

IN THE SUPREME COURT OF OHIO

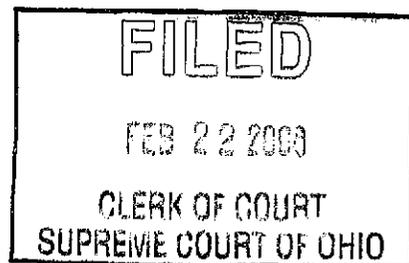
GENEVIEVE DICENZO, Executrix of)
the Estate of JOSEPH DICENZO,) **Case No. 07-1628**
Deceased, and GENEVIEVE DICENZO,)
in Her Own Right)
) **On Appeal from the**
) **Appellee**) **Cuyahoga County Court of Appeals,**
) **Eighth Appellate District**
)
) **v.**)
) **Court of Appeals**
A-BEST PRODUCTS CO., Inc., et al.) **Case No. CA 06-088583**
)
) **Appellant**)

BRIEF OF AMICI CURIAE

Ceecorp, Inc.; Cleveland Oak, Inc.; Fisher Scientific Company L.L.C.; The Edward R. Hart Company; McMaster-Carr Supply Company; P.C. Campana, Inc.; Standard Glove & Safety Equipment Company; Donald McKay Smith Inc.; F.B. Wright Company of Cincinnati; Hersh Packing & Rubber Company; Hollow Center Packing Company; M.F. Murdock Company; MVS Company, Inc.; Yohe Supply Company; Red Seal Electric Company; Akron Gasket & Packing Enterprise, Inc.; Fidelity Builders Supply; Graybar Electric Co., Inc.; F.B. Wright Company; Glidden Company; Advance Auto Parts, Inc.; Sears Roebuck and Company; Frank W. Schaefer, Inc.; Nitro Industrial Coverings, Inc.; Asbeka Industries of Ohio; Hill Building Supply, Inc.; Nock Refractories Co., Inc.; Applied Industrial Technologies, Inc.; Ohio Pipe & Supply, Inc.; Gateway Industrial Supply; Fairmont Supply Company; The C. P. Hall Company; Mau-Sherwood Supply Company; F.B. Wright Company of Pittsburgh; R.E. Kramig & Co., Inc.; McGraw Construction Company, Inc.; Ohio Alliance for Civil Justice

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INTEREST OF AMICI CURIAE

Amici curiae are but a handful of the numerous Ohio business entities (and organizations that represent their interests) that, prior to 1977, supplied, distributed or installed asbestos-containing products that were manufactured by other companies. Until now, because of statutes enacted by the Ohio legislature in 1984 (R.C. 2305.33) and 1988 (R.C. 2307.78), such businesses - - along with other businesses that only sold, distributed or installed (but did not manufacture) products that are alleged to have been defective - - have not been subjected to the strict liability that has been imposed upon manufacturers of such products. Instead, those two statutes limited the liability of non-manufacturing sellers to a handful of discrete situations. As a consequence, Ohio businesses that, many years ago, sold asbestos-containing products have not sustained the level of bankruptcies that have been experienced by asbestos manufacturers.

The decision of the Eighth District Court of Appeals in the instant case, however, would undermine the public policy reflected in those statutes. That decision would place those businesses at risk by subjecting them to strict liability for any injury arising from asbestos products supplied, distributed or installed by them prior to 1977 when this Court adopted Section 402A of the Restatement (Second) of Torts, which, for the first time in Ohio, imposed strict liability on “sellers” of defective products. Amici therefore join with appellant George V. Hamilton, Inc. in urging this Court to reverse the Court of Appeals decision.

STATEMENT OF THE FACTS

For their Statement of the Facts, these amici incorporate the discussion in Sections A and B, pp. 2-6, below, as well as the Statement of the Facts of Appellant George V. Hamilton, Inc.

ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW

Proposition of Law: The rule of law adopted by this Court in *Temple v. Wean* (1977), 50 Ohio St.2d 317, imposing strict liability on sellers (as distinguished from manufacturers) of allegedly defective products, does not apply retrospectively to sales that occurred prior to 1977.

A. **HOW THE CONCEPT OF STRICT LIABILITY OF SELLERS/SUPPLIERS WAS INTRODUCED INTO OHIO LAW IN 1977 AND THEN LIMITED BY THE OHIO LEGISLATURE**

In order to perceive how dramatically the decision of the Eighth District would change Ohio law and reverse Ohio public policy, one need only examine how strict liability on the part of non-manufacturing seller/suppliers of defective products entered Ohio case law in 1977 **almost by accident** and how the Ohio Legislature then proceeded to severely limit the effect of that case law.

1. **The Decisions of This Court**

Ohio courts did not impose strict liability on **manufacturers** of defective products until 1966, when this Court decided *Lonzrick v. Republic Steel*, 6 Ohio St. 227, 218 N.E.2d 185. In that case, brought against the **manufacturer** of an allegedly defective steel joist, this Court held that a plaintiff in a products liability action could henceforth “proceed in an action in tort based upon the theory of an implied warranty, notwithstanding that there is no contractual relationship between the plaintiff and the defendant.” However, in order to state a “good cause of action” based upon that theory, one of the elements the plaintiff had to allege was “that the defendant **manufactured** and sold” the product. *Lonzrick*, at syllabus ¶2 (emphasis added). Clearly, a non-manufacturing party who only “sold” a defective product would **not** be subject to the *Lonzrick* rule.

Eleven years later, in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267, another suit brought against a **manufacturer** of an allegedly defective product (in that case, a punch press), this Court decided to eliminate the “implied warranty in tort” nomenclature from Ohio law and to replace the “*Lonzrick* rule” with the language of Section 402A of the Restatement (Second) of Torts. This Court stated that it was adopting the new language “[b]ecause there are virtually no distinctions between Ohio’s ‘implied warranty in tort’ theory and the Restatement version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area.” 50 Ohio St.2d at 322. Nevertheless, this Court, in *Temple*, proceeded to affirm the summary judgment that had been granted in favor of the manufacturer, on the ground that the punch press was not defective when it left the hands of the manufacturer. (The trial court found, and this Court agreed, that the “sole responsible cause” for plaintiff’s injury was a modification made to the press by plaintiff’s employer.)

Essentially overlooked at the time of the *Temple* decision was one significant distinction between the language of Section 402A and the language of the *Lonzrick* rule. As noted above, the *Lonzrick* rule specifically referred solely to “manufacturers” of defective products. Section 402A of the Restatement, however, referred to “one who **sells** any product” and made no mention of one who “manufactures” a product.

This difference in language appears to have been missed by the Ohio courts for the next eight years, probably because it was nowhere mentioned in the *Temple* opinion. This lack of awareness is evidenced by *Bakonyi v. Ralston Purina Company* (1985), 17 Ohio St.3d 154, 478 N.E.2d 241, where both the Common Pleas Court and the Court of Appeals held that a person who had been blinded by a fertilizer spray could not assert a claim of strict liability

against the company that had **sold** the spray to plaintiff's employer because that company "was not the manufacturer of the product." 17 Ohio St.3d at 156. The plaintiff then appealed to this Court, which, obviously recognizing the need to clarify Ohio law on this point, accepted the appeal. Citing the language of Section 402A of the Restatement that had been adopted in *Temple*, this Court then held that the Court of Appeals had "erroneously concluded that strict liability only extends to sellers who also manufactured the defective product which allegedly caused the injury." *Ibid.* Notably, this Court in *Bakonyi* never cited *Lonzrick* for this holding.

2. The Legislative Intervention

In the meantime, the General Assembly had apparently become aware of the potential implications of the references to "sellers" contained in Section 402A of the Restatement. Accordingly, in 1984 (shortly before this Court issued its decision in *Bakonyi*), the General Assembly enacted R.C. 2305.33. That statute essentially "pre-empted the field" with respect to strict liability of non-manufacturer sellers by providing that a seller or supplier of a defective product could **not** be held strictly liable to persons injured by the product if the manufacturer of the product "is subject to judicial process in this state" and the manufacturer "has neither filed for bankruptcy prior to the commencement of or during the pendency of the action nor been judicially declared insolvent due to an inability to pay its debts as they become due in the ordinary course of business." (Former R.C. 2305.33(B)(2)(a)-(b).) However, strict liability could be imposed if the seller altered the product, had actual knowledge of the alleged defect, or failed to provide the claimant with the name and address of the manufacturers when requested to do so. (Former R.C. 2305.33(B)(1), (3), (4).) Outside of these specified situations, a non-manufacturing seller or supplier could not be subjected to strict liability.

In 1988, R.C. 2305.33 was replaced by another statute, R.C. 2307.78. Although its provisions were organized somewhat differently, the overall thrust of the new statute was the

same as the prior one: a mere supplier of a defective product can be subjected to strict liability, “as if it was the manufacturer of that product,” **only** if one of the following factual situations applies:

- (1) The manufacturer of that product is not subject to judicial process in this state;
- (2) The claimant will be unable to enforce a judgment against the manufacturer of that product due to actual or asserted insolvency of the manufacturer;
- (3) The supplier in question owns or, when it supplied that product, owned, in whole or in part, the manufacturer of that product;
- (4) The supplier in question is owned or, when it supplied that product, was owned, in whole or in part, by the manufacturer of that product;
- (5) The supplier in question created or furnished a manufacturer with the design or formulation that was used to produce, create, make, construct, assemble, or rebuild that product or a component of that product;
- (6) The supplier in question altered, modified, or failed to maintain that product after it came into the possession of, and before it left the possession of, the supplier in question, and the alteration, modification, or failure to maintain that product rendered it defective;
- (7) The supplier in question marketed that product under its own label or trade name;
- (8) The supplier in question failed to respond timely and reasonably to a written request by or on behalf of the claimant to disclose to the claimant the name and address of the manufacturer of that product.

(R.C. 2307.78(B).)

B. THE ATTEMPT BY PLAINTIFFS IN ASBESTOS CASES TO RE-IMPOSE STRICT LIABILITY UPON SUPPLIERS AND SELLERS

The above-quoted 1988 statute (R.C. 2307.78) has had a highly significant impact in asbestos cases. As more and more manufacturers of asbestos-containing products have gone

into bankruptcy, plaintiffs in those cases have searched for ways of imposing liability upon the distributors, sellers, suppliers and installers of those products without having to prove negligence or fault on their part. The existence of R.C. 2307.78 (and its predecessor, R.C. 2305.33) has effectively restrained those efforts.

Accordingly, in or about 2006, the plaintiffs in a number of asbestos cases pending in the Cuyahoga County Court of Common Pleas formulated a tactic that they hoped would enable them to avoid entirely the limitations imposed by R.C. 2307.78 (which severely restricted any statutory strict liability cause of action against mere suppliers, as discussed above), and “overcome” the fact that the 1977 *Temple v. Wean United* decision would be of minimal benefit to asbestos plaintiffs because most sales of and exposures to asbestos-containing products had occurred **prior to 1977**.¹ Therefore, to “reach” pre-1977 sales and hold those sellers liable under Section 402A of the Restatement, asbestos plaintiffs sought to persuade the Common Pleas Court for Cuyahoga County - - where tens of thousands of asbestos lawsuits are currently pending - - that the “rule” set forth in *Temple* was **retrospective** and therefore applied to sales of asbestos-containing products that antedated that 1977 decision.

Recognizing the importance of this issue, the three judges handling the special “asbestos docket” in Cuyahoga County, namely, former Justice Frances Sweeney, Judge Leo Spellacy and Judge Harry Hanna, convened a joint Hearing at which they received briefs and heard oral arguments with respect to that issue. On May 9, 2006, the three judges issued an Entry & Opinion in a group of cases known as *The Goldberg 23 Trial Group* (“*Goldberg*”).² In

¹ Indeed, most asbestos exposures occurred in the 1940s, 1950s and 1960s, since they were largely curtailed following the issuance, in 1972-1973, of OSHA regulations regarding asbestos-containing products.

² A copy of the May 9, 2006 Entry & Opinion in *In re Goldberg 23 Trial Group* (“*Goldberg*”) was attached as Exhibit A to Defendant George V. Hamilton’s Motion Requesting

that opinion, the three judges unanimously held that *Temple* adopted a “new legal standard” (i.e., the standard “contained in Section 402A of the Restatement”) and that this “new legal standard” imposing strict liability on all entities that “sold” defective products regardless of whether those entities had manufactured the product, was **not retroactive**.

The plaintiffs in the *Goldberg 23 Trial Group* cases did not appeal that ruling. However, several months later, in the course of appealing a summary judgment that had been granted in favor of the supplier-installer defendant in the instant case, plaintiff DiCenzo raised the same argument that had been unsuccessfully urged by the plaintiffs in the *Goldberg 23 Trial Group* cases - - i.e., that the rule of law adopted in *Temple v. Wean* should be applied retrospectively. Surprisingly, the Eighth District Court of Appeals reached a conclusion that was the exact opposite of the conclusion that had been reached by Justice Sweeney and Judges Spellacy and Hanna and held that “*Temple* applies retroactively to suppliers * * * who may have supplied asbestos products before the *Temple* case was decided.” *DiCenzo v. A-Best Products*, 8th Dist. App., 2007-Ohio-2370, ¶30.

As the following discussion will demonstrate, that holding was clearly erroneous.

C. **THE LANGUAGE OF *TEMPLE* v. *WEAN* SHOULD NOT BE APPLIED RETROSPECTIVELY TO CLAIMS AGAINST NON-MANUFACTURING SELLERS OR SUPPLIERS OF DEFECTIVE PRODUCTS**

In considering whether a decision of this Court should be applied retrospectively, Ohio courts have, for a number of years, applied a three-part test that was initially formulated by the U.S. Supreme Court in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30

Separate Ruling On The Issue of Strict Liability filed with the trial court, and is located in the record transmitted by the Court of Appeals as Item 7 identified on the Stipulated Supplement to the Record filed with the Court of Appeals on October 4, 2006. A copy of the Entry & Opinion is included in the Supplement to the Briefs filed with this Court by Appellant George V. Hamilton pursuant to S.Ct. R. VII (A), at Supp. pp. 1-4. A copy of the Entry & Opinion as attached in the Supplement to the Briefs is also attached as Exhibit 1 hereto for ease of reference. All page numbers herein refer to the page numbers in the Supplement to the Brief.

L.Ed.2d 296. See, for example, *Anello v. Hufziger* (1988), 48 Ohio App.3d 28, 547 N.E.2d 1220 (1st Dist.); *Day v. Hissa* (1994), 97 Ohio App.3d 286, 646 N.E.2d 565, 287 (8th Dist.); *Sarcom, Inc. v. 1650 Indian Wood Circle, Ltd.*, 2005 Ohio 6139 (6th Dist.); and *In re Moore* (2004), 158 Ohio App.3d 679, 2004 Ohio 4544 (7th Dist.) All of those Court of Appeals decisions pointed out that, under the three-part test, “a high court decision will not be applied retroactively if the decision meets three ‘separate factors’,” which factors “may be expressed in question form”:

- (1) Is the decision one of the first impression that was not clearly foreshadowed?
- (2) Will retrospective application retard the operation of the statute, considering its prior history, purpose and effect?
- (3) Will the retrospective application produce substantial inequitable results (“injustice or hardship”)?

Anello at p. 30; *Day* at p. 288; *Sarcom* at ¶¶ 11, 12 and 13; *Moore* at ¶ 24.

1. **The Application of the Three Factors by Justice Sweeney and Judges Spellacy and Hanna in *Goldberg 23 Trial Group***

In their May, 2006 decision in the *Goldberg 23 Trial Group* cases, Justice Sweeney and Judges Spellacy and Hanna determined that all three of these factors supported the conclusion that “the *Temple* decision should **not** be applied retroactively” (*Goldberg*, Supp. p. 2) insofar as that decision imposed strict liability on non-manufacturing sellers, suppliers and installers.

Thus, with respect to the first factor, the three judges found that this Court’s imposition in *Temple* of “strict liability on non-manufacturer suppliers [was] an establishment of a **new principle of law.**” (*Goldberg*, Supp. p. 2). Before that decision was issued, “strict liability for non-manufacturer suppliers of defective products **did not exist in Ohio,**” and the three judges could find nothing in “the case law as it existed prior to *Temple*” to “indicate that this change in the law would have been foreshadowed.” (*Ibid.*)

With respect to the second factor, the three judges concluded that retroactive application of Section 402A of the Restatement so as to render suppliers of defective products strictly liable, would “neither promote[] nor hamper[]” this Court’s “primary goal” in adopting Section 402(A), which goal “was merely to add structure and substance to the body of law in Ohio regarding strict liability in tort.” (*Goldberg*, Supp. p. 3)

With respect to the third factor, Justice Sweeney and Judges Spellacy and Hanna found that retrospective application of *Temple* “will produce substantial inequitable results.” (*Goldberg*, Supp. p. 4.) The three judges pointed out that, “[p]rior to 1977, a supplier of asbestos-containing products would have no reason to believe that it would be subject to liability for injuries suffered by end users so long as that supplier used reasonable care to prevent such injuries.” (*Ibid.*) Therefore, to “hold those suppliers strictly liable today for selling asbestos-containing products decades before the *Temple* decision was handed down would be **manifestly unjust.**” (*Ibid.*) Moreover, the judges concluded, the “purpose of the strict liability doctrine is to induce manufacturers and suppliers to do everything possible to reduce the risk of injury and to insure against what risk remains. Obviously, imposing strict liability retroactively cannot induce anyone to do anything; opportunities to mitigate the risk have long since passed.” (*Ibid.*)

2. **The Eighth District’s Erroneous Application of the Three Factors**

When, however, this same issue was raised by plaintiff DiCenzo with the Eighth District in the instant case, the Court of Appeals panel disagreed with Justice Sweeney and Judges Spellacy and Hanna on all three points. The panel’s reasoning, however, was critically flawed, since that reasoning was based entirely on Ohio case law imposing strict liability on **manufacturers** and failed to grasp the distinction between that case law and the case law imposing strict liability on **sellers/suppliers**, a distinction that had been clearly pointed out in the *Goldberg 23 Trial Group* decision.

Thus, in rejecting the conclusion of the three judges in *Goldberg 23 Trial Group* that Section 402(A)'s imposition of strict liability on sellers was "a new principle of law" in Ohio in 1977, the Court of Appeals pointed to the fact that this Court, when deciding the *Lonzrick* case back in 1966, had "cited § 402A, among other authorities, to establish a cause of action for breach of implied warranty in the absence of privity of contract" and had stated that there were "virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of strict liability in tort." (*DiCenzo*, ¶ 28.) Justice Sweeney, Judge Spellacy and Judge Hanna, however, never suggested that the concept of "strict liability in tort," as such, was a "new principle of law" in Ohio in 1977. To the contrary, the three judges recognized that the imposition of strict liability in tort upon **manufacturers** of defective products was well settled in Ohio by the latter date. What, however, was a "new principle of law" in Ohio in 1977 was the imposition of strict liability upon **non-manufacturers** such as sellers, distributors and suppliers. Indeed, that concept was so novel - - and so squarely at odds with what lower courts deemed to be Ohio law even after the *Temple* decision was issued - - that it took a 1985 decision of this Court (*Bakonyi v. Ralston Purina Company*, discussed above at pp. 3-4) to make clear that new principle of law.³

With respect to the second factor in the three-part test, the Court of Appeals agreed with the three judges in *Goldberg 23 Trial Group* that the "primary goal" of the *Temple* case "was to facilitate analysis of strict liability cases by incorporating the Restatement formulation." (*DiCenzo*, ¶29.) However, in the Court of Appeals' view, that goal would "be hampered if the Restatement's analysis were not applied in all cases decided after *Temple*." *Ibid.*

³ It should be further noted that, in deciding *Bakonyi* the way it did, this Court cited only *Temple* (1977), but not *Lonzrick* (1966), thus further evidencing that strict liability on the part of sellers and suppliers did not become a part of Ohio law until the *Temple* decision was issued, eleven years after *Lonzrick*.

That conclusion is a curious one. In what possible way would the law of strict liability be “hampered” by a holding that such liability should **not** be imposed on non-manufacturer sellers whose sole acts - - i.e., selling products that they did not manufacture - - occurred before 1977? Indeed, if one were to adopt the Court of Appeals logic, one would have to conclude that the goal of *Temple* had already been “hampered,” if not crippled, by the General Assembly’s enactment of R.C. 2305.33 and R.C. 2307.78, both of which statutes expressly limited strict liability of sellers and suppliers to certain discrete situations. Conversely, if it be concluded that those statutes did not “hamper” *Temple’s* “goal,” how can a similar limitation imposed on strict liability claims against sellers with respect to sales made **before 1977** be viewed as doing so?

Finally, the Court of Appeals disagreed with the conclusion of Justice Sweeney and Judges Spellacy and Hanna that retrospective application of *Temple* to businesses that had supplied or sold asbestos-containing products before 1977 would be “inequitable.” In the Court of Appeals’ view, since there is “virtually no distinction between the implied warranty cause of action recognized by *Lonzrick* and the strict liability theory under the Restatement adopted by *Temple*,” defendants “are not held to any higher standard than they were already required to meet.” (*DiCenzo*, ¶30.) Here again, the Court of Appeals missed the critical point. As pointed out above, *Lonzrick* imposed strict liability only upon **manufacturers**; it imposed no “standard” of liability whatever on **sellers or suppliers**. Strict liability was not imposed on non-manufacturing sellers until 1977, and obviously constitutes a much “higher standard” than the standard which sellers had previously been “required to meet.” Hence, prior to 1977 (when *Temple* was decided), non-manufacturing sellers or suppliers would have had no reason to expect that they would someday be held liable for alleged defects in the products they sold (so long as they had exercised reasonable care to prevent injury). Therefore, prior to 1977, they had no

reason to protect themselves against the imposition of such liability either through purchasing liability insurance or by entering into indemnification agreements with manufacturers. This fact was clearly grasped by Justice Sweeney and Judges Spellacy and Hanna - - but, unfortunately, not by the Court of Appeals.

For all of these reasons, it is manifest that those three judges were clearly correct when they concluded that retrospective application of *Temple* would be inequitable.

D. *TEMPLE v. WEAN'S ADOPTION OF SECTION 402A OF THE RESTATEMENT WOULD NOT BE RETROACTIVE UNDER HARPER v. VIRGINIA DEPT. OF TAXATION* (1993), 509 U.S. 86

Although the Eighth District arrived at its retroactivity conclusion by applying the same “three-part” test considered by Justice Sweeney and Judges Spellacy and Hanna in *Goldberg 23 Trial Group*, the Eighth District also took note of the argument (made by plaintiff DiCenzo) that the three-part test was no longer valid because the U.S. Supreme Court decision that had initially articulated that test - - *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 - - had been “overruled by *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74.” (*DiCenzo* at ¶26.) In *Harper*, the U.S. Supreme Court held that “[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” (*Ibid.*) “Clearly,” continued the Court of Appeals, “if the *Harper* analysis applies, *Temple v. Wean* must be applied retroactively to events which predated that decision.” (*DiCenzo* at ¶27.) Nevertheless, expressing uncertainty as to whether *Harper* did in fact overrule *Chevron*, the Eighth District proceeded to utilize the *Chevron* three-part approach, rather than the *Harper* “rule,” in deciding this case. (*DiCenzo* at ¶ 26)

Since it is likely that appellee will now argue in this Court (as they did in the Court of Appeals) that *Harper* overruled *Chevron*, these amici would point out two factors. First, regardless of what has happened in the federal courts, Ohio Courts of Appeals have continued to rely upon and apply the *Chevron* three-part test for roughly twenty years (see page 7 above). Therefore, that test has become part of Ohio law and should remain so.

Indeed, a number of other state appellate courts have reached the identical conclusion, namely, that *Harper* applies only to the interpretation of federal law by the United States Supreme Court, and have therefore continued to apply the *Chevron* three-part test when determining whether a decision of a state supreme court should, or should not, be given retrospective effect. These state appellate decisions that have so held include *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002) (“[A]s the instant case deals only with an issue of state law, the effect of [*Harper*’s] changed retroactivity analysis is not relevant to the instant case.”); *Beavers v. Johnson Controls World Servs, Inc.*, 118 N.M. 391, 881 P.2d 1376, 1380 (N.M. 1994); *In re Commitment of Thiel*, 241 Wis.2d 434, 625 N.W.2d 321 (Wis. App. 2001); *Findley v. Findley*, 280 Ga. 454, 629 S.E.2d 222 (2006); *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 104 P.3d 483 (2004); *Montells v. Haynes*, 133 N.J. 282, 627 A.2d 654 (1993); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 113 (Colo. 1992); and *City of New Bern v. New Bern-Craven County Bd. of Education*, 338 N.C. 430, 450 S.E.2d 735 (1994).

Second, even if it were assumed, *arguendo*, that the *Harper* rule should now be adopted in Ohio in lieu of the *Chevron* test, this Court’s adoption (in *Temple*) of Section 402A of the Restatement would **not** be retroactive even under *Harper*. As the Eighth District stated in its opinion, the “retroactivity” rule set forth in *Harper* applies only when the U.S. Supreme Court “applies a rule of federal law **to the parties before it.**” (*DiCenzo*, at ¶26.) However, in *Temple*

this Court did **not** apply the Restatement rule relating to “sellers” to the parties before the court. After all, the defendant before this Court in *Temple* was, like the defendant in *Lonzrick*, a **manufacturer**. Hence, this Court did **not** hold that the defendant in *Temple*, i.e., Wean United, was strictly liable as a **seller** of a defective product. (In fact, the defendant in *Temple* was not even held to be strictly liable as a manufacturer, since this Court agreed with the lower courts that the punch press manufactured by Wean United was not defective and that plaintiff’s injury resulted from modifications made to the press by the plaintiff’s employer.) Accordingly, since the new rule announced in *Temple* was **not** applied to the parties before the Court, that new rule would **not** be retroactive even under *Harper*.

E. THE EFFECT OF THE COURT OF APPEALS DECISION

In Cuyahoga County alone, there are already more than 40,000 pending asbestos cases, and more are filed every week. Up to now, the plaintiffs in those cases, searching for potential defendants other than asbestos manufacturers (most of whom have already filed for bankruptcy), could sue non-manufacturing suppliers and sellers for strict liability only in the limited situations set forth in R.C. 2307.78 (or, prior to 1988, in R.C. 2305.33). Although such plaintiffs could also assert negligence claims against non-manufacturers, such claims are rarely pursued to trial, given the difficulty of proving that suppliers or distributors engaged in culpable behavior.

If, however, the decision of the Eighth District is allowed to stand, plaintiffs in asbestos cases will henceforth be able to assert strict liability claims against any Ohio business (large or small) that may have innocently sold an asbestos-containing product more than 30 years ago. If (as would most likely be the case) such a business has no liability insurance protection with respect to such claims - - or once any such insurance is exhausted by the flood of new strict liability causes of action - - still more bankruptcies will result.

Contrary to what the Court of Appeals held below, such consequences can hardly be deemed to advance any public policy “goal.” Indeed, such an expansion of asbestos defendants and asbestos claims would be squarely at odds with the “statement of findings and intent” that the General Assembly set forth in Section 3 of Am. Sub. H.B. 292 (2004), a comprehensive bill aimed at limiting asbestos claims. In those “findings,” the General Assembly pointed out not only that “Ohio has become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos filings” (H.B. 292, §3(A)(3)(b)), but also that the massive and destructive effect of these claims upon Ohio businesses has resulted in the loss of tens of thousands of Ohio jobs:

- “[D]uring the first ten months of 2002, fifteen companies facing significant asbestos-related liabilities filed for bankruptcy and more than sixty thousand jobs have been lost because of these bankruptcies. . . . [T]he eventual cost of asbestos litigation could reach as high as four hundred twenty-three thousand jobs.” (§3(A)(4)(a).)
- “Owens Corning, a Toledo company, has been sued four hundred thousand times by plaintiffs alleging asbestos-related injury and as a result was forced to file bankruptcy. The type of job and pension loss many Toledoans have faced because of the Owens Corning bankruptcy also can be seen in nearby Licking County where, in 2000, Owens Corning laid off two hundred seventy-five workers from its Granville plant. According to a study conducted by NERA Economic Consulting in 2000, the ripple effect of those losses is predicted to result in a total loss of five hundred jobs and a fifteen-million to twenty-million dollar annual reduction in regional income.” (§3(A)(4)(d).)
- “Wage losses, pension losses, and job losses have significantly affected workers for

the bankrupt companies like Owens Corning, Babcox & Wilcox, North American Refractories, and A-Best Corp.” (§3(A)(4)(e).)

Examples of these economic effects abound. For instance, one of Owens Corning Fiberglas’ and Johns-Manville’s primary asbestos-containing products, pipe covering, is often the product at issue in asbestos cases against suppliers or installers. It is therefore exceedingly likely that these suppliers and installers will be forced into bankruptcy if they are now held strictly liable for selling or installing Owens Corning Fiberglas’ or Johns-Manville’s product in the 1950s-70s, the years in which most asbestos plaintiffs were allegedly exposed to such products. The same thing will also happen to the suppliers and installers of products made by other now-bankrupt Ohio manufacturers, such as Celotex/Philip Carey, Eagle Picher and Flintkote. And it will also happen to Ohio distributors and suppliers of products manufactured by numerous bankrupt out-of-state manufacturers, such as Keene, Raymark, Unarco, Pittsburgh Corning, Fibreboard, Armstrong, Congoleum, H.K. Porter, National Gypsum, U.S. Gypsum and the like, whose products, like those of the manufacturers referenced above, have been the major targets in asbestos litigation.

In addition, allowing such claims would run counter to the legislative purpose underlying Am. Sub. H.B. 292, which was to “enhance the ability of the state’s judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings” and to “conserve the scarce resources of the defendants.” (*Id.*, §§3(B)(3) and (4).)

Finally, it should be borne in mind that the ramifications of the Court of Appeals decision will not be limited to sellers of asbestos products. Strict liability claims will now also be asserted against pre-1977 sellers of other products (such as benzene, silica and lead paint) that may have contributed to a disease that did not manifest itself until years later. Similarly,

suppliers of materials and components that became part of commercial buildings more than thirty years ago can now be held strictly liable if those materials eventually develop a defect.

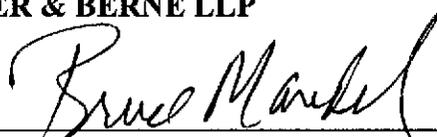
In short, countless businesses will be subject to a level of liability that they had no reason to anticipate prior to 1977, under circumstances which, in the words of Justice Sweeney and Judges Spellacy and Hanna in the *Goldberg 23 Trial Group* decision, “would be manifestly unjust.” This Court should not allow that to occur. It should reverse the decision of the Court of Appeals.

CONCLUSION

For all of the reasons set forth above, amici curiae respectfully urge this Court to reverse the decision of the Court of Appeals and reinstate the summary judgment entered by the trial court.

Respectfully submitted,*

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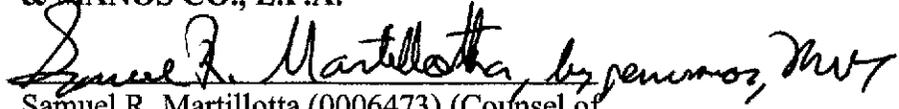
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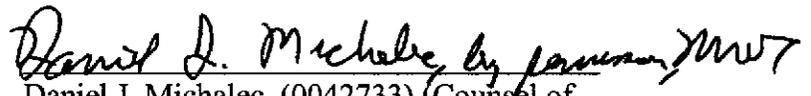
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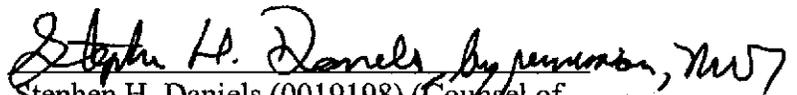
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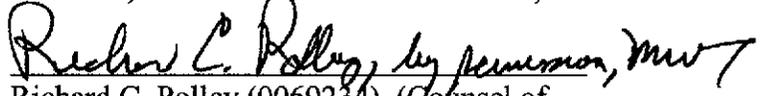
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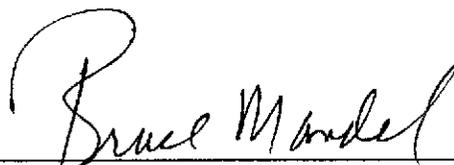
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IN THE SUPREME COURT OF OHIO

GENEVIEVE DICENZO, Executrix of)
the Estate of JOSEPH DICENZO,) **Case No. 07-1628**
Deceased, and GENEVIEVE DICENZO,)
in Her Own Right)
)
Appellee) **On Appeal from the**
) **Cuyahoga County Court of Appeals,**
) **Eighth Appellate District**
v.)
) **Court of Appeals**
A-BEST PRODUCTS CO., Inc., et al.) **Case No. CA 06-088583**
)
Appellant)

EXHIBIT 1

TO

BRIEF OF AMICI CURIAE

Ceecorp, Inc.; Cleveland Oak, Inc.; Fisher Scientific Company L.L.C.; The Edward R. Hart Company; McMaster-Carr Supply Company; P.C. Campana, Inc.; Standard Glove & Safety Equipment Company; Donald McKay Smith Inc.; F.B. Wright Company of Cincinnati; Hersh Packing & Rubber Company; Hollow Center Packing Company; M.F. Murdock Company; MVS Company, Inc.; Yohe Supply Company; Red Seal Electric Company; Akron Gasket & Packing Enterprise, Inc.; Fidelity Builders Supply; Graybar Electric Co., Inc.; F.B. Wright Company; Glidden Company; Advance Auto Parts, Inc.; Sears Roebuck and Company; Frank W. Schaefer, Inc.; Nitro Industrial Coverings, Inc.; Asbeka Industries of Ohio; Hill Building Supply, Inc.; Nock Refractories Co., Inc.; Applied Industrial Technologies, Inc.; Ohio Pipe & Supply, Inc.; Gateway Industrial Supply; Fairmont Supply Company; The C. P. Hall Company; Mau-Sherwood Supply Company; F.B. Wright Company of Pittsburgh; R.E. Kramig & Co., Inc.; McGraw Construction Company, Inc.; Ohio Alliance for Civil Justice

IN SUPPORT OF APPELLANT

App.3d 28. However, in *Anello*, the Court of Appeals for Hamilton County recognized that there should be exceptions to this general rule and adopted a test for determining when such exceptions should be granted.

The test adopted was first espoused by the United States Supreme Court in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, and requires the consideration of three separate factors. First, the Court must determine whether the decision at issue establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106 (citations omitted). Second, a Court must examine "the prior history of the rule in question, its purpose and effect, and whether retrospective operations will further or retard its operation." *Id.* Finally, it must be determined whether the retrospective application will produce "substantial inequitable results." *Id.*

Upon consideration of each of these factors, we conclude that the *Temple* decision should not be applied retroactively. All parties appear to agree that, before *Temple*, strict liability for non-manufacturer suppliers of defective products did not exist in Ohio. The *Temple* Court's express adoption of Section 402A of the Restatement, and the consequent imposition of strict liability on non-manufacturer suppliers, is thus an establishment of a new principle of law. Moreover, having reviewed the case law as it existed prior to *Temple*, we see no evidence to indicate that this change in the law would have been clearly foreshadowed.

The *Temple* Court states that it is adopting Section 402A "[b]ecause there are virtually no distinctions between Ohio's 'implied warranty in tort' theory and the Restatement version of

strict liability in tort¹, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area." *Temple*, 50 Ohio St. 2d at 322. Thus, it would appear that the primary goal of the Ohio Supreme Court in adopting the Restatement was merely to add structure and substance to the body of law in Ohio regarding strict liability in tort. We believe that this goal is neither promoted nor hampered by retroactively applying the holding in *Temple*.

In examining whether the retrospective application of *Temple* will produce substantial inequitable results, we answer affirmatively. Prior to 1977, a supplier of asbestos-containing products would have no reason to believe that it would be subject to liability for injuries suffered by end users so long as that supplier used reasonable care to prevent such injuries. To hold those suppliers strictly liable today for selling asbestos-containing products decades before the *Temple* decision was handed down would be manifestly unjust. As pointed out in the Joint Amicus Brief in Support of Defendants' Motions for Summary Judgment, the purpose of the strict liability doctrine is to induce manufacturers and suppliers to do everything possible to reduce the risk of injury and to insure against what risk remains. Obviously, imposing strict liability retroactively cannot induce anyone to do anything; opportunities to mitigate the risk have long since passed. Moreover, this Court believes that suppliers would have had no reason to anticipate prior to 1977 the liability that they face today. Therefore, this Court sees no just

¹ To support its position that no distinction existed between Ohio's implied warranty in tort and Restatement Section 402A, the *Temple* Court cites to a note published in the *Ohio State Law Journal*. See Note, Products Liability: A Synopsis, 30 Ohio St. L. J. 551 (1969). While that note does make the case that Ohio common law is virtually indistinguishable from Restatement 402A, it does not address the state of the law from the point of view of the non-manufacturer supplier. At the time of the *Journal's* publication, *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St. 2d 277, was the paramount Ohio decision in the law of products liability. However, while *Lonzrick* established the doctrine of strict liability in Ohio, that holding was never used, to the best of our knowledge, to impose strict liability upon a non-manufacturer supplier. Thus, the state of Ohio common law after the *Lonzrick* decision differed substantially from the state of the law after the *Temple* decision, particularly from the non-manufacturer supplier's standpoint.

reason to hold non-manufacturer suppliers strictly liable for sales of asbestos-containing products that occurred before the Supreme Court issued its opinion in *Temple v. Wean*.

For the foregoing reasons, we find that an exception must be made to the general rule of retrospective application of Ohio Supreme Court decisions. To do otherwise would produce substantial inequitable results and advance no valid public policy. Therefore, the new legal standard adopted by the Ohio Supreme Court in *Temple v. Wean* - that contained in Section 402A of the Restatement - can only be applied in those cases where the cause of action arose after the issuance of that opinion.

IT IS SO ORDERED.

Judge Leo M. Spellacy
Judge Harry A. Hanna
Justice Francis E. Sweeney

May 9, 2006