

IN THE SUPREME COURT OF OHIO

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

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REPLY BRIEF OF APPELLANT, GEORGE V. HAMILTON, INC.

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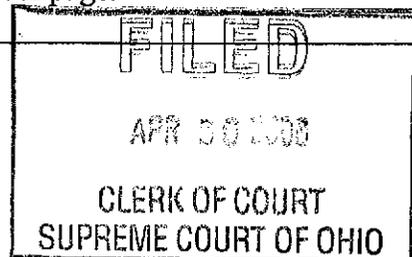
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## ARGUMENT

**A. The Standard for Determining Retroactivity of Court Decisions as Set Forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, is the Proper Test for Ohio Courts, and the U.S. Supreme Court's Ruling in *Harper v. Virginia Dept. Of Taxation* (1993), 509 U.S. 86, 97-98, 113 S.Ct. 2510, 125 L.E.2d 74, Does Not Preclude the Ohio Courts from Continuing to Use the *Chevron* Analysis.**

The foundational question which this Court must answer before considering the facts at hand is the appropriate test for determining when a decision of an Ohio court is to be applied retroactively in civil cases. It is generally the rule in Ohio that an Ohio Supreme Court decision overruling a previous decision is to be applied retrospectively. *Wendell v. AmeriTrust Co., N.A.* (1994), 69 Ohio St. 3d 74, citing *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209. This general rule applies to cases where a previous decision is being overruled, as well as to cases where the Supreme Court is interpreting a statute. *Anello v. Hufziger* (1988), 48 Ohio App.3d 28.

However, Ohio law also recognizes that retroactive application of Supreme Court decisions is a narrow doctrine, see, e.g., *State ex rel. Adams v. AluChem, Inc.* (2004), 104 Ohio St. 3d 640, 641 (“Only those legal conclusions that we announced in [the prior decision] can be retrospectively applied to other cases”), and that decisions should not be retroactively applied when the application would not be just or sensible. Although this Court has never explicitly adopted the three prong test set forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, this Court has nonetheless employed a balancing test in order to determine the equities of retroactive application of its decisions. In *Wagner v. Midwestern Indem. Co.* (1998), 83 Ohio St. 3d 287, 290, this Court clearly stated:

[B]lind application of the *Peerless* [retroactivity] doctrine has never been mandated by this court.\* \* \* Consideration should be

given to the purpose of the new rule or standard and to whether a remand is necessary to effectuate that purpose.

Id. at 290. This Court then went on to decide in *Wagner* that its prior ruling should not be applied retroactively, holding that “the court of appeals’ rigid application of *Peerless* was inappropriate in this situation.” Id. at 290.

Similarly, the courts of appeal in Ohio have recognized the injustice that can result from the inflexible retroactive application of court decisions and have, for the past twenty years, looked to the three prong test set forth in *Chevron* to establish guidelines for making the determination of when decisions are to be applied retroactively. The considerations outlined in *Chevron* were first adopted by the First District Court of Appeals in 1988 in *Anello v. Hufziger* (1988), 48 Ohio App.3d 28. Since that time, Ohio courts of appeal have continued to cite *Chevron* as setting forth the criteria for retroactive application. See, for example, *Sarcom, Inc. v. 1650 Indian Wood Circle, Ltd.* (6<sup>th</sup> Dist), 2005 Ohio 6139 (court decisions should not be applied retroactively where retrospective application will produce “substantial inequitable results”).

Thus, although this Court has never specifically addressed this issue, the courts of appeal in Ohio have consistently held that the three part test outlined by the United States Supreme Court in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, provides a proper balancing of the interests of the litigants, taking into account the public policy underlying the rule of law announced by the decision as well as the reliance by the parties on the law as it existed at the time when the behavior at issue took place.

**1. This Court Has Never Adopted a Bright Line Test that Only Those Decisions that Are Specifically Stated to Be Prospective Will be Given Prospective Application.**

Appellee has not provided a single compelling reason why the *Chevron* test should be abandoned in Ohio. Instead, Appellee relies on the declarations of the general rule of retroactivity by citing to *Lakeside Ave. L.P. v. Cuyahoga County Board of Revision* (1999), 85 Ohio St. 3d 125, ignoring the clear mandate of this Court against blind application of retroactivity in *Wagner v. Midwestern Indem. Co.* (1998), *supra*. In the single paragraph in *Lakeside* that discussed retroactivity, this Court stated the general rule that judicial decisions are to be applied retroactively, but did not engage in any analysis or discussion of any of the long list of Ohio cases that have held that there are exceptions to the general rule of retroactivity. Certainly, *Lakeside* cannot be construed as overturning *Wagner*, since this Court did not even address *Wagner* in the *Lakeside* decision. Therefore, *Lakeside* can hardly be seen as the ultimate pronouncement of this State's highest Court on the issue of retroactivity.

A hard and fast rule that all pronouncements of this Court are to be applied retroactively ignores the reality that the law evolves and changes over time. In fact, there is no better example of the changing law than the evolution of products liability law in Ohio. As described more fully in the brief of Amici Curiae Coalition for Litigation Justice, Inc., et al., the concept of strict liability was unknown in Ohio jurisprudence 50 years ago. Further, strict liability was not suddenly enacted by the General Assembly, but instead developed through court decisions over the course of many years. An unyielding standard for determining retroactivity which employs the unwavering approach that any pronouncement is a statement of what the law has always been is contrary to reason and common sense when applied to evolving concepts such as strict

liability. As Justice Frankfurter acknowledged long before the U.S. Supreme Court developed the *Chevron* doctrine:

We should not indulge in the fiction that the law now announced has always been the law. \* \* \* It is much more conducive to the law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.

*Griffin v. Illinois* (1956), 351 U.S. 12, 26, 76 S.Ct. 585, 100 L.Ed. 891 (opinion concurring in judgment). Further, a bright line rule ignores the reality that retroactive application can result in unconscionable injustice to a party that justifiably relied on the prior law. Such is the situation when a suit brought under the prior law would have resulted in a different outcome than a suit brought under the new pronouncement. Individuals must have the ability to conform their conduct to the requirements of the law, without the fear that the rug will be pulled out from under them.

This Court has never adopted a stringent rule that decisions will apply retroactively unless the prior opinion expressly limits the decision to prospective application, nor should it. In order to avoid blind reliance on the general rule of retroactivity, Ohio courts must be permitted to balance the purpose for the new rule against the potential for unfair or unjust results to the litigants.

**2. The *Harper* Decision Applies Exclusively to Federal Law and has No Affect on Ohio's Use of the Three Pronged Balancing Test in *Chevron*.**

Appellee's reliance on certain decisions of the United States Supreme Court since *Chevron* is misplaced. In a series of cases culminating with *Harper v. Virginia Dept. Of*

*Taxation* (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.E.2d 74, the United States Supreme Court revisited the test that had been used in federal as well as many state courts for more than twenty years.

However, the *Harper* case provoked considerable contention among the members of the Supreme Court, as is evidenced by the two concurring and one dissenting opinions, all of which focused on the proper standard for determining retroactivity of court decisions in civil cases. In her dissent, Justice O'Connor sharply criticized the majority, stating "[t]his Court's retroactivity jurisprudence has become somewhat chaotic in recent years. \* \* \* As a result, the Court today finds itself confronted with such disarray that, rather than relying on precedent, it must resort to vote counting." *Harper* at 113.

Perhaps because of the strong opinion on both sides of this issue, the U.S Supreme Court majority opinion, written by Justice Thomas, made it clear that *Harper* applies only to federal law. "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law." *Id.* at 97. Thus, state courts are entirely free to adopt their own standard for determining the retroactive application of the decisions of their supreme courts. "Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, cannot extend to their interpretations of federal law." *Id.* at 100 (citation omitted). "When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Assoc v. Smith* (1990), 496 U.S. 167, 177, 110 S. Ct. 2323, 110 L.Ed. 2d 148.

Since the issuance of the *Harper* decision, a number of state supreme courts have addressed the issue of retroactivity of their decisions. Significantly, a clear majority of those

courts have expressly adopted the *Chevron* analysis and have declined to follow *Harper*. See *Dempsey v. Allstate Ins. Co.* (Mt. 2004), 2004 MT 391, 325 Mont. 207, 217, 104 P3d 483 (the *Chevron* test is still viable as an exception to the rule of retroactivity in Montana, but the exception will only be invoked when all three *Chevron* factors are satisfied); *Christy v. Cranberry Volunteer Ambulance Corps* (Pa. 2004), 579 Pa. 404, 418-419, 856 A.2d 43 (retroactive application is a matter of judicial discretion and must be exercised on a case-by-case basis, making a sweeping rule of retroactive application unjustified under Pennsylvania law); *City of New Bern v. New Bern-Craven County Bd. of Ed.* (N.C.1994), 338 N.C. 430, 442-443, 450 S.E.2d 735 (because the issue is one of state law, the North Carolina courts are free to apply a test of "reasonableness and good faith" to determine the affect which a judicial decision holding a statute unconstitutional will have on the rights and obligations of parties who have taken action pursuant to the invalid statute); *Montells v. Haynes* (N.J. 1993), 133 N.J. 282, 295, 627 A.2d 654 ("[w]hatever path [the U.S. Supreme Court] may follow, we believe that in an appropriate case a purely prospective application may provide the fairest and most equitable disposition."); *Martin Marietta Corp. v. Lorenz* (Colo. 1992), 823 P.2d 100, 113, n. 7 (Colorado will continue to adhere to the *Chevron Oil* analysis in resolving the issue of retroactivity or prospectivity of state judicial decisions); *In re Commitment of Thiel* (Wis.Ct.App. 2001), 241 Wis.2d 439, 625 N.W.2d 321 (the Wisconsin Supreme Court declined to follow *Harper* because it applies only to federal law; a radical change in the manner in which the state's appellate courts approach retroactivity analysis is within the exclusive superintending authority of the state supreme court; and it is within the inherent power of the state supreme court to give a decision prospective or retrospective application without offending constitutional principles); *Findley v. Findley* (Ga.

2006), 280 Ga. 454, 629 S.E.2d 222, 2006 Ga. LEXIS 254, 2006 Fulton County D. Rep. 1337 (the juristic philosophy of the Georgia courts recognizes that there are compelling reasons for making exceptions to the general rule that the decisions of the courts apply retroactively); *Beavers v. Johnson Controls* (N.M. 994), 118 N.M. 391, 881 P.2d 1376 (the New Mexico Supreme Court declined to follow *Harper* and continued to apply the factors outlined in *Chevron*).

This Court should take the same approach as taken by these courts and continue to use the *Chevron* test as the proper test to analyze the retroactive application of new Ohio case law. The *Harper* decision should be limited to changes in federal rules of law and should not be applied to state law. The Cuyahoga Court of Common Pleas decision of May 9, 2006, applied the correct and appropriate standard when three judges sitting *en banc*, one of which is a former Ohio Supreme Court Justice, determined that the *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267 decision should not be applied retroactively.

**B. Under the Three Part Test of *Chevron* This Court's Decision in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267 Should Not be Applied Retroactively to Non-Manufacturing Sellers.**

As set forth in the merit brief of Appellant Hamilton, application of the *Chevron* criteria clearly requires a prospective application of *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267 to suppliers of allegedly defective products. When an analysis is performed with the critical distinction between a manufacturer and a seller in mind, it becomes clear that the three judge panel sitting on the trial court below properly applied the three part test in reaching

its conclusion that *Temple* should not be applied retroactively with regard to suppliers of allegedly defective products.

Although Appellee argues that this Court's 1977 decision in *Temple* did not announce a new rule of law with regard to suppliers of products, the reality is that she is unable to point to a single decision of this or any Ohio court before 1985 which held that suppliers can also be strictly liable. The prevailing view of Ohio courts during this era was that the new concept of strict liability was one designed to hold a **manufacturer** liable for the products that it made.

With this in mind, this Court adopted §402A of the Restatement (Second) of Torts in *Temple* for the purpose of providing structure to this evolving area of law. The retrospective application of *Temple* to those who were not the manufacturers of the products will not promote this goal.

Finally, *Chevron* requires an analysis of whether the decision will produce "substantial inequitable results". When engaging in this analysis, the courts look to whether retroactive application will result in injustice or hardship to the party against whom the new rule of law is to be applied. Appellee's argument that *she* will be disadvantaged if this Court finds that *Temple* should be applied prospectively is misconceived. Rather, the emphasis of the courts in applying the third prong of *Chevron* is whether retrospective application will result in substantial inequitable results to the party against whom the retroactive application is sought. See *Chevron*, supra, and *Anello*, supra. Thus, the three Judge panel that decided *In re: Goldberg 23*, Cuy.C.P. No. S.D. 73958 (Supp. 1-4) correctly examined how the retroactive application of *Temple* would impact the suppliers of products, concluding that "imposing strict liability retroactively cannot

induce anyone to do anything; opportunities to mitigate the risk have long since passed.” Id. at 3 (Supp. 3).

The Eighth District Court of Appeals in this matter employed the correct standard for determining retroactivity, but failed to conduct a proper analysis of the factors set forth in *Chevron*. The Court of Common Pleas conducted a much more thorough and thoughtful review of each of the considerations of *Chevron* and properly reached the conclusion that *Temple* should not be applied retroactively to suppliers of products.

**C. *Temple* Should Not be Retroactively Applied to Suppliers Even Under the Harper Analysis Because Ohio Courts Have Not Applied *Temple* Retroactively to Supplier Litigants in Prior Cases.**

Although Appellant Hamilton believes that the *Chevron* test is the correct analysis for determining retroactive application, even under the *Harper* analysis *Temple* should not be applied retroactively. *Harper* 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.” *Harper* at 97. Thus, the only requirement for determining retroactivity under the *Harper* analysis is whether the rule of law announced by a supreme court – whether that be the United States Supreme Court with regard to a question of federal law or a state supreme court which has adopted the *Harper* standard – was applied to the litigants before that court when it announced its decision. That was not the situation in *Temple*. In *Temple* the new rule of law was not even applied to the manufacturer of the product that caused injury to the plaintiff, let alone to the non-manufacturer seller.

Indeed, as discussed in Appellant Hamilton's primary brief, it was not until this Court decided *Bakonyi v. Ralston Purina Co.* (1985), 17 Ohio St. 3d 154, 478 N.E.2d 241, that this Court announced that suppliers of products can be held strictly liable. Yet even then, this Court did not apply that "rule" to the party before it. The unanimous opinion of this Court in *Bakonyi* stated "we hold that a seller of a defective product \* \* \* is **not strictly liable** under the dual capacity doctrine to an employee who is unintentionally injured in the course of employment while using the defective product." This Court therefore affirmed the summary judgment that had been granted to the defendant.

Although it is the Ohio Supreme Court which ultimately pronounces the law of this state, Appellee cites four lower court opinions for the proposition that *Temple* has been applied retroactively and therefore must be applied retroactively to Hamilton. These decisions are neither instructive nor controlling on this Court. As discussed above, the *Harper* analysis applies only to rules of law that are announced by a supreme court. Thus, the decisions of the courts of appeal cited by appellee are irrelevant to the *Harper* analysis. More importantly, however, none of the four decisions cited by appellee even discuss the retroactive application of *Temple*. In two of the cases, *Hodory v. Federated Department Stores, Inc.* (1<sup>st</sup> Dist.), 1979 WL 208781, 1979 Ohio App. LEXIS 9764, and *Kranz v. Benjamin & Medwin, Inc.* (6<sup>th</sup> Dist.), 1979 WL 207244, 1979 Ohio App. LEXIS 10620, it appears that the litigants conceded the issue of retroactivity and therefore these courts did not express an opinion regarding the rule of law of retroactivity as it relates to suppliers of products. As a result, the holdings in each of these cases addressed issues other than whether a supplier can be held strictly liable. In *Hodory* the issue was whether the

trial court erred in instructing the jury to use a “reasonably prudent person” standard. In *Kranz*, the issue was whether the product was used as the manufacturer had intended.

In *Sivillo v. Dreis & Krump Manufacturing Co.* (8<sup>th</sup> Dist.), 1986 WL 6114, 1986 Ohio App. LEXIS 7075, the only issue the Plaintiff raised in the Court of Appeals with regard to the supplier defendant was that the general verdict of the jury was inconsistent with the special interrogatory answers provided by the jury. In its analysis, the Eighth District Court of Appeals cited *Bakonyi supra*, for the proposition that a supplier can be held strictly liable. It is important to recognize that, between the date of the jury verdict and the date of the appeal in *Sivillo*, this Court had announced its decision in *Bakonyi*, and for the first time there was a clear rule that suppliers could be held liable under §402A of the Restatement (Second) of Torts. Once again, however, there was absolutely no discussion by the court of appeals on the issue of retroactivity.

Finally, Appellee cites an opinion of the Third District Court of Appeals in *Kinstle v. J&M Manufacturing Co.* (3d Dist.), 1977 WL 199565, 1977 Ohio App. LEXIS 8224, which was decided the same year as *Temple*. The court in *Kinstle* discussed §402A liability and the *Temple* decision, but only when discussing the potential liability of the manufacturer. The Third District Court of Appeals concluded that the only basis for recovery from the supplier which was available to plaintiff was that of negligence. Once again, there was no discussion of the retroactive application of *Temple* to suppliers and, once again, the court did not apply the theory of strict liability to the supplier.

The decision of the Washington Court of Appeals in *Lunsford v. Saberhagen* (Wash.App. Div.1 2007), 160 P.3d 1089, similarly provides no guidance to this Court in deciding the retroactivity of *Temple* for several reasons. First, the Washington Supreme Court

had already limited the application of the *Chevron* test before *Lunsford* was decided. Then, applying the *Harper* standard, the Washington Court of Appeals looked to the prior decisions of the Washington Supreme Court, and found that the Supreme Court had applied strict liability retroactively to the suppliers on several occasions. Thus, the relevant considerations in *Lunsford* are antithetical to those currently before this Court.

There have been no decisions by the Ohio Supreme Court holding that strict liability applies to a supplier which have actually applied the doctrine to the supplier-litigant before the Court. Thus, even if this Court were to adopt the *Harper* test for retroactivity, *Temple* could not be applied retroactively with regard to suppliers.

**D. The Merits of This Case Exemplify the Reasons Why *Temple* Should Not Apply Retroactively to Suppliers of Products.**

Asbestos litigation has required the courts in this state and throughout the county to apply theories of products liability law to parties involved in mass tort litigation. See briefs of Amici Curiae Coalition for Litigation Justice, Inc., et al., and Amici Curiae Ceecorp, Inc., et al. This Court is now being asked to determine whether a theory of liability that had not yet been adopted by Ohio courts should be applied to the actions of Appellant Hamilton that occurred in the 1950s, 1960s and perhaps the early 1970s. At that time, there was no way for distributors of products to know that in the future the courts would hold them strictly liable for the sale of products that they did not manufacture. The alleged sale of the asbestos products by Hamilton to Mr. DiCenzo's workplace ceased years before this Court's decision in *Temple*. Thus, Ohio

common law had not extended strict liability to suppliers at the time that Appellant alleges that Hamilton was a supplier of asbestos products to Wheeling-Pittsburgh Steel in Yorkville, Ohio.

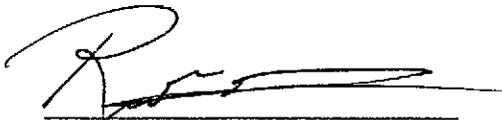
Until *Temple* was decided, a non-manufacturer could not be held liable for any injuries that resulted from the use of a product unless it could be shown to have committed actual negligence. For more than 20 years, Ohio courts and juries have decided asbestos cases that have been brought against suppliers by looking to whether the conduct of each supplier was negligent. Thus, a plaintiff who alleges injury from exposure to an asbestos containing product will not be foreclosed from bringing a cause of action against the supplier of that product if this Court determines that *Temple* should be applied prospectively to non-manufacturers.

## CONCLUSION

The three pronged test set forth by the United States Supreme Court in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97 is the proper standard for determining the retroactivity of decisions of the Ohio Supreme Court. Although the U.S. Supreme Court's decision in *Harper v. Virginia Dept. Of Taxation* (1993), 509 U.S. 86, 113 S.Ct. 2510, 125 L.E.2d 74 limited the application of *Chevron*, the *Harper* decision applies only to federal law, and state courts are free to make their own determination of when decisions will be applied retroactively. Ohio should follow the majority of other states and adopt the *Chevron* test for determining retroactivity.

The Cuyahoga Court of Common Pleas decision of May 9, 2006, provided a reasoned and thorough analysis of the *Chevron* factors and determined that the *Temple* decision should not be applied retroactively. For these reasons, it is requested that this Court reverse the ruling of the Eighth District Court of Appeals and affirm the ruling of the Court of Common Pleas granting summary judgment in favor of Hamilton.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

AND NOW this 30<sup>th</sup> day of April, 2008, I hereby certify that a true and correct copy of the foregoing document has been served on all counsel by postage prepaid, first class mail.

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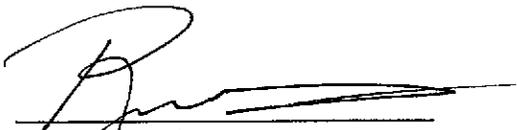
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