



## Strategies for overturning precedent

by Anthony R. McClure

*Westfield v. Galatis* is a decision often cited, yet rarely applied.

In *Galatis*, the Supreme Court of Ohio established Ohio's test for overturning prior precedent.<sup>1</sup> Many thought this decision would change the landscape of Ohio jurisprudence. But in the more than eight years since *Galatis* was decided, how much has it really played a role in the decision making of Ohio's appellate courts? And what does this mean for Ohio's practitioners, as a practical matter, when confronted with adverse precedent that they seek to overturn or modify?

*Galatis* concerned the Court's controversial 1999 decision in *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*<sup>2</sup> In that decision, the Court held that uninsured and underinsured motorist (UM/UIM) coverage clauses in corporate insurance policies should be read to cover all company employees, whether injuries were incurred in the course of their employment. The Court went even further later in *Ezawa v. Yasuda Fire & Marine Ins. Co. of America*, holding that UM/UIM coverage in corporate motor vehicle policies extended not only to company employees, but also to their resident family members who were injured in traffic accidents.<sup>3</sup> Four years later in *Galatis*, the Court limited *Scott-Pontzer* and overturned *Ezawa* to extend this kind of coverage to company employees only for injuries they incurred "within the course and scope of employment."<sup>4</sup>

In overturning the earlier precedent, the majority in *Galatis* noted that "we have not adopted a standard by which to judge whether a past decision should be abandoned."<sup>5</sup> After considering the procedure in other states for overturning precedent, the Court held:

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.<sup>6</sup>

Thus the *Galatis* test was born. The next question was whether—and when—the Court might apply this new test again.

### A pattern?

In 2006, the Court twice applied *Galatis* to overturn prior precedent. First, in *State ex rel. Stevens v. Indus. Comm.*, the Court overruled prior decisions relating to whether a natural increase in earnings over time is a "special circumstance" sufficient to justify recalculation of a worker's average weekly wage for workers' compensation.<sup>7</sup> The Court answered that it was not and ob-

served that the earlier decisions "responded to a difficult situation in a manner that has since proven to be confusing and unworkable from a practical perspective."<sup>8</sup> Next, in *State ex rel. Advanced Metal Precision Prods. v. Indus. Comm.*, the Court overruled two similar decisions relating to the phrase "operating cycle" in a former workers' compensation regulation.<sup>9</sup>

### Too different for stare decisis

Since that time, however, the Supreme Court has issued few—if any—decisions squarely applying the *Galatis* test to overturn prior decisions. In 2007 and 2008, the Court considered two tort reform cases that provided opportunities to expressly overturn precedent, but the Court found that the current statutes at issue were too different from earlier versions of similar statutes for stare decisis to apply. For instance, in *Arbino v. Johnson* (2007), the Court sustained certain tort reform statutes passed in 2005.<sup>10</sup> Eight years earlier, in *State ex rel. OATL v. Sheward*, the Court held that similar provisions were unconstitutional.<sup>11</sup> But in *Arbino*, instead of applying *Galatis* and overturning *Sheward*, the Court chose a more measured approach, observing that "[t]he statutes before us here are sufficiently different from the previous enactments to avoid the blanket application of stare decisis and to warrant a fresh review of their individual merits."<sup>12</sup>

Similarly, in *Groch v. Gen. Motors Corp.*, the Court determined that the 10-year statute of repose in Ohio's products liability statute did not violate the Ohio Constitution, thereby limiting its prior decision in *Brennaman v. R.M.I. Co.*, which struck down a similar provision.<sup>13</sup> The Court noted:

We will not apply stare decisis to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments that we have deemed unconstitutional. To be covered by the blanket of stare decisis, the legislation must be phrased in language that is substantially the same as that which we have previously invalidated.<sup>14</sup>

So the Court did not overrule *Brennaman*; it "simply decline[d] to follow its unreasoned rule in contexts in which it is not directly controlling."<sup>15</sup>

### Dissension is heard

Although Justice Judith Ann Lanzinger concurred in part of the decision in *Groch*, she wrote separately to "question the continued vitality" of *Galatis*.<sup>16</sup> Specifically, Justice Lanzinger complained that the majority in *Groch* describes "why *Brennaman* was wrongly decided," but "given a prime opportunity to apply *Galatis* and

state that *Brennaman* is overruled, the majority does not actually do so.<sup>17</sup> She concluded: “If *Galatis* constrains our decisions so greatly that we cannot acknowledge cases that have clearly been wrongly decided and require overruling, then it is of questionable value itself.”<sup>18</sup> Justice Lanzinger’s dissenting opinion echoed the words of earlier dissents authored by Justice Paul Pfeiffer, who characterized *Galatis* as a “hopelessly random and formulaic approach to overruling precedent” and a “legalistic straitjacket.”<sup>19</sup>

### Similar but distinguishable

More recently, in 2009 and 2010, the Supreme Court also declined to apply *Galatis* in three separate cases, although on these occasions, the Court distinguished *Galatis* by name. In *State v. Silverman* (2009), the Court held that under Ohio Evid.R. 807, a third party may present “hearsay” testimony in a criminal trial under certain circumstances.<sup>20</sup> In so holding, the Court limited its prior decision in *State v. Said*, but declined to apply *Galatis* because the issue was procedural in nature.<sup>21</sup>

A year later, in *State v. Bodyke*, the Court rejected a portion of the Adam Walsh Act, which allowed the attorney general to change the registrations of sex offenders convicted before 2007.<sup>22</sup> The prior decisions confronted by the Court in *Bodyke* concerned the separation of powers, as well as ex post facto and retroactivity principles, and double jeopardy. The majority in *Bodyke* avoided applying the *Galatis* test to this precedent by observing that stare decisis “is not controlling in cases presenting a constitutional question.”<sup>23</sup> As Justice O’Donnell noted in his dissenting opinion, however, the Court created the test in *Galatis* in partial reliance on U.S. Supreme Court decisions relating to precedent involving constitutional questions.<sup>24</sup>

Finally, in *State v. Johnson*, the Court held that when determining whether two criminal offenses can be merged under R.C. 2941.25, “the conduct of the accused must be considered.”<sup>25</sup> In so holding, the Court over-ruled its earlier decision in *State v. Rance*.<sup>26</sup> In doing so, however, the Court held that in overruling *Rance*, “we need not apply the test of [*Galatis*], because R.C. 2941.25 is a prophylactic statute that protects a criminal defendant’s rights under the Double Jeopardy Clauses of the U.S. and Ohio constitutions. Because there is a constitutional protection underlying the proper application of R.C. 2941.25, stare decisis does not compel us with the same force as it does in other areas of the law.”<sup>27</sup>

### Practice pointers

Although the Supreme Court appears to be hesitant to apply the *Galatis* test to overturn prior precedent, and has sidestepped any application of *Galatis* at all, the decision assuredly has played a role in many important outcomes since 2003—whether directly or indirectly. For those hoping to convince the Court to overturn prior precedent, the argument is likely to be an uphill battle. Indeed, on multiple occasions when the Supreme Court of Ohio has considered the *Galatis* test, it has held that the test has not been met.<sup>28</sup> As the Court has noted, the party seeking to have the Court overturn prior precedent has the burden to establish all three requirements of the *Galatis* test. This cannot be accomplished with unsupported statements.<sup>29</sup>

Practitioners may find more success in convincing the Court to limit the scope of a prior holding, or distinguish it for other reasons, without having to decide that a prior decision should be completely overturned. If recent history is any indicator, the Court would find these types of arguments to be much more appealing. ■

## Author bio

Anthony McClure is a partner in the litigation department at Porter Wright in Columbus. McClure has represented clients in a variety of complex disputes in both state and federal courts. He has experience in matters including complex commercial litigation disputes, contractual and mortgage disputes, tort litigation, administrative appeals, legal malpractice and environmental litigation.

## Endnotes

- <sup>1</sup> *Westfield v. Galatis*, 100 Ohio St.2d 216, 2003-Ohio-5849.
- <sup>2</sup> *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116.
- <sup>3</sup> *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557, 1999-Ohio-124, 715 N.E.2d 1142.
- <sup>4</sup> *Galatis*, paragraphs two and three of the syllabus.
- <sup>5</sup> Id. at ¶45.
- <sup>6</sup> Id. at ¶48.
- <sup>7</sup> *State ex rel. Stevens v. Indus. Comm.*, 110 Ohio St.3d 32, 2006-Ohio-3456, 850 N.E.2d 55; *State ex rel. Lemke v. Brush Wellman, Inc.* (1998), 84 Ohio St.3d 161, 702 N.E.2d 420; *State ex rel. Price v. Cent. Serv., Inc.*, 97 Ohio St.3d 245, 2002-Ohio-6397, 779 N.E.2d 195.
- <sup>8</sup> *Stevens*, 2006-Ohio-3456, at ¶11.
- <sup>9</sup> *State ex rel. Advanced Metal Precision Prods. v. Indus. Comm.*, 111 Ohio St.3d 109, 2006-Ohio-5336, 855 N.E.2d 435; *State ex rel. Aspinwall v. Indus. Comm.* (1988), 40 Ohio St.3d 55, 531 N.E.2d 681; *State ex rel. Garza v. Indus. Comm.* (2002), 94 Ohio St.3d 397, 763 N.E.2d 174; also in 2006, the Court applied the *Galatis* test to another earlier decision relating to UM/UIM coverage, but declined to over-rule the prior decision. *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St.3d 70, 2006-Ohio-1926, 846 N.E.2d 16.
- <sup>10</sup> *Arbino v. Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948.
- <sup>11</sup> *State ex rel. OATL v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123.
- <sup>12</sup> *Arbino* at ¶24.
- <sup>13</sup> *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546; *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 1994-Ohio-322, 639 N.E.2d 425.
- <sup>14</sup> *Groch* at ¶104 (internal quotations omitted).
- <sup>15</sup> Id. at ¶147. The Court issued a similar decision in 2010 with *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 97, declining to apply stare decisis because “[t]he statute we review here differs considerably from the former version of R.C. 2745.01 at issue in [*Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107].”
- <sup>16</sup> *Groch*, 2008-Ohio-546, at ¶219 (Lanzinger, J., dissenting).
- <sup>17</sup> Id. at ¶223.
- <sup>18</sup> Id.
- <sup>19</sup> Id. at ¶222 (quoting *State ex rel. Shelly Materials*, 115 Ohio St.3d 337, 2007-Ohio-5022, 875 N.E.2d 59, ¶50 (Pfeifer, J., dissenting)); Id. (quoting *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 19 (Pfeifer, J., dissenting)).
- <sup>20</sup> *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576.
- <sup>21</sup> *State v. Said* (1994), 71 Ohio St.3d 473, 644 N.E.2d 337.
- <sup>22</sup> *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424.
- <sup>23</sup> Id. at ¶37.
- <sup>24</sup> Id. at ¶85 (O’Donnell, dissenting).
- <sup>25</sup> *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus.
- <sup>26</sup> *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699.
- <sup>27</sup> *Johnson*, 2010-Ohio-6314, at ¶45.
- <sup>28</sup> See, e.g., *Hedges*, 2006-Ohio-1926, *Gliozzo*, 2007-Ohio-3762; see also *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, ¶ 21.
- <sup>29</sup> *CompManagement* at ¶¶15-21.