

IN THE SUPREME COURT OF OHIO

**GENEVIEVE DICENZO, Executrix of
the Estate of JOSEPH DICENZO,
Deceased, and GENEVIVE DICENZO,
in her own right,**

Appellee,

v.

A-BEST PRODUCTS COMPANY, INC.,

Appellants.

Case No. 2007-1628

**On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District,**

**Court of Appeals Case No.
06-088583**

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COUNTER-STATEMENT OF FACTS

The instant action was filed on March 23, 2000 in the Court of Common Pleas of Cuyahoga County, alleging damages from mesothelioma arising from Appellee's decedent, Joseph DiCenzo's exposure to asbestos-containing products during the course of his employment. Mr. DiCenzo died of mesothelioma on February 22, 2000. Following the entry of a Final Order and Judgment in this action on July 17, 2006, Appellee filed a Notice of Appeal to the Court of Appeals for the Eighth District. Appellee appealed the trial court's Order ruling that this Court's adoption of strict liability for suppliers pursuant to Restatement (Second) of Torts § 402A in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267, may not be applied retroactively for the supply of asbestos-containing products occurring prior to the *Temple* court's decision.¹ Both parties took the position before the trial court that under Section 28, Article II of the Ohio Constitution, O.R.C. § 2307.78(B)² cannot be applied retroactively with regard to asbestos exposure occurring prior to the enactment of the statute, and Appellee argued that there was a viable common law strict liability claim with regard to Mr. DiCenzo's injuries from exposure to asbestos-containing products

¹ Appellee also appealed the trial court's grant of summary judgment to Defendant Borg-Warner Corporation ("Borg-Warner") with regard to whether the evidence of record created an issue of fact regarding Mr. DiCenzo's exposure to Borg-Warner's asbestos-containing products and whether those asbestos-containing products were a substantial factor in causing his mesothelioma and to Appellant G.V. Hamilton with regard to whether the evidence of record created an issue of fact as to its liability under a negligent failure to warn theory. The Court of Appeals for the Eighth District reversed the grant of summary judgment to Borg-Warner and affirmed the grant of summary judgment to G.V. Hamilton on the negligent failure to warn theory. Neither of these issues is before this Court in the instant appeal.

² O.R.C. § 2307.78(B), enacted in 1988, bars the application of strict liability to suppliers unless one of eight specified situations is fulfilled.

supplied by G.V. Hamilton.

The Court of Appeals for the Eighth District reversed the trial court's ruling that *Temple* could not be retroactively applied for the supply of asbestos-containing products occurring prior to 1977 and held that "*Temple* applies retroactively to suppliers, like Hamilton, who may have supplied asbestos products before the *Temple* case was decided." Appendix to Appellant's Merit Brief at 21. G.V. Hamilton filed a Notice of Appeal to this Honorable Court on August 29, 2007. This Honorable Court accepted jurisdiction on December 26, 2007.

ARGUMENT

A. This Court's Opinion in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267, was not Expressly Limited to Prospective Application.

This Court has expressly stated, "In the absence of a specific provision in a decision declaring its application to be prospective only, the decision shall be applied retrospectively as well." *Lakeside Ave. L.P. v. Cuyahoga County Board of Revision* (1999), 85 Ohio St.3d 125, 127-28, 707 N.E.2d 472, 475; *State ex rel. Bosch v. Industrial Commission of Ohio* (1982), 1 Ohio St.3d 94, 98, 438 N.E.2d 415, 418. Thus, the Court of Appeals in the present case had no choice but to rule as it did in keeping with the directive of this Court. While G.V. Hamilton argues that this Court's adoption of § 402A of the Restatement (Second) of Torts in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267, may not be applied retroactively for the supply of asbestos-containing products occurring prior to the date of the *Temple* opinion, it offers no cogent reason why this Court should reconsider or overrule the salutary rule set forth in *Lakeside*.

Adhering to the *Lakeside* rule is important because the best time to weigh the considerations of whether a new rule should only be applied prospectively is at the time of its adoption. The adopting court is already considering policy concerns and matters of fairness and is in the best position to make a determination whether the general rule of retroactivity should be followed or whether prospective-only application is more appropriate. Having a bright-line test as to the retroactivity of court opinions announcing or adopting new law avoids confusion among lower courts. Therefore, the Court of Appeals correctly ruled that this Court's adoption of § 402A in *Temple* must be

retroactively applied; undoubtedly, had this Court intended its adoption of § 402A to be applied only prospectively, it would have specifically stated as much.

Indeed, no Ohio decision has ever held that § 402A should *not* be applied to conduct pre-dating its adoption. The Court of Appeals' opinion was simply in keeping with Ohio and national law regarding the operation of court opinions announcing or adopting new law. A reversal of the Court of Appeals' decision would make Ohio the first jurisdiction in this country of those adopting § 402A or common law strict liability to hold that the doctrine should not be given retroactive application. See *Casrell v. Altec Indus. Inc.* (Ala. 1976), 335 So.2d 128 (adopting strict liability and applying it to the facts of the case); *Clary v. Fifth Ave. Chrysler Center, Inc.* (Alaska 1969), 454 P.2d 244 (same); *O. S. Stapley Co. v. Miller* (1968), 103 Ariz. 556, 447 P.2d 248 (applying strict liability to the facts of the case); *Hiigel v. General Motors Corp.* (1975), 190 Colo. 57, 544 P.2d 983 (adopting 402A and applying it to the facts of the case); *Vandermark v. Ford Motor Co.* (1964), 61 Cal.2d 256, 391 P.2d 168 (applying strict liability retroactively); *Rossignol v. Danbury School of Aeronautics, Inc.* (1967), 154 Conn. 549, 227 A.2d 418 (adopting 402A and applying it to the facts of the case); *Martin v. Ryder Truck Rental, Inc.* (Del. 1976), 353 A.2d 581 (adopting strict liability and applying it to the facts of the case); *West v. Caterpillar Tractor Co* (Fla. 1976), 336 So.2d 80 (adopting 402A in response to certified question from 5th Circuit); *Stewart v. Budget Rent-A-Car Corp.* (1970), 52 Haw. 71, 470 P.2d 240 (adopting strict liability and applying it to the facts of the case); *Shields v. Morton Chem. Co.* (1973), 95 Idaho 674, 518 P.2d 857 (adopting 402A and applying it to the facts of the case); *Suvada v. White Motor Co.* (1965), 32 Ill. 2d 612, 210 N.E.2d 182 (same); *Cornette v. Searjeant Metal Prod., Inc.*

(1970), 147 Ind.App. 46, 258 N.E.2d 652 (adopting strict liability and applying it to the facts of the case), *approved of by Ayr-Way Stores, Inc. v. Chitwood* (1973), 261 Ind. 86, 300 N.E.2d 335; *Hawkeye-Security Ins. Co. v. Ford Motor Co.* (Iowa 1970), 174 N.W.2d 672 (adopting 402A and applying it to the facts of the case); *Brooks v. Dietz* (1976), 218 Kan. 698, 545 P.2d 1104 (same); *Dealers Transport Co. v. Battery Distributing Co.* (Ky. 1965), 402 S.W.2d 441 (same); *Phipps v. General Motors Corp.* (1976), 278 Md. 337, 363 A.2d 955 (adopting 402A in response to certified question from D.Md); *McCormack v. Hanksraft Co.* (1967), 278 Minn. 322, 154 N.W.2d 488; *State Stove Mfg. Co. v. Hodges* (Miss. 1966), 189 So.2d 113 (adopting 402A and applying it to the facts of the case); *Keener v. Dayton Electric Manufacturing Company* (Mo. 1969), 445 S.W.2d 362 (same); *Brandenburger v. Toyota Motor Sales, U.S.A.* (1973), 162 Mont 506, 513 P.2d 268 (same); *Stephan v. Sears, Roebuck & Co.* (1970), 110 N.H. 248, 266 A.2d 855 (expressly applying strict liability retrospectively); *Henningsen v. Bloomfield Motors, Inc.* (1960), 32 N.J. 358, 161 A.2d 69 (adopting strict liability and applying it to the facts of the case); *Weber v. Fidelity & Cas. Ins. Co. of New York* (1971), 259 La. 599, 250 So.2d 754 (same); *Kohler v. Ford Motor Co.* (1971), 187 Neb. 428, 191 N.W.2d 601 (same); *Shoshone Coca-Cola Bottling Co. v. Dolinski* (1966), 82 Nev. 439, 420 P.2d 855 (same); *Stang v. Hertz Corporation* (1972), 83 N.M. 730, 497 P.2d 732 (adopting 402A and applying it to the facts of the case); *Codling v. Paglia* (1973), 32 N.Y.2d 330, 298 N.E.2d 622 (adopting strict liability and applying it to the facts of the case); *Johnson v. American Motors Corp.* (N.D. 1974), 225 N.W.2d 57 (adopting 402A and applying it to the facts of the case); *Kirkland v. General Motors Corp.* (Okla. 1974), 521 P.2d 1353 (adopting strict liability and applying it to the facts of the case); *Heaton v Ford Motor*

Co. (1967), 248 Or. 467, 435 P.2d 806 (adopting 402A and applying it to the facts of the case); *Webb v. Zern* (1966), 422 Pa. 424, 220 A.2d 853 (same); *Ritter v. Narragansett Elec. Co.* (1971), 109 R.I. 176, 283 A.2d 255 (same); *Engberg v. Ford Motor Company* (1973), 87 S.D. 196, 205 N.W.2d 104 (same); *Olney v. Beaman Bottling Co.* (1967), 220 Tenn. 459, 418 S.W.2d 430 (adopting 402A and applying it to the facts of the case); *McKisson v. Sales Affiliates, Inc.* (Tex. 1967), 416 S.W.2d 787 (same); *Ernest W. Hahn, Inc. v. Armco Steel Co.* (Utah 1979), 601 P.2d 152 (same); *Zaleskie v. Joyce* (1975), 133 Vt. 150, 333 A.2d 110 (same); *Ulmer v. Ford Motor Co.* (1969), 75 Wash.2d 522, 452 P.2d 729 (same); *Morningstar v. Black and Decker Manufacturing Co.* (1979), 162 W.Va. 857, 253 S.E.2d 666 (adopting strict liability in response to certified question from S.D.W.Va.); *Dippel v. Sciano* (1967), 37 Wis.2d 443, 155 N.W.2d 55 (adopting 402A and applying it to the facts of the case); *Ogle v. Caterpillar Tractor Co.* (Wyo. 1986), 716 P.2d 334 (same). Therefore, because this Court did not expressly limit *Temple* to prospective application, the decision may be applied retroactively and the Court of Appeals' opinion should be affirmed.

B. The Retroactive Application of Strict Liability is an Imperative Because It has been Retroactively Applied.

Proper development of a common law system based on precedent requires that new legal rules, once applied retroactively to the parties before the adopting court, must be given retroactive application to all cases not completely resolved. In the usual case, the very nature of litigation assures that the conduct at issue predates the adoption of the rule governing the legal effect of that conduct. Consequently, as the Supreme Court of the United States has observed,

[W]e can scarcely permit 'the substantive law [to] shift and spring' according to

'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'

Harper v. Virginia Dept. of Taxation (1993), 509 U.S. 86, 97-98, 113 S.Ct. 2510

(citations omitted). Stability and fairness in the judicial system require that exceptions are not made based on a particular litigant's circumstances. Indeed, G.V. Hamilton's supply of asbestos-containing products prior to this Court's adoption of § 402A in 1977 should not change "the fundamental rule of 'retrospective operation' that has governed "[j]udicial decisions ... for near a thousand years.'" *Harper*, 509 U.S. at 94 (citations omitted).

Three days prior to the Court of Appeals' decision in the instant action, on June 25, 2007, the Court of Appeals of Washington in *Lunsford v. Saberhagen* (Wash.App. Div. 1 2007), 160 P.3d 1089, addressed the retroactive application of strict liability for injuries arising from asbestos exposure occurring prior to the adoption of Restatement (Second) of Torts § 402A. In holding that strict liability should be applied retroactively, the Court found that the issue of retroactivity was already resolved because strict liability had already been applied in cases involving asbestos exposure occurring before the adoption of strict liability. *Lunsford*, 160 P.3d at 1094. The Court quoted the Supreme Court of the United States in *James B. Beam Distilling Co. v. Georgia* (1991), 501 U.S. 529, 111 S.Ct. 2439:

'Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules.' Once rung, the bell is not unring.

Lunsford, 160 P.3d at 1093 (quoting *James B. Beam Distilling*, 501 U.S. at 543). The principle recognized in *Beam* and *Lunsford* court is fully applicable to the instant action because strict liability has already been applied retroactively by this Court. In nearly every case, a newly adopted rule will apply to the parties before the court. Thus, the new rule has retroactive effect and remaining consistent in a rule's application is essential to avoid disparate results and serious equal protection concerns. See, e.g., *Solem v. Stumes* (1984), 465 U.S. 638, 642, 104 S.Ct. 1338 ("a legal system based on precedent has a built-in presumption of retroactivity."). In *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, 218 N.E.2d 185, this Court adopted strict liability and applied it to the parties before it. Appellee submits that the same policy analysis that led this Court to apply strict liability retroactively to a manufacturer is equally applicable to the consideration of the retroactive application of strict liability to a non-manufacturing seller.

Indeed, although the supplier in *Temple* was determined not to be strictly liable, this Court clearly applied the principles of § 402A in reaching its determination. Noting that "[u]nder Section 402A, . . . a plaintiff must prove that the product was defective at the time it left the seller's hands[,]” *id.*, 364 N.E.2d at 271, this Court declined to find that either the manufacturer or the seller could be held strictly liable since the injury-causing press had undergone substantial change after leaving their hands. *Id.*, 364 N.E.2d at 272. Moreover, at least four appellate courts have applied the *Temple* rule in analyzing a strict liability claim against a supplier either asserted prior to the *Temple* decision or based on tortious conduct occurring prior to the *Temple* decision. *Silvillo v. Dreis & Krump Manufacturing Co.* (8th Dist.), 1986 WL 6114, involves a chronology of events

identical to those in the instant action. The plaintiff sustained an injury in 1978 caused by a defective press brake that was sold by the defendant seller in the 1950s. The jury returned a verdict in favor of the defendant seller, despite answering special interrogatories finding that the press brake was defective in design, caused the plaintiff's injuries, and was distributed by the defendant seller. *Silvillo*, 1986 WL at *16. The Court, in reversing the judgment in favor of the seller because the record demonstrated that all the elements of strict liability were established, cited *Temple* and § 402A in recognizing that "in Ohio, sellers can be held liable under strict liability in tort." *Id.* See also *Hodory v. Federated Department Stores, Inc.* (1st Dist.), 1979 WL 208781 (in case involving 1973 injury from toe retainer wire snapping from ski binding on skis purchased in 1972, court reversed judgment notwithstanding the verdict entered in favor of seller, specifically noting trial court's "misapprehension of the doctrine of strict liability"); *Kranz v. Benjamin & Medwin, Inc.* (6th Dist.), 1979 WL 207244 (court ruled after consideration of *Temple* and § 402A that summary judgment for seller was not error because injury resulted from misuse of the product); *Kinstle v. J&M Manufacturing Co.* (3rd Dist.), 1977 WL 199565 (court ruled after consideration of *Temple* and § 402A that refusal to instruct jury on strict liability as to retailer/supplier was not error because plaintiff did not establish defect).

G.V. Hamilton and *Amici's* citation to *Bakonyi v. Ralston Purina Co.* (1985), 17 Ohio St.3d 154, 478 N.E.2d 241, for the proposition that a court of appeals' misinterpretation of the availability of the application of § 402A to suppliers somehow establishes that "[n]ot until 1985 could a supplier have known definitively that merely selling or supplying products could give rise to an action in strict liability[.]" Appellant's

Memorandum at 8, only serves to cloud the issue before this Court. Contrary to G.V. Hamilton's characterization of this Court's opinion in *Bakonyi*, it is clear that rather than "[r]ecognizing the need to clarify Ohio law on this point," Appellant's Memorandum at 8, this Court specifically stated that the Court of Appeals incorrectly granted summary judgment to the appellee because it was not the manufacturer of the product causing the injury, "*[i]n contradiction to our holding in Temple,*" *Bakonyi*, 478 N.E.2d at 243 (emphasis added). Indeed, the *Bakonyi* Court quoted – and emphasized -- paragraph 1 from the syllabus from *Temple*:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Temple, 478 N.E.2d at 243 (emphasis in original). This Court's specific emphasis of the words "*One who sells any product*" clearly expresses a reiteration of its holding in *Temple*, as opposed to a "clarification". Any suggestion that courts of common pleas or courts of appeals were unclear that § 402A liability could be applied to suppliers after 1977 is irrelevant to this Court's consideration of whether its clear adoption of § 402A in *Temple* is to be given retroactive application.

C. *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, has been Overruled.

G.V. Hamilton relies on the test set forth by the Supreme Court of the United States in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, and subsequently applied by *Anello v. Hufziger* (1st Dist. 1988), 48 Ohio App.3d 28, 547 N.E.2d 1220, of

three determinative factors in the consideration of whether a court decision may be applied retroactively: (1) whether the decision announces a new principle of law by either overruling past precedent or deciding an issue of first impression “whose resolution was not clearly foreshadowed[.]” *Chevron Oil*, 404 U.S. at 106-07, (2) whether, following an examination of the history, purpose and effect of the previous rule, retrospective application of the court decision will “further or retard its operation[.]” *id.*, and (3) whether retrospective application will result in inequity. *Id.* However, in *Harper*, the United States Supreme Court overruled the *Chevron Oil* decision, holding “[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.”

Moreover, the United States Supreme Court’s decision in *Harper* has been recognized as “unambiguously overrul[ing]” *Chevron Oil* to the extent that it countenanced the exercise of selective retroactivity. See *Pollard v. State Farm Fire & Casualty* (6th Cir. 2005), 122 Fed.Appx. 837, 843; *Jordan v. Armsway Tank Transport, Inc.* (2nd Dist.), 2004 WL 102785, 3. See also *Toms v. Taft* (6th Cir. 2003), 338 F.3d 519, 529-30 (recognizing the overruling of *Chevron Oil* “to the extent it permits the selective prospective-only application of a new rule of law” and applying the principle set forth in *Harper* to a consideration of the application of a decision to an action initiated prior to that decision).

D. Even If It Were Appropriate to Apply the *Chevron Oil* Factors to Subsequent Cases Involving the Application of *Temple*, Those Factors Would Still Favor Its Retroactive Application.

Consideration of the *Chevron Oil* factors still favors a retroactive application of the *Temple* opinion. First, the *Chevron Oil* test requires the announcement of a *new rule*. *Chevron Oil*, 404 U.S. 106-07. This Court's decision in *Temple* to apply strict liability to the sellers of defective products does not constitute an announcement of a new rule. To the contrary, the rule of strict liability for sellers of defective products had previously been announced by this Court in *Lonzrick, supra*, and this Court's application of that rule to non-manufacturing suppliers did not constitute adoption of any new rule. As the *Lunsford* court explained, "[e]ven if it applied, the *Chevron Oil* test required the announcement of a new rule in those cases, not application of an existing rule. . . . This is a question of application of an existing rule to a new fact pattern, rather than an announcement of a new rule." *Lunsford*, 160 P.3d at 1094.

This Court's 1966 decision in *Lonzrick* to allow a cause of action based on strict liability clearly was an announcement of a new rule of law. The *Temple* decision simply constitutes an application of that rule of law. Moreover, the *Lonzrick* Court's discussion of the implied warranty cause of action on which its adoption of strict liability was based certainly foreshadows the future application of the cause of action to non-manufacturing sellers of defective products:

This 'kind of warranty' arose not out of a contract of sale but out of the duty of a ***manufacturer or seller of a product*** to protect the person consuming or using that product in the ordinary way in which it was intended to be used from the harm of injury to person or property caused by a defect in the product.

Lonzrick, 218 N.E.2d at 190 (emphasis added).

The second factor under the *Chevron* test is whether, following an examination of

the history, purpose and effect of the previous rule, retrospective application of the court decision will “further or retard its operation.” *Chevron Oil*, 404 U.S. at 106-07. In *Bakonyi*, this Court set forth the policy rationale behind the application of strict liability to a non-manufacturing retailer:

‘The retailer is in a more favorable position to bear the costs of accidents due to the defectively dangerous products he sells than is the first purchaser for use. If the defect is one that is traceable to the manufacturer, the retailer may be more likely to get acceptance of financial responsibility without litigation than is the consumer purchaser. If the manufacturer is insolvent or is a corporation that has been dissolved, or if the defect is one that is not traceable to the manufacturer, the loss is one that can best be borne by the retailer as a cost of doing business.’

Id., 478 N.E.2d at 242 n.1 (quoting Prosser and Keeton on Torts, § 100 at 706-707 (1984)). See also *Bowling v. Heil Co.* (1987), 31 Ohio St.3d 277, 511 N.E.2d 373, 378-79 (“the seller, . . . has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by [its product]; . . . *public policy demands that the burden of accidental injuries . . . be placed upon those who market them, and be treated as a cost of production* against which liability insurance can be obtained”) (emphasis in original); *Vandermark v. Ford Motor Co.* (1964), 61 Cal.2d 256, 391 P.2d 168, 171-172 (“Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.”) (citations omitted).

G.V. Hamilton and *Amici* suggest that if the decision of the Court of Appeals is affirmed and *Temple* is applied retroactively against suppliers for the supply of asbestos-containing products occurring prior this Court’s adoption of § 402A, Ohio businesses will be threatened by claims for which they have no liability insurance protection based on

past conduct for which they could not have anticipated liability. Merit Brief at 11-12; Brief of *Amici Curiae* Ceecorp, Inc., et al., at 14. However, it is standard business practice to carry insurance that covers the liability of a business based on past conduct: “occurrence” policies remain in effect indefinitely for conduct during a given time period, and “claims made” policies cover claims during a given time period, regardless of when the conduct occurred. Indeed, G.V. Hamilton studiously avoids representing to this Court that it does not have insurance to cover the strict liability claim of Appellee in the instant action.

The general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively. . . . ‘When a defective article enters the stream of commerce and an innocent person is hurt, *it is better that the loss fall on the manufacturer, distributor or seller than on the innocent victim.* This is true even if the entities in the chain of production and distribution exercise due care in the defective product’s manufacture and delivery. *They are simply in the best position to either insure against the loss or spread the loss among all the consumers of the product.* . . . *No justification exists why such reasoning is any less applicable when applied before March 19, 1986* [the date of the Wyoming Supreme Court’s opinion adopting strict liability].

Harvey v. General Motors Corp. (Wyo. 1987), 739 P.2d 763, 765 (quoting Prosser and Keeton on Torts, §§ 96-97 (1984)) (other citations omitted) (emphasis added).

Upholding the retroactive application of *Temple* undoubtedly furthers the principles attendant to the doctrine of strict liability.

The final *Chevron Oil* factor requires a determination of whether retrospective application of the rule of will result in inequity. In this situation, the only potential inequity is that to plaintiffs who will be denied the ability to assert or maintain a strict liability cause of action against the suppliers of asbestos-containing products should the Court of Appeals’ decision not be permitted to stand.

In its attempt to argue that the retroactive application of *Temple* would create

substantial inequities, G.V. Hamilton declares that the “the ramifications for Ohio businesses in the future would be calamitous.” Merit Brief at 15. This assertion, and similar statements by G.V. Hamilton and *Amici*, should not be considered as a basis for a determination of substantial inequity for several reasons. First, claims that the retroactive application of *Temple* will result in a “stampede”, *Amici Curiae* Brief of Coalition for Litigation Justice, Inc., et al. at 12, of new asbestos cases against the suppliers of asbestos-containing products lack merit. To the best of Appellee’s knowledge, the assertion of strict liability claims against non-manufacturing suppliers has been standard practice in Ohio since the start of asbestos litigation. As argued *supra*, Ohio courts have applied strict liability retroactively since its adoption in *Lonzrick* and its adoption of § 402A liability in *Temple*. Contrary to the arguments of G.V. Hamilton and *Amici*, the trial court’s determination that *Temple* could not be applied retroactively was a radical departure from “the fundamental rule of ‘retrospective operation’ that has governed ‘[j]udicial decisions . . . for near a thousand years.’” *Harper*, 509 U.S. at 94 (citations omitted). Therefore, if a “stampede” of new asbestos claims was going to take place based on the retroactive application of strict liability, it already would have occurred. Moreover, G.V. Hamilton’s threat of a “stampede” of cases is inconsistent with the position it asserts in this and other Courts regarding Am.Sub. H.B. 292, Ohio’s asbestos tort reform legislation enacted in 2004, which requires asbestos claimants to establish that their non-malignant or malignant asbestos disease meets a new *prima facie* standard before their cases may proceed in court. In that context, G.V. Hamilton argues that Am.Sub. H.B. 292 applies to all pending and newly filed cases and has the effect of

precluding virtually all asbestos cases from proceeding.³

Finally, the nature of asbestos litigation in Ohio and elsewhere is that a suit alleging asbestos injury is typically filed against numerous defendants, including both manufacturers and non-manufacturing suppliers. Ordinarily a negligence claim as well as a strict liability claim will be asserted, as was the case in the instant action against G.V. Hamilton. Consequently, although curtailment of strict liability theory would serve to disadvantage plaintiffs – unfairly, in Appellee’s view – it would not appreciably affect the volume of litigation or the number of parties. Simply put, there is no foreseeable impact on litigation costs or expenditure of judicial resources by a determination that the strict liability claim may be maintained along with others in a suit brought for injuries resulting from defective products.⁴

The Court of Appeals correctly applied the general rule of retroactivity to this Court’s adoption of § 402A in *Temple*, and this Court should affirm that decision.

³ Appellee believes that H.B. 292 may not be retroactively applied to cases arising from exposure occurring before its effective date (September 2, 2004) for the same reasons that the parties herein agreed that R.C. § 2307.78 could not be applied.

⁴ The contention of *Amici* that “the ramifications of the Court of Appeals decision will not be limited to sellers of asbestos products[.]” Brief of *Amici Curiae* Ceecorp, Inc., et al., at 16, should also not be countenanced as an example of a substantially inequitable result of the retroactive application of *Temple*. *Amici* provide no credible support for the assertion that there are masses of defective products manufactured and supplied before 1977 causing latent injuries.

CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the decision of the Court of Appeals for the Eighth District.

Dated: April 10, 2008

Respectfully submitted,

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