

IN THE SUPREME COURT OF OHIO

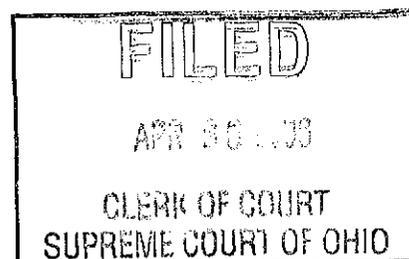
GENEVIEVE DICENZO, Executrix of)
the Estate of JOSEPH DICENZO,) Case No. 07-1628
Deceased, and GENEVIEVE DICENZO,)
in Her Own Right)
Appellee) On Appeal from the
v.) Cuyahoga County Court of Appeals,
A-BEST PRODUCTS CO., Inc., et al.) Eighth Appellate District
Appellant) Court of Appeals
Case No. CA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

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ARGUMENT

A. **THE FACT THAT THIS COURT’S OPINION IN *TEMPLE V. WEAN UNITED, INC.* (1977), 50 OHIO ST. 2d 317, WAS NOT EXPRESSLY LIMITED TO PROSPECTIVE APPLICATION IS NOT DISPOSITIVE OF THIS APPEAL**

Appellee begins her argument by citing the statement of this Court in *Lakeside Ave. L.P. v. Cuyahoga County Board of Revision* (1999), 85 Ohio St. 3d 125, 127-28, 707 N.E.2d 472, 475, that “in the absence a specific provision in a decision declaring its application to be prospective only, the decision shall be applied retrospectively as well,” citing *State ex rel Bosch v. Industrial Commission of Ohio* (1982), 1 Ohio St.3d 94, 98, 438 N.E.2d 415, 418 (Brief of Appellee, p. 3). Appellee then asserts that this statement is dispositive of the instant appeal, because the opinion in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.3d 317, 364 N.E.2d 267, contained no such “specific provision.” (*Ibid.*)

However, for the past twenty years the Ohio courts of appeals have recognized that “[t]here are exceptions to the general rule, as illustrated by *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97[, 92 S. Ct. 349].” *Anello v. Hufziger* (1st Dist., 1988), 48 Ohio App.3d 28, 30, 547 N.E.2d 1220. One such exception, continued the Court of Appeals, is that a “high court decision, will **not** be applied retroactively if the decision meets three ‘separate factors’”:

(1) Is the decision one of 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”)?

(*Ibid.*)

Accord: *Day v. Hissa* (8th Dist., 1994), 97 Ohio App. 3d 286, 287-288, 646 N.E.2d 565; *Sarcom, Inc. v. 1650 Indian Wood Circle, Ltd.*, Sixth Dist. App. No. L-05-1115, 2005-Ohio-6139, ; and *In re Moore* (7th Dist., 2004), 158 Ohio App.3d 679, 2004-Ohio-4544, ¶ 24.

These three factors were therefore relied upon by the Eighth District Court of Appeals in the instant case, as well as by Justice Sweeney and Judges Spellacy and Hanna in the *Goldberg 23 Trial Group* case discussed in the prior briefs. Applying those factors, the three judges in *Goldberg 23* concluded that the statement in *Temple v. Wean United* “approv[ing] Section 402A of the Restatement of Torts 2d” should not be applied retroactively to acts of non-manufacturer sellers that occurred prior to 1977. The Court of Appeals panel in the instant case, however, reached the opposite conclusion. The position of appellant and these amici is that, in reaching that conclusion, the Court of Appeals did not correctly apply the three factors.

B. THE INAPPLICABILITY OF THE CASES STRING-CITED BY APPELLEE

Appellee’s next argument is that 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” (Brief of Appellee, p. 4). Appellee then devotes three pages to string-citing cases in which state appellate courts adopted strict liability or Section 402A, the implication being that all of those cases expressly held that Section 402A (or the rule of strict liability) is retroactive. That implication is wrong. The central issue in each of the

string-cited cases was simply whether a manufacturer (or, in some cases, the seller) of a defective product **who was an actual defendant in that case** should be held strictly liable, not whether the “rule of law” adopted in that case should be applied retroactively. Nor did any of those cases address the specific issue that is now before this Court, which is whether the language of Section 402A imposing strict liability on **all sellers** of defective products (not just manufacturers) should be applied retroactively when the state Supreme Court decision “approving” Section 402A did not actually impose such liability on the parties before it.

As will be discussed below, this is a critical fact when it comes to determining which retroactivity “approach” should be utilized in this case.

C. **THE RETROACTIVITY RULE APPLIED IN *HARPER V. VIRGINIA DEPT. OF TAXATION*, 509 U.S. 86, 113 S.CT. 2510, AND *LUNSFORD V. SABERHAGEN* (WASH. APP. 2007), 160 P.3D 1089 HAS NO APPLICATION TO *TEMPLE V. WEAN UNITED, INC.*’S APPROVAL OF A STRICT LIABILITY RULE THAT WOULD BE APPLICABLE TO ALL “SELLERS” OF DEFECTIVE PRODUCTS**

At pages 6-7 of her Merit Brief, appellee quotes some generalized language from *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86, 97-98, 113 S.Ct. 2510, about the benefits of the “approach to retroactivity” adopted in that case. Tellingly, however, appellee does not (at least at this point in her Brief) articulate what that approach was. Amici believe that the reason for this omission is that appellee realized that the “approach to retroactivity” announced by Justice Clarence Thomas in *Harper* could not possibly apply to the portion of *Temple* (50 Ohio St.3d at 322) where this Court “approved” Section 402A. Thus, the *Harper* “approach” (or “rule”) read as follows:

When 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 post-date our announcement of the rule.

(509 U.S. at 97)

As pointed out at page 13 of these amici's principal Brief (and at greater length in the Reply Brief of Appellant being filed contemporaneously with this Reply Brief), a number of state appellate courts have held that the above-quoted rule applies **only** to an interpretation of federal law by the United States Supreme Court. See also *Jones v. St. Anthony Medical Center* (Feb. 20, 1996), 10th Dist. App. No. 95APE08-1014, 1996 Ohio App. LEXIS 542 at *16, stating that "[s]tate supreme courts still enjoy freedom 'to limit the retroactive operation of their own interpretations of state law' [citing U.S. Supreme Court decisions]." However, even if the *Harper* rule were adopted by this Court, that rule, by its express terms, would be applicable only to a rule of law announced by this Court that was **actually applied** "to the parties before [this court]." That, however, did not occur in *Temple*. This Court, in *Temple*, did **not** apply the Restatement rule relating to "sellers" to the parties before the court. Indeed, this Court, in *Temple*, did not even impose Section 402A strict liability on a manufacturer, since this Court agreed with the lower courts in that case that the punch press manufactured by defendant Wean United was not defective and that plaintiff Temple's injury resulted, instead, from modifications that had been made to the press by Temple's employer. This Court therefore affirmed the summary judgment that had been entered by the Common Pleas Court. Accordingly, since the new rule "approved" in *Temple* was **not** applied "to the parties before" the Court in that case, that new rule (expanding the rule in *Lonzrick v.*

Republic Steel (1966), 6 Ohio St.2d 227, 218 N.E.2d 185 to encompass non-manufacturer sellers) would **not** be retroactive even under *Harper*.

The fact that this Court did not actually apply Section 402A to a non-manufacturer seller in *Temple* also distinguishes the instant case from *Lunsford v. Saberhagen* (Wash. App. 2007), 160 P.3d 1089, cited at page 7 of appellee's Merit Brief. In that case, plaintiff Lunsford asserted an asbestos claim against a supplier of insulation that contained asbestos. In resisting that claim, the supplier argued that when, years earlier, two Washington courts of appeals "adopted § 402 strict product liability, it was a new rule that should not be applied retroactively under a three-part test from *Chevron Oil Co. v. Huson*" (*Id.* at 337). The *Lunsford* Court of Appeals rejected that argument for two reasons. First, the court concluded that, in 1992, the Washington Supreme Court had "rejected the *Chevron Oil* test" (*Id.* at 343) - - which, of course, has not happened in Ohio. Second, the *Lunsford* Court took the position that "[w]hen a Washington appellate decision applies a rule announced in that decision retroactively to the parties in that case, the rule will also be applied to all litigants not barred by a procedural rule" (*Id.* at 343-344). As pointed out above, that is not what happened in *Temple*: this Court did **not** apply Section 402A "to the parties in that case." Hence, *Lunsford* is not relevant authority insofar as this case is concerned.

D. THE THREE FACTORS IN CHEVRON DO NOT FAVOR RETROACTIVE APPLICATION OF THAT PORTION OF THE TEMPLE RULE THAT RELATES TO NON-MANUFACTURER SELLERS

At pp. 12-16 of her Brief, appellee attempts to argue that, even if this Court were to follow *Chevron Oil*, application of the three *Chevron* factors do not support the conclusion of Justice Sweeney and Judges Spellacy and Hanna, in *Goldberg 23 Trial Group*, that "the *Temple* decision should not be applied retroactively"

(*Goldberg*, Supp. p. 2). However, all of appellee's arguments are either factually inaccurate or are unrelated to the reasons advanced by those three judges.

Thus, with respect to the first *Chevron* factor, appellee disputes the three judges' finding that this Court's imposition in *Temple* of "strict liability on non-manufacturing suppliers [was] an establishment of a new principle of law" (*Goldberg*, Supp. p. 2). According to the appellee, that conclusion was incorrect because "the rule of strict liability for **sellers** of defective products had previously been announced by this Court in *Lonzrick*" (Merit Brief of Appellee, p. 12). Appellee's assertion is patently wrong. The "rule announced" in *Lonzrick* related only to **manufacturers**. This is made clear by the concluding paragraph of the *Lonzrick* opinion, which stated:

The petition in this case states a good cause of action grounded in tort, based upon the breach of the representations which are implicit **when a defendant manufactures and sells** a product which, if defective, will be a dangerous instrumentality.

(6 Ohio St.2d at 240)

Indeed, when, more than eleven years later, it issued its decision in *Temple*, this Court was still describing Ohio's strict liability law in terms that limited that liability to manufacturers. Thus, the third paragraph of this Court's opinion in *Temple* stated:

It is now well established that, in order for a party to recover based upon a strict liability in tort theory, it must be proven that: "(1) There was, in fact, a defect in the product **manufactured and sold** by the defendant; (2) such defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's [* * *8] injuries or loss." *State Auto Mutual Ins. Co. v. Chrysler Corp.* (1973), 36 Ohio St.2d 151[, 304 N.E.2d 891].

This Court then went on to declare, in the very next paragraph, that

[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, we hereby approve Section 402A of the Restatement of Torts 2d.

With respect to the second *Chevron* factor, appellee ignores the conclusion of the three judges in *Goldberg 23 Trial Group* that retroactive application of Section 402A so as to render suppliers of defective products absolutely liable would "neither promote[] nor hamper[]" this Court's "primary goal" in adopting Section 402A, 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). Instead, appellee quotes language from this Court's decision in *Bakonyi v. Ralston Purina Company* (1985), 17 Ohio St.3d 154, 478 N.E.2d 241, as to the "policy rationale" for applying strict liability to a non-manufacturing seller (Merit Brief of Appellee, p. 13). But here also appellee ignores a critical fact, namely, that the *Bakonyi* decision was not issued until 1985. In other words, almost twenty years had elapsed from the time that this Court first imposed strict liability on manufacturers (in *Lonzrick*) before this Court finally addressed the question (and the "policy rationale") of whether strict liability should also be imposed on non-manufacturer sellers or suppliers.

Appellee also ignores the question of whether imposing such liability retroactively on businesses that sold (but did not manufacture) defective products prior to 1977 will "retard the operation of the [law]" in this area. As pointed out by Justice Sweeney and Judges Spellacy and Hanna in the *Goldberg 23 Trial Group* case, "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 [to conduct that occurred more than thirty years ago] cannot induce anyone to do anything; opportunities to mitigate the risk have long since passed” (*Goldberg*, Supp. p. 4).

Moreover, as pointed out in these amici’s principal Brief, the General Assembly in 1984 and again in 1988 enacted statutes (R.C. 2305.33 and 2307.78, respectively) that expressly limited the strict liability of non-manufacture sellers to certain discrete situations. The public policy of this state **against** the imposition of such liability, except in those restricted circumstances, was thus made abundantly clear. Equally clear is that imposing unlimited strict liability on non-manufacturer sellers for sales that occurred prior to 1977 would be in derogation of that public policy.

The propriety of taking into account subsequent actions of the General Assembly, such as those described above, when applying the *Chevron Oil* factors to a particular court holding was clearly acknowledged by this Court in *Copperweld Steel Company v. Lindley* (1987), 31 Ohio St.3d 207, 509 N.E.2d 1242. *Copperweld* was a follow-up to *OAMCO v. Lindley* (1987), 29 Ohio St.3d 207, 509 N.E.2d 1242, a case in which this Court had interpreted certain exemptions in the Ohio sales and use tax statute in a manner that was favorable to manufacturers. Although the *OAMCO* decision specifically stated that it was to “operate prospectively only,” several manufacturers that had not been parties to *OAMCO* asked this Court, in *Copperweld*, to extend the *OAMCO* decision to companies that had “appeals pending in this court at the time of [that] decision” raising the same issue (31 Ohio St.3d at 211). Accordingly, **citing *Chevron Oil***, this Court proceeded to consider whether it would be “equitable” to enable those manufacturers to take advantage of the *OAMCO* interpretation, in the face of objections

by the Ohio Tax Commissioner that such a ruling “could have a significant impact on the state’s tax revenue” (31 Ohio St.3d at 211) . This Court concluded that allowing the taxpayers in the roughly half-dozen appeals that were pending before this Court on the date of the *OAMCO* decision to have the benefit of that holding would have no such “significant impact” (*Ibid.*) . . Nevertheless, this Court went on to point out that, “[s]oon after our decision in *OAMCO*, the General Assembly enacted Am. H.B. No. 159, effective March 13, 1987,” in order to “protect the state from any potential revenue resulting from” the decision in *OAMCO*. This Court therefore **took into account** the General Assembly’s “expressed concern [in Am. H.B. No. 159] about the financial impact created by *OAMCO*” and declared that “*OAMCO* will only be retroactively applied to those cases pending in this court at the time of our decision on rehearing in November, 1986.” (*Ibid.*)

Similarly, in the instant case, given the General Assembly’s obvious “concern” (as expressed in R.C. Sections 2305.33 and 2307.78) over the effect of imposing strict product liability on non-manufacturer sellers except in very limited situations, this Court should hold that Section 402A, as “approved” in *Temple*, should not be applied retroactively with respect to non-manufacturer sellers.

As for the third *Chevron* factor (whether retroactive application would produce “substantial inequitable results”), appellee once again ignores the reasoning of the three judges in *Goldberg 23 Trial Group*. Those judges concluded 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” (*Goldberg*, Supp. p. 4). Therefore, to

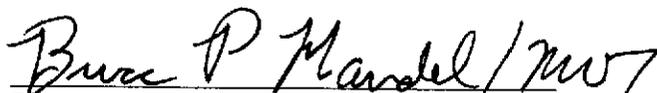
“hold those suppliers strictly liable today for selling asbestos-containing products decades before the *Temple* decision was handed down would be **manifestly unjust.**” (*Ibid.*) Appellee skips over this reasoning entirely and, instead, makes the totally irrelevant argument that, since negligence claims against “non-manufacturing suppliers” are “typically” included in asbestos cases, there would be “no foreseeable impact on litigation costs or expenditure of judicial resources” if claimants were now allowed to also assert strict liability claims against such sellers for acts that occurred prior to 1977 (Merit Brief of Appellee, p. 16). Litigation costs, however, are not the real concern of businesses who sold, but did not manufacture, asbestos products, prior to 1977, especially since negligence claims against suppliers are rarely pursued to trial, given the difficulty of proving such claims. Rather, the concern of those businesses relates to the likelihood of now being assessed damages for injuries that may have resulted from products that they did not manufacture, with respect to which they were not negligent and for which they have no insurance. Asbestos claims have already resulted in the bankruptcy of approximately seventy manufacturers. How many sellers and suppliers will go that same route if Section 402A liability is now retroactively imposed upon them?

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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Handwritten signature of Bruce P. Mandel in black ink, written over a horizontal line. The signature is cursive and includes the initials 'MW' at the end.

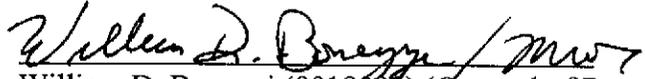
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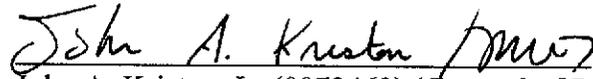
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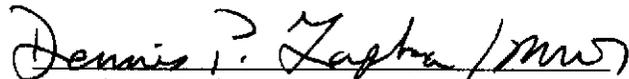
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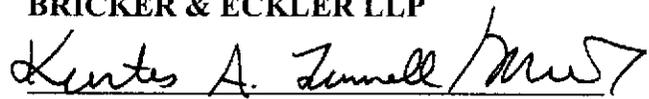
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