supreme Court Chief Justice Thomas J. Moyer

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Prologue

Chief Justice Moyer leaves a rich legacy. During his twenty-three years as Chief Justice of the Ohio Supreme Court, he restored the Court's reputation for excellence. He shored up the administration of justice at all levels with needed support programs. He re-focused attention on pro bono service. He inspired lawyers to be the best they could be – as advocates and professionals. He gave the Court its first independent home and gave the people of Ohio a judicial center of magnificent stature. All these accomplishments have been noted in the many tributes that have taken place since his death in April 2010. The tributes also have focused on the personal traits of this respected – indeed, beloved – Chief Justice. Humility. Thoughtfulness. Diligence. Compassion. Wit. Kindness. Intellect. Civility. All these remembrances are important and appropriate to document his legacy, but there is one more aspect to his legacy that also is important – the Court's jurisprudence under his leadership.

At the Court's May 1, 2010 Memorial Service for Chief Justice Moyer, Justice Pfeifer wondered why no one talked about the Chief's opinions and the mark he left on the rule of law in Ohio. This article is an attempt to remedy the omission in some small way by looking at the

Moyer legacy through the Court's opinions. The Moyer Court is now most often remembered as a stable, conservative court, and it surely grew to deserve that reputation as the Chief persuaded his colleagues and the public about the value of measured progression and clarity in the rule of law. But it was never a one-dimensional court. Although perhaps conservative in the business context, the Moyer Court was as well a committed guardian of constitutional precepts and a staunch protector of personal freedoms. It was a Court comfortable with the exercise of judicial authority, not afraid of tackling difficult questions and willing to set its own course.

Chief Justice Moyer spoke of the "beauty of the law," and its primary elements – integrity or perfection, proportion or harmony, and brightness or clarity – and made the case that the beauty of the law can be found in the written opinions of a court.[1] He said: "The beauty of the law, in my humble opinion, is that it is the product of the ages – wrapped in the opinion of the moment."[2] That is why Justice Pfeifer is so right in thinking that the tributes are incomplete if they do not include some reflection on the Court's opinions, and

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[1] See e.g., Annual State of the Judiciary Address, September 11, 2008
(" Judiciary Address").
[2] Id.

particularly those so skillfully crafted by the Chief. One finds the enduring beauty of the Moyer legacy in the opinions as much as in the grand Ohio Judicial Center.

The Struggle for Harmony

In his remarks at the May 1, 2010 Moyer Memorial, Justice Pfeifer offered one example of a notable Moyer opinion – his opinion in *State ex rel. Dann v. Taft*,[3] recognizing a form of executive privilege that may in appropriate circumstances justify an exception to the Ohio Public Records Law. The case is notable for one obvious reason. The Moyer Court typically was steadfast in its rigorous enforcement of the Public Records Law. It was an unapologetic believer in transparency in government and only rarely recognized a non-statutory exception to the mandatory disclosure of governmental records. So it surprised some that the Chief would break from this tradition and persuade the Court to recognize a common law privilege for certain records maintained at the highest level of government. In context, however, the opinion is easily explained and not at all surprising. Chief Justice Moyer believed that one element of the beauty of the law is harmony and that harmony is best preserved by respecting the constitutional separation of

[3] 109 Ohio St.3d 364, 2006-Ohio-1825.

powers. *Dann v. Taft* is representative of the Chief's strong desire to have harmony among the legislative, judicial and executive branches.

Respect for the exercise of power by each of the co-equal branches of government was a thread woven across the tapestry of the Moyer Court years. Ironically, however, the search for harmony among the branches of government produced some of the most divisive opinions from the Court – those dealing with tort reform and school funding.

The Tort Reform Opinions

The Moyer Court addressed the constitutionality of tort reform legislation six times over a period that spanned from 1991 to 2007. On all but one of these occasions, the Court found some aspect of tort reform unconstitutional. While critics might call this pattern "judicial activism," in truth, the Court was struggling to harmonize its legitimate role in upholding the Constitution with the General Assembly's legitimate role in providing for the general welfare. The battle over tort reform was not fought just between the branches; a split over tort reform developed within the Court itself.

In the first such decision *Morris v. Savoy*,[4] the Court holds that a provision in the Tort Reform Act of 1975 imposing a $200,000 cap on general damages awarded for medical malpractice is unconstitutional. The opinions, though divergent, are civil and respectful. The Chief Justice and two justices conclude the damages cap violates due process because the General Assembly failed to show that the cap bore a real and rational relationship to the purpose of the Act, which was to remedy the perceived health care crisis prompted by escalating medical malpractice premiums. Their analysis leaves the door open for the General Assembly to re-enact damages caps by doing a better job of making a clear connection between the remedy and the public welfare; in other words, by doing a better job of legislating. Two of the justices opt for a broader approach. They agree the damages cap fails to pass muster on due process grounds but also find the cap violates other substantive constitutional rights, including the right to jury trial. Under their rule of law, the General Assembly would lack the power to impose damages caps, absent an amendment to the Ohio Constitution.

In 1994, the minority view in *Morris v. Savoy* became the majority view. Five members of the Court hold that provisions in the Tort Reform Act of 1987 are unconstitutional because they

[4] 61 Ohio St.3d 684, 576 N.E.2d 765 (1991).

violate the right to jury trial and the guarantees of due process or equal protection. In *Sorrell v. Thevenir*,[5] the Court holds that the collateral benefits rule, which allows a defendant to set off against a jury verdict other recoveries received by the plaintiff as a result of the injury, is unconstitutional. Writing the dissent, Chief Justice Moyer concludes that the elimination of double recoveries does not violate the right to jury trial and is a rational exercise of the General Assembly's powers. He writes:

> If the underlying purpose of tort law is to wholly compensate victims, due process is satisfied when the plaintiff recovers, from all sources, the amount the jury deems a just and appropriate award. By disallowing a setoff for collateral benefits, the majority sanctions a windfall for the plaintiff at the expense of all insureds. One must ask, what purpose is served by such reasoning? The majority will allow a plaintiff to take substantially more than what a jury found to be full compensation.[6]

[5] 69 Ohio St.3d 415, 633 N.E.2d 504 (1994).
[6] Id. Ohio St. 3d at 427.

The split over tort reform was repeated twice more in 1994 in *Galayda v. Lake Hospital*[7] and *Zoppo v. Homestead Ins. Co.*[8] In *Galayda*, the Court finds a tort reform statute requiring awards of future damages in excess of $200,000 to be paid in periodic payments unconstitutional. In *Zoppo*, the Court holds a statute allowing the judge to determine a punitive damages award unconstitutional. In his dissenting opinion in *Galayda,* Chief Justice Moyer reacts with concern to the majority's expansive interpretation of the right to jury trial. Not surprisingly, he attempts to refocus the Court on the separation-of-powers implications of invalidating tort reform measures as violative of the right to jury trial, such that the General Assembly is powerless to craft reasonable remedial measures. He opines:

> I agree with the majority that the right to a trial by jury includes a determination by the jury of all questions of fact, as well as the amount of compensatory damages to which the plaintiff is entitled. Once the jury has resolved the facts and assessed damages, however, the constitutional right is satisfied. * * * * While a party has a constitutional right to have a jury

[7] 71 Ohio St.3d 421, 644 N.E.2d 298 (1994).
[8] 71 Ohio St.3d 552, 644 N.E.2d 397 (1994).

> assess damages for injury, the party has no right to have a jury dictate the legal process by which the jury award is satisfied. It is a startling new thought that the legislative branch does not have the constitutional authority to create the legal process. It is the province of the legislative branch to determine policy issues related to the method by which jury awards are satisfied.[9]

By far one of the most acrimonious exchanges in the Moyer Court's opinions occurred five years later when the Court decided *Ohio Academy of Trial Lawyers v. Sheward*[10] and struck down the Tort Reform Act of 1997 *in toto* on the grounds, among others, that it violated separation of powers. The debate over tort reform became a robust debate over separation of powers because the 1997 Act re-enacted in somewhat different packaging several of the reforms, including the collateral source principle and caps on damages, the Court had struck down in prior opinions. The General Assembly also filled the new law with long passages of legislative intent explaining how it considered the new law to fully address the Court's prior findings of unconstitutionality. This prompted the plaintiff trial bar to take the

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[9] 71Ohio St.3d at 436.
[10] 86 Ohio St.3d 451, 715 L.Ed.2d 1062 (1999).

unprecedented step of filing an original action directly in the Ohio Supreme Court against trial court judges to prevent them from enforcing the law on the grounds that the law intruded on judicial authority and, therefore, was a nullity.

The majority opinion concludes that the Court should hear the case, notwithstanding the unusual manner in which its jurisdiction was invoked, and agrees with the trial lawyers that the new law is nothing short of a direct affront to the Court. The majority opinion decries:

> The General Assembly has circumvented our mandates, while attempting to establish itself as the final arbiter of the validity of its own legislation. It has boldly seized the power of constitutional adjudication, appropriated the authority to establish rules of court and overrule judicial declarations of unconstitutionality, and, under the thinly veiled guise of declaring "public policy", establishing "jurisdiction", and enacting "substantive" law, forbade the courts the province of judicial review.[11]

In his dissent, Chief Justice Moyer writes that the case should be dismissed because of the unusual way in which the trial lawyers sought

[11] Id., 86 Ohio St.3d at 492.

to invoke the Court's original jurisdiction to grant extraordinary writs. He takes issue not only with the majority's result but also with the method of its delivery, expressing concern that the majority's rhetoric would unnecessarily create tension between the Court and the General Assembly. Finding himself in the perhaps unusual position of dissenting from a separation-of-powers opinion, Chief Justice Moyer writes: "I bow to no one in my respect for the doctrine of separation powers. Nevertheless the doctrine is not one that is easily defined."[12]

Believing that there must be some give in the joints between the branches of government, his view is that the General Assembly is free to disagree with the Court's constitutional analysis and to enact legislation even if its constitutionality is questionable. He willingly gives the General Assembly this freedom because he is confident that should it adopt a law in conflict with the Constitution, the Court would exercise its constitutional responsibility to void that action in a proper case. But his opinion gives the General Assembly no new practical advice on how he would balance the legislative and judicial roles or on how the General Assembly might craft constitutionally permissible reform legislation in the future.

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[12] Id. at 526.

Chief Justice Moyer was given the opportunity to provide that practical advice in 2007 in the final tort reform case to come before the Moyer Court – *Arbino v. Johnson & Johnson*.[13] The case came directly to the Court when the federal district court asked the Court to advise whether the caps on noneconomic damages and punitive damages created in the Tort Reform Act of 2005 violated the Ohio Constitution on any of the grounds addressed in the Court's prior tort reform opinions, including due process or right to jury trial. Because the Court has a rule of practice allowing federal courts to certify questions of state law directly to it,[14] *Arbino* avoided the procedural maelstrom created by *Sheward*. The way was clear for the Court to use the case to better define the constitutional separation of powers.

Moyer's majority opinion strives to bring clarity to the difference between the fact-finding role of the jury and the General Assembly's right to set legal limits on the amount of damages that may be recovered. It also strives to better define how the General Assembly can effectively demonstrate the rational relationship between its policy choices and a legitimate governmental purpose. The opinion succeeds in both objectives.

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[13] 116 Ohio St.3d 468, 2007-Ohio-6948.

[14] Ohio Supreme Court Rule of Practice, Section 18, S.Ct.Prac. R. 18.

The opinion accepts the right to jury trial as being a fundamental right, embracing the words of Thomas Jefferson that the right to jury trial is "the only anchor, ever yet imagined by man, by which a government can be held to the principles of [its] constitution."[15] It balances that right against what Chief Justice Moyer believed to be the equally fundamental principle of separation of powers – the General Assembly's right to be "the ultimate arbiter of public policy."[16] It does so by concluding that "the right to trial by jury protects a plaintiff's right to have a jury determine all issues of fact in his or her case," but that "[s]o long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered as a matter of law."[17]

The *Arbino* opinion gave the General Assembly real comfort that the high court is willing to listen to the legislative justification for difficult and sometimes unpopular policy choices. The 1997 tort reform initiative survived the constitutional scrutiny that felled the 1978 process because the General Assembly did a better job marshalling its facts and making its case. The Court's majority was persuaded that

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[15] 116 Ohio St. 3d at 474, ¶31.
[16] Id. at 472, ¶ 21.
[17] Id. at 475, ¶ 34 & 37.

damages caps bear a real relation to the general welfare by something familiar to courts – evidence. In upholding the caps, Moyer writes for the majority:

> The General Assembly reviewed evidence demonstrating the uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit, logical conclusion is that the uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system.[18]

The opinion concludes by giving the General Assembly the additional comfort that the Court does not see itself cross-checking the facts or reviewing the facts de novo. Chief Justice Moyer writes:

> [T]he General Assembly is responsible for weighing [policy] concerns and making policy decisions; we are charged with evaluating the constitutionality of those choices. Issues such as the wisdom of damages limitations and

[18] Id. at 479, ¶55.

> whether specific dollar amounts available under them best serve the public interest are not for us to decide. Using a highly deferential standard of review appropriate to a facial challenge to these statutes, we conclude that the General Assembly has responded to our previous decisions and has created constitutionally permissible limitations.[19]

Thus the struggle to balance the separate powers of the judicial and legislative branch in the very public, highly contentious arena of tort reform was finally brought to peaceful, though not unanimous, rest. There was not to be, however, a happy ending for the equally high profile and contentious struggle over school funding. Although the school funding cases spanned a shorter period than the tort reform cases, they consumed the Court's attention in equal measure and proved no less a test of judicial temperaments.

The School Funding Opinions

Chief Justice Moyer began his career in public service as an elected member of the Columbus City School District Board of Education. That

[19] Id. at 492, ¶113.

background likely gave him the prescience to appreciate how difficult it would be for the Court to articulate a definitive constitutional standard for a thorough and efficient educational system and how *DeRolph v. State of Ohio*[20] would put the judiciary on a collision course with the legislative and executive branches. Despite the Chief's strong opposition, the Court embarked on that course and before it was done twice declared Ohio's system of public education unconstitutional, almost constitutional once albeit only briefly, and finally declared it unconstitutional a third time. *DeRolph* was never actually resolved to the satisfaction of any party or the Court. The Court ultimately declared its "mission accomplished," but without victory or finality.

DeRolph I was decided in 1997. It is a 4-3 decision which holds that the then-current system for funding schools violates the Ohio Constitution's mandate for a "thorough and efficient system of common schools throughout the state."[21] Chief Justice Moyer dissents, arguing that the case does not present a justiciable question. His opinion discloses a keen appreciation of the very practical difference between the legislative branch and the judicial branch in terms of accountability to the public for difficult policy choices.

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[20] 78 Ohio St.3d 193, 677 N.E.2d 733 (1997).
[21] Ohio Constitution, Article VI, Section 2.

> Members of the legislative branch represent the collective will of the citizens of Ohio, and the manner in which public schools are funded in this state is a fundamental policy decision that is within the power of the citizens to change. 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 judicial authority. * * * * [W]e find it unlikely that the public is "willing to turn over to a tribunal against which they have little if any recourse, a matter of such grave concern to them and upon which they hold so many strong, though conflicting views. If their legislators pass laws with which they disagree or refuse to act when the people think they should, they can make their dissatisfaction known at the polls. * * * The court, however, is not so easy to reach * * * nor is it so easy to persuade that its judgment ought to be revised."[22]

DeRolph I ended with a remand directing the trial court to retain jurisdiction over the case to determine whether the expected remedial

[22] 78 Ohio St. 3d at 270 (citations omitted).

efforts by the legislative and executive branch actually cured the constitutional defect. After extensive briefing and a lengthy hearing, the trial court concluded that the State had failed to implement the systematic overhaul of the school funding system required by *DeRolph I*. In *DeRolph II*,[23] a majority of the Supreme Court agrees. Although complimentary of the State's efforts to improve the system, the majority finds "it is apparent that a great deal of work has yet to be done before Ohio can be said to have a constitutionally thorough and efficient system of public schools . . . much more is involved in this process than merely providing funds."[24]

For Chief Justice Moyer, what he had predicted as the grim reality of a state supreme court enmeshed in determining state taxation methods, budgetary priorities and educational policy had come to fruition. His dissent again calls out for respect for the integrity of the other branches of state government, noting that without it the likelihood of protracted judicial supervision over public education appears certain. He asks: "why is the majority so averse to placing its confidence in a Governor who has dramatically and effectively expressed his deep commitment to improving public education in Ohio and a General Assembly that

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[23] 89 Ohio St.3d 1, 2000-Ohio-437.
[24] Id. at 35.

has increased public expenditures at record levels? The work is their work to do. I have confidence in their will and in their ability to do it." [25]

DeRolph commanded the Court's attention for another two and half years. The Court did not give up jurisdiction over the case until December 11, 2002. But it is the Court's penultimate decision, not its final one, that is most interesting. On September 6, 2001, Chief Justice Moyer authored the majority opinion in *DeRolph III*,[26] which held that the legislative effort at educational reform, with some tweaking proposed by the Court itself, passed the constitutional tests articulated in *DeRolph I and II*. What is so significant about the majority opinion is that each of the four justices joining it had to give up a position he or she had fervently held in the prior *DeRolph* opinions. For his part, the Chief had to give up his belief that giving meaning to the Through and Efficient Clause was a nonjusticiable question. He had to embrace the law of the case as established by *DeRolph I and II*, and apply it to the latest educational reform legislation. He wielded a power he personally believed the Court did not possess, and should not want, in order to finally end what he believed was unwarranted judicial involvement from its

[25] Id. at 56.
[26] 93 Ohio St.3d 309, 2001-Ohio-1343.

inception. Chief Justice Moyer explains the spirit of the Court's newly found consensus as follows:

> The current plan for funding public primary and secondary education adopted by the General Assembly and signed by the Governor is probably not the plan that any one of us would have created were it our responsibility to do so. But that is not our burden, and it is not the test we apply in this decision. None of us is completely comfortable with the decision we announce in this opinion. But we have responded to a duty that is intrinsic to our position as justices of the highest court of the state. Drawing upon our own instincts and the wisdom of Thomas Jefferson, we have reached the point where, while continuing to hold our previously expressed opinions, the greater good requires us to recognize "the necessity of sacrificing our opinions sometimes to the opinions of others for the sake of harmony." [27]

The harmony of *DeRolph III* was short-lived. As a result of a motion for reconsideration that sought only a point of clarification, the mandate of *DeRolph III* never issued. Upon

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[27] Id., 93 Ohio St.3d at 310.

reconsideration, the Court changed its collective mind, vacated *DeRolph III*, reinstated *DeRolph I* and *DeRolph II*, and ended the case.[28] But despite its demise, *DeRolph III* should not be overlooked. It is a rare public example of judicial compromise and aptly demonstrates the beauty of the law as it reaches out for harmony.

Integrity: "The Law is beautiful when it reveals the human side."[29]

While the separation of powers cases dominated the Moyer years and were the Court's most publicly watched cases, it would be a mistake to define the Moyer Court by that theme alone. During the Moyer years, the Court heard significant cases in all areas of the law and touched the lives of Ohioans at the personal level, as well as the public level. The beauty of the law shines particularly strong in the Court's personal freedom opinions. And, remarkably, while civil debate surrounding personal freedoms – religious freedom, free speech, sexual orientation and reproductive rights – is often the most discordant civil dialogue, the Court's personal freedom decisions seem to find common ground more

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[28] *DeRolph v. State* ("*DeRolph IV*"), 97 Ohio St.3d 434, 2002-Ohio-6750.

[29] Judiciary Address.

easily. Even when there is dissent, it is restrained and respectful. Consider these examples.

First Amendment Freedoms

In Chief Justice Moyer's first year, the Court decided *In re Milton*[30] holding that the State may not compel a legally competent adult to submit to medical treatment in violation of his religious beliefs even if the treatment is life-extending. In so doing the Court rejected the State's argument that Milton's beliefs were not entitled to protection because she was not a member of any specific religious denomination or sect and was not receiving any recognized form of spiritual healing. The Court writes:

> [Milton] has expressed a long-standing belief in spiritual healing, and great weight must be given to her statement of her personal beliefs. We cannot evaluate the "correctness" or propriety of appellant's belief. Absent the most exigent circumstances, courts should never be a party to branding a citizen's religious views as baseless on the grounds that they are non-traditional,

[30] 29 Ohio St.3d 20, 505 N.E.2d 255 (1987).

> unorthodox or at war with what the state or others perceive as reality.[31]

The Court reaffirmed its strong support for the free exercise of religion in *Humphrey v. Lane*.[32] The case is significant because in 1990 the United States Supreme Court abandoned the use of the strict scrutiny standard in federal Free Exercise Clause cases. That standard requires a state seeking to justify a law that infringes upon religious freedom to demonstrate that the law employs the least restrictive means to further a compelling state interest. In *Oregon Dept. of Human Resources, Emp. Div. v. Smith*,[33] the Court held that a state law did not violate the federal free exercise clause so long as the law was religiously neutral and generally applicable. In *Humphrey v. Lane*, the Ohio Supreme Court chose not to follow in-step. It holds that for purposes of the Ohio Constitution's free exercise clause, it will continue to apply the strict scrutiny standard. The Court explains its divergence with federal law by noting that the Ohio Constitution's statement of religious freedom is broader than its federal counterpart and, thus, evinces an intent to give the broadest possible protection to religious freedom.

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[31] Id., 29 Ohio St. 3d at 26.
[32] 89 Ohio St.3d 62, 2000-Ohio-435.
[33] 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed. 2d 876 (1990).

During the Moyer years the Court was equally committed to protecting freedom of speech. In this area, the Court continued to interpret Ohio constitutional law using federal free speech analysis. Although the Court applies federal law rather than precedents strictly of its own making, its opinions are robustly analytical and richly worded. Chief Justice Moyer believed that the rules that guide "exquisite legal writing are no different than the ones that guide authors of fiction or history."[34] A good example of exquisite legal writing on his part is *City of Painesville Bldg. Dept v. Dworken & Bernstein Com L.P.A.*[35]

The Court holds a city ordinance limiting the period of time in which political signs could be posted to seventeen days before and forty-eight hours after an election unconstitutional as applied to a single sign posted on private property outside the restricted period. Writing for a unanimous court, the Chief gives a clear, concise essay on the applicable free speech precedents, methodically applies the law to the ordinance and the known facts, and concludes that the ordinance is not narrowly tailored to meet the city's proffered interests. To illustrate how the ordinance prohibits too much speech, the opinion observes that under the ordinance:

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[34] 2008 OSBA Annual Meeting Address.
[35] 89 Ohio St.3d 564, 733 N.E.2d 1152 (2000).

> signs urging fellow citizens to "Support Life [or Choice]" or to "Impeach [or support] the President" or displaying the message "America-Love it or Leave it" would be illegal unless posted during a campaign season, even though the speaker's message is of equal relevance during other times of the year. * * * * By its own terms the ordinance would prohibit the posting of a sign reading "Vote for Bush [or Gore]" in front of Bush [or Gore] campaign headquarters, except for the nineteen day period set by the ordinance, even though campaigns supporting presidential candidates often are organized at the local level for months rather than weeks. [36]

Because this was a unanimous decision, the Chief did not have to write his opinion so as to persuade his fellow justices or to disarm a dissent. Yet, he obviously took care in structuring the opinion, making the reasoning crisp, and using visual images to explain that reasoning. This opinion is one of many that proves the Chief was a master of his craft.

[36] Id., 89 Ohio St.3d at 572-73.

Privacy-based Freedoms

The Ohio Supreme Court first recognized a common law cause of action for invasion of privacy in 1956,[37] but it was a limited right and did not allow claims based upon publicity that merely places a person in a false light before the public. Although the Court discussed the "false light" theory on a number of occasions over the next fifty years, it was not until 2007 that the Court finally adopted the tort of false-light invasion of privacy.[38] It did so in a scholarly opinion that carefully weighs the benefits and possible pitfalls of recognizing such claims, but ultimately concludes:

> [T]he viability of a false-light claim maintains the integrity of the right to privacy, complementing the other right-to-privacy torts. In Ohio, we have already recognized that a claim for invasion of privacy can arise when true private details of a person's life are publicized. The right to privacy naturally extends to the ability to control false statements made about oneself. * * * * Without false light, the right to privacy is not whole * * *.[39]

The Court rejects the notion that this new tort would be too chilling on First Amendment

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[37] *Housh v. Peth*, 165 Ohio St.35, 133 N.E.2d 340 (1956).
[38] *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451.
[39] Id. at ¶ 48-49.

rights, noting a heightened need to protect privacy interests in a changed world. "Today, thanks to the accessibility of the Internet, the barriers to generating publicity are slight, and the ethical standards regarding the acceptability of certain discourse have been lowered. As the ability to do harm has grown, so must the law's ability to protect the innocent."[40]

The Court addressed issues impacting the personal freedom of sexual orientation on more than one occasion. In 1990 the Court reversed a court of appeals decision that held as a matter of law that homosexuals were not eligible to adopt children.[41] In 2002, the Court found a path through the juvenile court statutes that would allow same sex partners to petition for shared custody of their children.[42] In *State v. Thompson*,[43] the Court reversed an importuning conviction on the grounds that the statute violated the Equal Protection Clauses of the United States and Ohio Constitutions. The Court analyzed the statute as a content-based restriction on speech because it prohibited soliciting a person of the same sex to engage in sexual activity with the offender but did not

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[40] Id. at ¶ 60.
[41] *In re Adoption of Charles B.*, 50 Ohio St.3d 88, 552 N.E.2d 884 (1990).
[42] *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660.
[43] 95 Ohio St.3d 264, 2002-Ohio-2124.

overtly prohibit sexual activity between persons of the same sex. No one seriously doubted, however, that the chilling effect of the statute was most heavily felt by the gay and lesbian community.

Perhaps most significant of all its personal freedom decisions, however, is *State v. Carswell*,[44] the Court's first opportunity to interpret the 2004 Marriage Amendment to the Ohio Constitution. The amendment limited "marriage" in Ohio to a union between one man and one woman, and prohibited the State from giving legal status to relationships that approximate marriage.[45] The issue in *Carswell* was whether the Marriage Amendment rendered the domestic violence law unconstitutional to the extent that it imposed greater penalties for violence against a person "living as a spouse" with the offender. How the Court resolved the case would have significant consequences for any number of statutes or governmental programs that affect persons living together as domestic partners. In an opinion authored by Chief Justice Moyer, the Court concludes that the Marriage Amendment did not invalidate the domestic violence law. The Court reads the Marriage Amendment narrowly to mean only that the "state cannot create or recognize a legal status for unmarried

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[44] 114 Ohio St.3d 210, 2007-Ohio-3723.
[45] Ohio Constitution, Article 15, Section 11.

persons that bears all of the attributes of marriage — a marriage substitute."[46]

The Consequences of Reproductive Rights

Roe v. Wade[47] settled the question of a constitutional right to terminate a pregnancy but the recognition of this right by the highest court raised other issues to be resolved by the state courts. One such issue is the extent to which there may be tort liability when the constitutional right to choose whether or not to terminate a pregnancy is frustrated.

In *Hester v. Dwivedi*[48] the Court had to decide whether Ohio would recognize a tort claim for "wrongful life", i.e. whether a child born with a disability could bring an action for medical negligence based upon a doctor's failure to inform her mother of the possibility that she would be born with a disability, thereby depriving the mother of the right to make a fully informed decision whether to seek an abortion. The Court declined to recognize a "wrongful life" claim, finding that such a claim failed to satisfy the elements of damages and causation needed to establish a medical negligence claim. Chief Justice Moyer, writing

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[46] 114 Ohio St.3d at 213, ¶ 13.
[47] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed 2d 147 (1973).
[48] 89 Ohio St.3d 575, 2000-Ohio-230.

for the Court, explains why the child suffers no compensable injury.

> Because the Hesters assert that Patricia would have opted for abortion, adoption of the proposition that Alicia was thus injured would necessitate our acceptance of the proposition that abortion, therefore nonexistence, would have been better for Alicia than life accompanied by physical and/or mental deficiencies. We would, in effect, be making a judicial determination that the trial court is able to adjudicate that it would have been better for Alicia had she not been born. * * * * We remain committed to the proposition . . . that such weighing falls within the ambit of moral, philosophical, and religious considerations rather than judicial. Judges and jurors are no more able to judge the value of life in a "normal" condition (however that might be defined) versus nonbeing. We therefore reject the Hesters' suggestion that Alicia suffered damage based on the fact of her being born rather than aborted. [49]

In *Schirmer v. Mt. Auburn Obstetrics*[50] the Court answers the obvious related question of

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[49] Id., 89 Ohio St.3d at 581-82.
[50] 108 Ohio St.3d 494, 2006-Ohio-042.

whether the mother of a disabled child born following negligent genetic counseling may bring a medical malpractice action, i.e. a "wrongful birth" claim, based upon her testimony that she would have chosen an abortion had she been informed of the likelihood that her child would be born with a disability. The Court holds that the mother may recover the costs arising from the pregnancy and the birth of the child but may not recover the costs of raising and supporting the disabled child or recover for the emotional or physical injuries resulting from the added burdens of a disabled child. The opinion explains that because the doctors did not cause the child's genetic condition and could not have prevented it by treating the child or the mother, the only causally related injury to the misdiagnosis is the loss of the opportunity to decide to terminate the pregnancy. The Court concludes it would be improper to award damages based upon a calculation of life versus impaired life because unimpaired life was never a possibility in this situation. Noting that the crux of the case again was a comparison of nonexistence versus existence albeit impaired, the Court finds "the law does not sanction an award of damages based on the relative merits of 'being versus nonbeing.'"[51]

[51] Id. at ¶ 23.

Property Rights

The freedom to own property, a fundamental right in Ohio, received full protection from the Moyer Court. The property right opinions tend to be among its most scholarly, filled with historical references as well as precedent, but also show the Court in tune with very practical, personal realities. These opinions perhaps best illustrate Chief Justice Moyer's "*humble opinion*" that the beauty of the law "*is that it is the product of the ages –wrapped in the opinion of the moment*."[52] There are two excellent examples.

State ex rel. Pizza v. Rezcallah[53] involved the constitutionality of a statute that required a trial court, upon finding a nuisance, to issue an injunction closing the property against any use for one year unless the owner posts a bond equal to the value of the property. The issue was whether the statute was properly applied to a non-resident owner who did not participate or acquiesce in the creation or continuation of the nuisance. Writing for the majority, Chief Justice Moyer finds that a property owner forced to sacrifice all economically beneficial use of his property has suffered an unconstitutional taking of his property. The opinion shows genuine compassion for the very practical predicament of the innocent owner, in

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[52] Judiciary Address.

[53] 84 Ohio St.3d 116, 1998-Ohio-313.

this case an owner who had unknowingly rented her property to a drug dealer. Chief Justice Moyer writes:

> Landlords are limited in the actions they may take against tenants engaged in illegal activities both by law and practical considerations. They are statutorily prohibited from entering leased residential property unannounced. * * * * [I]t is unrealistic to expect a landlord to subject himself or herself to the risk of possible injury inherent in an attempt to unilaterally dispossess tenants who may be under the influence of drugs and may be armed. Landlords have no authority to conduct regular drug searches, nor may they break a lease based solely on unsubstantiated suspicions that a tenant is conducting illegal activities. * * * * Appellee Rezcallah persuasively argues that even without these legal restrictions, her limited resources for investigating or acting upon any suspicion of drug activity on her property make her "no match for the illegal drug trade."[54]

[54] Id., 84 Ohio St.3d at 130.

The Court's most sweeping property rights opinion, however, is *Norwood v. Horney*,[55] involving the constitutionality of a municipal ordinance that allowed the city to take private property in a deteriorating area for redevelopment purposes. The court strikes down the ordinance on the grounds that it constitutes an unconstitutional taking of private property. The opinion is a rhapsodic tribute to private property rights. The tone is set in the following introductory paragraph:

> Our consideration does not take place in a vacuum. We recognize that eminent domain engenders great debate. Its use, though necessary, is fraught with great economic, social, and legal implications for the individual and the community. * * * * Appropriation cases often represent more than a battle over a plot of cold sod in a farmland pasture or the plat of municipal land on which a building sits. For the individual property owner, the appropriation is not simply the seizure of a house. It is the taking of a home – the place where ancestors toiled, where families were raised, where memories were made. Fittingly, appropriations are scrutinized

[55] 110 Ohio St.3d 353, 2006-Ohio-3799.

> by the people and debated in their constitutions.[56]

The Court first provides a concise historical summary of the two great fundamental rights – the right of eminent domain in all the people, and the right of private property in each, noting that "[t]hese great rights exist over and above, and independent of all human conventions, written and unwritten."[57] The opinion focuses on the evolution of modern notions of what constitutes an acceptable "public use" justifying the taking of private property, noting a paradigm shift in the early decades of the 20th century to allow eminent domain to be used to destroy a threat to the general welfare rather than to create something new for the public welfare. The Court then reaches two key conclusions. First, it declines to hold that the takings clause in the Ohio Constitution has the sweeping breadth that the United States Supreme Court attributes to the federal Takings Clause. Second, it holds that defining the parameters of public use is a judicial function, such that legislative findings of a public use are subject to a heightened scrutiny and are not entitled to the deference or presumption of constitutionality afforded legislative findings in other contexts. The Court holds that an economic or financial benefit alone is

[56] Id. at 354-55, ¶ 3-4.
[57] Id. at ¶ 33.

insufficient to satisfy the public-use requirement of the Ohio Constitution.

The Court's opinions in each of these areas of personal freedom effectively demonstrate that the Moyer Court, though often described as a business-minded court, respected and broadly protected individual rights and liberties. It was a court that minded the hearth as well as the marketplace.

The Gift of Clarity

At oral argument counsel could anticipate one very predictable question from Chief Justice Moyer. He would ask in his quiet, disarming way: "What is the rule of law you would have this Court write?" For the Chief, the essence of the Court's role was to write clear rules of law upon which parties could rely in conducting commerce and going about their daily lives. He always wanted the Court's rulings to be sharp, crisp and to the point. His high standard for bright lines and clear analysis is an important part of his legacy in Ohio jurisprudence.

Over his twenty-three years on the high court bench, the Court issued a legion of opinions involving statutory construction and contract interpretation. In his very first opinion for the Court, the Chief divined the difference between "revoke" and "suspend" to find that a statute

authorized a trial court to exercise discretion to permanently revoke a person's driver's license.[58] His last opinion for the Court demystified how a vendor markdown allowance affected inventory value for purposes of the personal property tax law.[59] In these and many like cases throughout his time on the bench, the Chief gave clarity to the words of others. That is important work, but it can be transitory. The legislature not infrequently amends statutes and parties are free to rewrite their contracts. The Court's more enduring legacy is found in opinions developing the common law. The common law is the Court's unique work product and endures unless it is subsequently overruled or modified by the Court or expressly abrogated by the General Assembly. The Court's common law work product is remarkable not only for the law that the Court wrote but also for the law it declined to write.

Restraint in Growing the Common Law

The Moyer Court was cautious in developing common law principles, particularly where the common law was invoked by parties to limit the application of a statute or to ameliorate the consequences of a written contract. As the following cases illustrate, the Moyer Court was

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[58] *State v. White*, 29 Ohio St.3d 39, 505 N.E.2d 632 (1987).
[59] *Rich's Dept. Store v. Levin*, 125 Ohio St.3d 15, 2010-Ohio-957.

very committed to the notion that one important aspect of the beauty of the law is its ability to make life more predictable by giving parties clear principles, enforcing statutes and agreements as written, and eschewing reformative common law principles and exceptions where appropriate.

An early example of this restraint is *Flaugher v. Cone Automatic Machine Co.*, in which the Court adopts the general rule of corporate successor liability that holds that a purchaser of a corporation's assets is not liable for the debts and obligations of the seller corporation unless one of four exceptions applies. [60] The exceptions are: 1) that the buyer expressly or impliedly agreed to assume such liability; 2) the transaction amounts to a de facto consolidation or merger; 3) the buyer is merely a continuation of the seller; or 4) the transaction was entered into fraudulently for the purpose of escaping liability. The Court declines, however, to adopt a "product line" exception, a progressive exception recognized by some states in products liability cases. The product line exception holds that where the buyer continues to manufacture the seller's product line, the buyer assumes strict tort liability for injuries resulting from defects in units of the same product line previously manufactured and

[60] 30 Ohio St.3d 60, 507 N.E.2d 331 (1987).

distributed. The Court explains its decision to reject this exception:

> The adoption of the product line theory would cast a potentially devastating burden on business transfers and would convert sales of corporate assets into traps for the unwary. * * * The consideration of whether the benefits of the product line theory outweigh its drawbacks is a matter best consigned to the legislature, with its "comprehensive machinery for public input and debate."[61]

Six year later the Court again considered a request to expand the exceptions to the general rule on successor liability. In *Welco Indus. v. Applied Cos.*[62], the appellant asked the Court to relax the requirements for invoking the "mere continuation" exception to the general rule. Some courts had expanded this exception in products liability cases so that liability would attach when there are significant shared features between the two corporations, such as a common name, the same management or the same employees. The Court refuses to relax the mere continuation exception in this way, finding that the adoption of this broader exception would be particularly unsound where

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[61] Id., 30 Ohio St.3d at 66 (citations omitted).
[62] 67 Ohio St. 3d 344, 617 N.E.2d 1129 (1993).

the claim against the successor corporation is for breach of contract, not products liability. Chief Justice Moyer sets out the Court's reasoning:

> However valid the justifications for expanding the liability of successor corporations in products liability cases, those justifications do not apply here. Unlike tort law, which is guided largely by public policy considerations, contract law looks primarily to the intentions of the contracting parties. * * * * The concerns for predictability and free transferability in corporate acquisitions that led this court to decline to expand the test for tort successor liability in *Flaugher* are even more compelling where the claim is in contract. To expand the mere-continuation exception to a contractual claim would virtually negate the difference between an asset purchase and a stock purchase. Courts would be forced to look beyond the surface of any asset purchase to determine the extent of shared features between predecessor and successor in order to decide whether liability should attach to contractual obligations that were explicitly excluded from the transaction. The sale of a corporation's

> assets is an important tool in raising liquid capital to pay off corporate debts. A court-imposed expansion of contractual liability of successor corporations beyond the traditional exceptions would unnecessarily chill the marketplace of corporate acquisitions.[63]

In *Hamilton Ins. Serv. v. Nationwide Ins. Co.*,[64] the Court refuses to imply a common law covenant of good faith to avoid enforcing a termination without cause provision in a written contract. Similarly, in *Dugan & Meyers Construction Co. v. Ohio Dept. of Adm. Servs.*,[65] the Court declines to apply a public construction law doctrine that excuses contractors from the contractual consequences of defects in construction plans and specifications prepared by the owner. Chief Justice Moyer, writing for the majority, explains why:

> This court has long recognized that "where a contract is plain and unambiguous, it does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto and a

[63] Id., 67 Ohio St.3d at 348-49.
[64] 86 Ohio St.3d 270, 1999-Ohio-162.
[65] 113 Ohio St.3d 226, 2007-Ohio-1687.

> corresponding advantage to the other, [and] that it is not the province of courts to relieve parties of improvident contracts." * * * * In order to hold for Dugan & Meyers, we would need first to find that the state had impliedly warranted its plans were buildable, accurate and complete, and, second, to hold that the implied warranty prevails over express contractual provisions. To do so would contravene established precedent, which we will not do.[66]

In *Wilborn v. Bank One Corp.*,[67] the Court holds that a provision in a standard residential-mortgage contract requiring a defaulting borrower to pay the lender's attorney fees as a condition of terminating foreclosure proceedings and reinstating the loan is not contrary to Ohio law or public policy. The Court rejects the argument that the standard mortgage forms are adhesion contracts because little, if any, negotiation occurs between the borrowers and lenders as to the terms contained in the contract, because the record established that the standard, uniform mortgage form was developed through an extensive, national process that involved lenders, consumer advocates and disinterested

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[66] Id. at ¶ 29 & 37 (citations omitted).
[67] 121 Ohio St.3d 546, 2009-Ohio-306.

legal scholars and associations. The Court concludes:

> In all, these uniform mortgage forms are the result of sophisticated parties, all with competing interests and wielding significant bargaining power, freely entering discussions, compromises, and negotiations for the purpose of creating "what the law of mortgages will be in 50 States in most of the home buying transactions for the next several decades." . . . Accordingly, we are persuaded that both the borrowers and the lenders in this case are the beneficiaries of the negotiations that culminated in the inclusion of the mortgage-reinstatement or alternate-workout provision in the uniform mortgage forms.
>
> Moreover, public policy strongly favors the use of these uniform mortgage forms to further Congress' stated purpose and to permit the trading of Ohio's conventional mortgages on the secondary market. To declare some part of these forms unenforceable would make Ohio less competitive in the secondary mortgage market . . ., denying lenders liquidity for their investment portfolios, and decreasing

> the capital available to borrowers for mortgages. In light of the economic difficulties afflicting the national economy as of late, and particularly in the housing sector, our decision today also serves the public policy of this state by avoiding further destabilization.[68]

In *Olympic Holding v. ACE Limited*,[69] the Court refuses to recognize an equitable promissory estoppel exception to the Statute of Frauds. The Court explains:

> We recognize that numerous jurisdictions have held that under various circumstances, promissory estoppel may be used to remove an agreement from having to comply with the statute of frauds. * * * However, we decline to adopt that exception under the circumstances of this case because it is both unnecessary and damaging to the protections afforded by the statute of frauds. * * * * "[T]he statute of frauds is supposed both to make people take notice of the legal consequences of a writing and to reduce the occasions on which judges enforce non-existent contracts because of perjured evidence." * * * * If promissory estoppel

[68] Id. at ¶ 37-38 (citation omitted).
[69] 122 Ohio St.3d 89, 2009-Ohio-2057.

> is used as a bar to the writing requirements imposed by the statute of frauds, based on a party's oral promise to execute the agreement, the predictability that the statute of frauds brings to contract formation would be eroded. Parties negotiating a contract would no longer know what signifies a final agreement.[70]

Precision in Making Common Law Rules

The Moyer Court on occasion did add to the common law. When it did, it was committed to the notion that the law should be clear so that parties could conduct their affairs with confidence that they knew the consequences of their actions. The Chief's opinion in *Dombroski v. WellPoint, Inc.*[71] typifies the Court's desire for clearly defined and practical common law rules.

The Court first recognized that individual or corporate shareholders might be liable for the acts of a corporation or corporate subsidiary – the common law doctrine of alter ego or "piercing the corporate veil" – in *North v. Higbee*,[72] which articulated a very conservative view of when the corporate shield might be

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[70] Id. at ¶29-35 (citations omitted.).
[71] 119 Ohio St.3d 506, 2008-Ohio-4827.
[72] 131 Ohio St. 507, 3 N.E.2d 391 (1936).

disregarded. *North* held that the separate corporate entity would not be disregarded "in the absence of proof that the subsidiary was formed for the purpose of perpetuating a fraud and that domination of the parent corporation over its subsidiary was exercised in such a manner as to defraud [the] complainant."[73] The Court did not address the issue again for fifty-seven years.

In *Belvedere Condo. v. R.E. Roark*,[74] the Court, relying on a recent Sixth Circuit decision, modifies and clarifies the doctrine into a three-part test. *Belvedere* holds that the corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when: 1) the shareholders' control over the corporation is so complete that the corporation has no separate mind, will or existence of its own; 2) that control is exercised "to commit fraud or an illegal act"; and 3) injury or unjust loss results from such control and wrong.

While the *Belvedere* test appears clear and precise in articulating the Court's standard for piercing the corporate veil, it proved not to be so for the lower courts, particularly with respect to the second prong. Several courts of appeal construed "fraud or illegal act" broadly to allow

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[73] Id., Syllabus.
[74] 67 Ohio St.3d 274, 1993-Ohio-119.

the corporate veil to be pierced when unjust or inequitable acts short of fraud or illegality were shown to have occurred. The result was to significantly increase the number and types of cases in which a plaintiff could seek relief from individual shareholders for corporate wrongs.

Noting this trend, the Court revisits the issue again in *Dombrowski*. Writing for the majority, Chief Justice Moyer acknowledges that "*there are compelling reasons to follow the majority of the courts of appeal and expand the fraud-or-illegal-acts test in Belvedere*,"[75] but nevertheless concludes that to do so would upset the correct balance between the sound purpose of limited shareholder liability and the fact that shareholders sometimes misuse the corporate form.

> Were we to allow piercing every time a corporation under the complete control of a shareholder committed an unjust or inequitable act, virtually every close corporation could be pierced and sued, as nearly every lawsuit sets forth a form of unjust or inequitable action and close corporations are by definition controlled by an individual or small group of shareholders. * * * * Controlling shareholders in publicly traded corporations could also be

[75] 119 Ohio St.3d at 512, ¶ 25.

> subject to frequent piercing, regardless of the corporation's liability and its ability to pay for the plaintiff's injuries. Such expansive liability would run contrary to the concept of limited shareholder liability and upset the balance struck in *Belvedere*. Thus, the proposed expansion of the second prong of the *Belvedere* test to include unjust or inequitable conduct is simply too broad to survive exacting review.[76]

Curl v. Volkswagen of Am., Inc.[77] is another good example of the Court's commitment to predictable rules of law that parties can rely upon in conducting their affairs. In *Curl*, the Court reaffirms that a party seeking to assert a claim for breach of implied warranty must be in privity with the purchaser of the product – a minority view across the nation. In reaching this conclusion the Court notes its holding gives sellers of consumer goods greater foreseeability.

> [L]longstanding Ohio jurisprudence provides that purchasers of automobiles may assert a contract claim for breach of implied warranty only against parties with whom they are in privity. Having reviewed the authority in Ohio, as well

[76] Id. at ¶ 27.
[77] 114 Ohio St.3d 266, 2007-Ohio-3609.

> as that of other jurisdictions, we see no compelling reason to stray from precedent. A claim for breach of implied warranty, though similar to a tort action, arises pursuant to the law of sales codified in Ohio's uniform Commercial Code. The privity requirement, which remains absent in strict liability tort actions, allows sellers of goods to define their scope of responsibility and provides a greater degree of foreseeability regarding potential claimants. * * * * To permit a claimant to recover without establishing vertical privity blurs the distinction between contract and tort.[78]

Shoemaker v. Gindelsberger[79] is another example. The case invited the Court to relax the strict privity requirement established by the Court in *Simon v. Zipperstein,*[80] which prevents third persons from pursuing negligence claims against attorneys for actions taken on behalf of their clients. The case involved a claim by beneficiaries of a decedent that the decedent's attorney had negligently prepared a deed transferring her property and that as a result estate assets had be sold to pay taxes on the transfer. The Court declines to relax the privity

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[78] Id. at ¶ 26 (citations omitted).
[79] 118 Ohio St.3d 226, 2008-Ohio-2012.
[80] 32 Ohio St.3d 74, 512 N.E.2d 636 (1987).

rule, again favoring stability and predictability in the Ohio rule of law, even though its position is the minority position. The Court writes:

> [T]the United States Supreme Court, in its seminal case discussing privity, noted that "[t]he only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." . . . Rather than expose the lawyer to the 50, we conclude that lawyers should know in advance whom they are representing and what risks they are accepting.
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> * * * *
>
> While recognizing that public-policy reasons exist on both sides of the issue, we conclude that the bright-line rule of privity remains beneficial. The rule provides for certainty in estate planning and preserves an attorney's loyalty to the client. * * * A holding that attorneys have a duty to beneficiaries of a will separate from their duty to the decedent who executed the will could lead to significant difficulty and uncertainty, a breach in confidentiality, and divided loyalties.[81]

[81] 118 Ohio St.3d at 230, ¶ 14-19 (citations omitted).

In *Toledo Blade v. Toledo Port Auth.*[82] the Court again opted for a bright-line rule. The case asked the Court to better define the scope of the common law attorney client privilege. The issue was whether the newspaper had made a valid public records request for an investigative report prepared by a law firm for the port authority. The Court holds that the report was not a public record because it was covered by the attorney client privilege.

The Court rejects the newspaper's argument that the factual portions of the report were not covered by the attorney client privilege because they did not constitute legal advice. It finds: "That cramped view of the attorney-client privilege is at odds with the underlying policy of encouraging open communication; it poses inordinate practical difficulties in making surgical separations so as not to risk revealing client confidences; and it denies that an attorney can have any role in fact-gathering incident to the rendition of legal advice and services."[83] The Court's holding keeps the privilege intact so long as an investigation relates to the rendition of legal advice.

These opinions reflect – and they are just representative of the many opinions that reflect – the Moyer Court's belief that there should be

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[82] 121 Ohio St.3d 537, 2009-Ohio-1767.
[83] Id. at ¶26.

clarity in any rule of law announced by the Court. That belief is very much in character for Chief Justice Moyer. Clarity in writing is achieved when the author seeks to serve people rather than to impress them.[84] Chief Justice Moyer was the consummate public servant. He was a lawyer and justice not for money or prestige but because the law excited him. In his own words, he explains:

> Why? Why are we judges?
>
> Certainly not the compensation.
>
> What compels us to pull that black robe up over our shoulders to preside over the unrelenting stream of disputes that society brings our way?
>
> What draws us as judges to sort between those who are hurt, and those who are hurtful –to seek justice where others see conflict?
>
> If we push ourselves beyond our daily tasks we will realize it is because the law touches us. It excites us.
>
> It is because law reminds us that we follow in the footsteps of the masters

[84] F.L. Lucas, *Style*, p. 76 (Cassell, 1955).

the greats such as Locke, Montesquieu, and Jefferson.

We are judges because the law brings order from chaos.

Like brush strokes on canvas, law brings form to cloudy images of the mind.

We are judges because of the beauty of the law.[85]

[85] Judiciary Address.

Epilogue

In his beauty of the law speech, Chief Justice Moyer reflected on the following quote:

> Pity the person, if such there be, who can go through life reading, studying, teaching and practicing law, and adjudicating cases without ever beholding the beauty of the work material or the grandeur of the work product. Such a person would be like the man who thinks he is just pushing a wheelbarrow, when in fact, he is building a cathedral.[86]

Chief Justice Moyer's legacy includes two judicial cathedrals. One of marble, plaster and wood – the beautiful Ohio Judicial Center, the architectural heirloom he lovingly restored. And one of words, ideas and thought – the work product of twenty-three dedicated years of judicial leadership and scholarship. They are of equal worth and equal beauty. The building is the Court's physical foundation; it houses the Court so it can do its work. The opinions are the Court's spiritual foundation for the work yet to be done.

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[86] Id. (quoting United States District Court Judge William Bootle).

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