

NO. 80728-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RONALD LUNSFORD and ESTHER LUNSFORD,

Appellants,
v.

SABERHAGEN HOLDINGS, INC.,

Respondents.

BRIEF OF AMICUS CURIAE OF
SCHROETER GOLDMARK & BENDER

WILLIAM RUTZICK, WSBA #11533
SCHROETER GOLDMARK & BENDER
810 Third Avenue, #500
Seattle, Washington 98104
206/622-8000

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ARGUMENT.....	1
A. This Court Has Rejected “Selective Prospectivity”.....	1
B. Asbestos Cases Around The Country Apply Strict Liability To Claims Of Exposure To Asbestos That Predate The Formal Adoption Of Strict Liability Theory.....	7
III. CONCLUSION.....	13

TABLE OF AUTHORITIES

	<u>Pages</u>
Cases	
<u>ACandS v. Asner</u> , 344 Md. 155, 686 A.2d 250 (1996)	11
<u>Adams v. Owens-Corning Fibreglass</u> , 923 So. 2d 118, 123 (2005)	9
<u>Beshada v. Johns-Manville Prods. Corp.</u> , 90 N.J. 191, 447 A.2d 539 (1982).....	11
<u>Burgard v. Benedictine Living Cmtys</u> , 680 N.W.2d 296, 300 (2004).....	3
<u>Chevron Oil Co. v. Huson</u> , 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)	2, 3, 4, 5
<u>Cline v. Ashland, Inc.</u> , 970 So.2d 755 (Alabama 2007).....	5
<u>Darryl v. Ford Motor Co.</u> , 440 S.W.2d 630 (Tex. 1969).....	12
<u>Dempsey v. Allstate Ins. Co.</u> , 325 Mont. 207, 104 P.3d 483 (2004)	5, 6
<u>Elmore v. Owens-Illinois</u> , 673 S.W.2d 434 (1984).....	9
<u>Estate of Ireland v. Worcester Ins. Co.</u> , 149 N.H. 656, 826 A.2d 577 (2003)	3
<u>Fischer v. Johns-Manville Corp.</u> , 103 N.J. 643, 512 A.2d 466 (1986).....	11
<u>Gideon v. Johns-Manville Sales Corp.</u> , 761 F.2d 1129, 1135 (5 th Cir. 1985)	12
<u>Greenman v. Yuba Power Products, Inc.</u> , 59 Cal.2d 57, 377 P.2d 897 (1963)	10

TABLE OF AUTHORITIES

	<u>Pages</u>
<u>Halphen v. Johns Manville</u> , 484 S.2d 110 (La. 1986)	8
<u>Harper v. Virginia Dep't of Taxation</u> , 509 U.S. 86, 113 S. Ct. 2510, 125 L.Ed. 2d 74 (1993)	passim
<u>Hulin v. Fibreboard</u> , 178 F.3d 316 (5 th Cir. 1999).....	8, 9
<u>James B. Beam Distilling Co. v. Georgia</u> , 501 U.S. 529, 111 S. Ct. 2439, 115 L.Ed. 2d, 481 (1991)	1, 2, 4, 5
<u>Jenkins v. T&N, PLC</u> , 45 Cal.App. 4th, 1224, 53 Cal. Rptr. 642 (1996)	10
<u>Johns-Manville Sales Corp. v. Janssens</u> , 463 So. 2d 242 (Fla. Dist. Ct. App. 1 st Dist. 1984); <i>rev. denied</i> , 467 So. 2d 999 (Fla. 1985).....	11
<u>MacCormack v. Boston Edison Co.</u> , 423 Mass. 652, 672 N.E.2d 1 (1996)	4
<u>Mayer Unif. Sch. Dist. V. Winkleman</u> , ___ P.3d ___ (2008) WL 2128065 (Ariz. App. 2008)	6
<u>Ortiz v. Fibreboard Corp.</u> , 527 U.S. 815 n.1, 144 L.Ed.2d 715, 119 S.Ct. 2295 (1999).....	7
<u>Phipps v. General Motors Corp.</u> , 278 Md. 337, 363 A.2d 955 (1976).....	11
<u>Polakoff v. Turner</u> , 385 Md. 467, A.2d 837 (2005)	4
<u>Robinson v. Seattle</u> , 119 Wn.2d 34, 830 P.2d 318 (1992)	1
<u>Santor v. A & M Karagheusian, Inc.</u> , 44 N.J. 52, 207 A.2d 305 (1965).....	11

TABLE OF AUTHORITIES

	<u>Pages</u>
<u>State v. Styles</u> , 166 Vt. 615, 693 A.2d 734, 735 (1997).....	5
<u>Stavenjord v. Montana State Fund</u> , 334 Mont. 117, 146 P.3d 724, 727 (2006)	6
<u>Weber v. Fidelity Casualty Insurance Company</u> , 259 La. 599, 250 So.2d 754 (1971)	8
<u>West v. Caterpillar Tractor Co.</u> , 336 So. 2d 80 (Fla. 1976).....	10
 Other Authorities	
Restatement (Second) of Torts §402A	10, 11
Tex. Civ. Prac. & Rem. Code §82.004 et seq.....	12

I. INTRODUCTION

Schroeter, Goldmark & Bender (“SGB”) has represented more than 1,000 Washington residents who have contracted asbestos-related diseases, has filed complaints relating to those diseases, and currently represents over one hundred such residents. Since the early 1990s, SGB has represented almost 200 clients diagnosed with mesothelioma, a disease whose only established cause is asbestos exposure. Almost all of those clients were exposed to asbestos primarily or exclusively prior to 1977 and almost all of those clients’ complaints include claims based upon strict liability. The decision in this appeal may well impact those and other clients’ claims. As such, SGB, on behalf of itself and its clients, has an interest in the outcome of this appeal, and believes that this amicus brief will be useful to the Court.¹

II. ARGUMENT

A. This Court Has Rejected “Selective Prospectivity”.

In Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992), this Court unanimously rejected “selective prospectivity” and held that:

To state it another way, under Beam Distilling, retroactive application of a principle in a case announcing a new rule precludes prospective application of the rule in any

¹ SGB has previously filed an amicus curiae brief in this case in the Court of Appeals. Lunsford v. Saberhagen Holding, Washington Court of Appeals, Division I, 139 Wn. App. 334, 160 P.3d 1089 (2007). The discussion here raises new matters.

subsequently raised suit based upon the new rule. Such selective, or “modified”, prospectivity would be unequal and unmindful of stare decisis as it treats similarly situated litigants unequally. *Beam Distilling*, 501 U.S. at ___, 111 S.Ct. at 2447-48, 115 L. Ed. 2d at 493. We are persuaded that the *Beam Distilling* holding is sound. While our decision in *National Can* relied in part on the *Chevron Oil* analysis, we now modify our rule from *National Can* in a manner consistent with the limitations on the *Chevron Oil* rule effected in *Beam Distilling*. We expressly limit our holding in this case to the abolishment of selective prospectivity in the application of our state appellate decision.

Id. at 77 (Court’s emphasis). This Court relied upon James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 115 L.Ed. 2d, 481 (1991) which was reaffirmed later in Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L.Ed. 2d 74 (1993).

Saberhagen (“Defendant”) barely addresses the logic and policy reasons that convinced the United States Supreme Court in those cases to reject the approach taken in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Nor does it acknowledge that this Court often follows current United States Supreme Court precedent even when not constitutionally required to do so. In lieu of such analysis, Saberhagen cited a number of appellate decisions from other states and implies that there has been a wholesale rejection by other states of the limitations on “selective prospectivity” set forth in Beam, supra, and Harper, supra.

The reality is different. For example, in Estate of Ireland v. Worcester Ins. Co., 149 N.H. 656, 660, 826 A.2d 577 (2003), the New Hampshire Supreme Court quoted Harper, supra, and held:

We agree with the Supreme Court's rejection of selective civil prospectivity, and will no longer apply the Chevron Oil test to that end. "We 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." *Id.* at 97 (quotations and brackets omitted). To do so would compromise the value that we place upon "stability in legal rules." See *Matarese*, 147 N.H. at 400. (Emphasis added.)

In Burgard v. Benedictine Living Cmtys, 680 N.W.2d 296, 300 (2004), the South Dakota Supreme Court relied on Harper to modify its prior Chevron based retroactivity analysis:

In *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), the United States Supreme Court revised its analysis of this issue and held, the "Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Harper*, 509 U.S. at 90, 113 S. Ct. at 2513, 125 L. Ed. 2d at 81. This Court is not bound to adopt this bright line rule of retroactivity for our decisions, and the parties have not requested that we do so. While we do not abandon our analysis of the equities in cases such as this, we accept the Court's reasoning that "the legal imperative 'to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevail over any claim based on Chevron Oil analysis.'" *Id.* This determination arose from the Court's recognition of the potential inequity of application of "selective prospectivity." (emphasis added)

In Polakoff v. Turner, 385 Md. 467, 488, 869 A.2d 837 (2005),

Maryland's highest court extensively discussed Beam and Harper. The Maryland Court stated:

For purposes of clarity, we hereby adopt the Supreme Court's classification of "retroactive" for application of new interpretations of constitutional provisions, statutes or rules that include the case before us and all other pending cases where the relevant question has been preserved for appellate review. Regardless of how the application is classified, however, both the federal rule and the general rule in Maryland is that a new interpretation of a statute applies to the case before the court and to all cases pending where the issue has been preserved for appellate review.

The Superior Judicial Court of Massachusetts also relied upon Harper in MacCormack v. Boston Edison Co., 423 Mass. 652, 657-658, 672 N.E.2d 1 (1996) in shifting away from the Chevron analysis in its state constitutional retroactivity analysis:

A constitutional decision is not a legislative act but a determination of rights enacted by the Constitution, so that all persons with live claims are entitled to have those claims judged according to what we conclude the Constitution demands. This was the analysis put forward by Justice Harlan in *Desist v. United States*, 394 U.S. 244, 258-259, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969) (Harlan, J., dissenting), to which the Supreme Court returned in *Harper*. It is an analysis which has equal force in adjudicating claims under our State Constitution. (Emphasis added.)

See also State v. Styles, 166 Vt. 615, 693 A.2d 734, 735 (1997).²

In its Supplemental Brief, defendant suggests that Montana³ and Arizona⁴ have rejected the Harper and Beam analysis and simply follow the Chevron Oil Co. v. Huson equitable factors as the basis for determining retroactivity. Petitioner's Supplemental Brief, pp. 3-4, Defendant misreads these cases.

Defendant inaccurately argues that in Dempsey, *supra*, the Montana Court set forth its long standing use of Chevron, its brief use of Harper and its subsequent rejection of Harper and return to the Chevron criteria. Def.

² In Cline v. Ashland, Inc., 970 So.2d 755, 758-759 (Alabama 2007), Justice See joined by two other justices of the Alabama Supreme Court, concurred specifically and relied on both Harper and Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 115 S. Ct. 1745, 131 L.Ed 2d 820 (1995):

The Supreme Court of the United States has renounced the practice of prospective application of judicial decisions. See Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L.Ed. 2d 74 (1993)...; Reynoldsville Casket Co. v. Hyde, 514 U.S. 749; 752, 115 S. Ct. 1745, 131 L.Ed.2d 820 (1995) (following Harper and summarizing the decision as follows: "this Court, in Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97, 125 L.Ed. 2d 74, ... held that, when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat the same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involved predecision events.")...

I agree with Justice Scalia and the Supreme Court of the United States that prospectivity is incompatible with the traditional conception of judicial power. (Emphasis added.)

³ Dempsey v. Allstate Ins. Co., 325 Mont. 207, 104 P.3d 483 (2004).

⁴ Mayer Unif. Sch. Dist. V. Winkleman, ___ P.3d ___ (2008) WL 2128065 (Ariz. App. 2008).

Supp. Brief, n.3, p. 4.) The Dempsey court's actual approach was to utilize both Harper and Chevron:

As we explain later in this opinion, the two lines of cases may be comfortably merged into a rule of retroactivity in keeping with the last seventy years of this Court's jurisprudence. (Emphasis added.)

325 Mont. at 211. The Dempsey Court further explicated its approach at pp. 216-17 of the opinion:

We agree with the *Harper* court that limiting a rule of law to its prospective application creates an arbitrary distinction between litigants based merely on the timing of their claims. Interests of fairness are not served by drawing such a line, nor are interests of finality. In the interests of finality, the line should be drawn between claims that are final and those that are not (the line drawn in *Harper*). (emphasis added)

* * *

Therefore today we reaffirm our general rule that "we give retroactive effect to judicial decisions," *Kleinhesselink v. Chevron, U.S.A.* (1996), 277 Mont. 158, 162, 920 P.2d 108, 111. We will, however, allow for an exception to that rule when faced with a truly compelling case for applying a new rule of law prospectively only.

The *Chevron* test is still viable as an exception to the rule of retroactivity. However, given that we wish prospective applications to be the exception, we will only invoke the *Chevron* exception when a party has satisfied all three of the Chevron factors.

See also Stavenjord v. Montana State Fund, 334 Mont. 117, 146 P.3d 724, 727 (2006). Defendant also cites to Mayer, supra, at n. 7 of its Supplemental Brief, p. 4. It implies that Mayer rejected the Harper

approach. A fairer reading of that footnote 10 is that the Arizona Court (a) recognized the Harper rule, i.e., “[i]n *Harper* the Court held once it applies a rule retroactively to the parties before it, the rule must be applied retroactively to all cases thereafter.” Id. at 96, but (b) held that no such retroactive application had taken place in the case being discussed because the Court in that prior Arizona case only applied the rule prospectively.

B. Asbestos Cases Around The Country Apply Strict Liability To Claims Of Exposure To Asbestos That Predate The Formal Adoption Of Strict Liability Theory.

There have been an enormous number of asbestos disease cases brought around the United States since the early 1970s. Many of these cases solely involved exposure to asbestos during World War II and many others involve asbestos exposures in the 1950s and 1960s. As quoted by Justice Souter in Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 n.1, 144 L.Ed.2d 715, 119 S.Ct. 2295 (1999):

[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015. (Emphasis added.)

As discussed infra, cases based upon strict liability are commonplace around the United States.⁵ During the past 30 years, untold numbers of such claims were brought, settled, tried and appealed. Yet Saberhagen cites not a single published appellate case holding that strict liability may not be raised in cases in which the asbestos exposure predated the formal adoption of strict liability in a particular state. Plaintiffs here provide a sample of cases involving asbestos injury claims considering strict liability under those factual circumstances.

Louisiana

Louisiana first recognized a strict products liability theory of recovery under Louisiana civil law in Weber v. Fidelity Casualty Insurance Company, 259 La. 599, 250 So.2d 754 (1971). In Halphen v. Johns Manville, 484 S.2d 110 (La. 1986), the Louisiana Supreme Court interpreted Louisiana strict liability law in the context of asbestos. The Court in Hulin v. Fibreboard, 178 F.3d 316, 324 (5th Cir. 1999), concluded:

...that the Louisiana Supreme Court will continue to apply its general rule under which a judicial decision must be given retroactive effect unless the rendering court specifies otherwise or such application is barred by prescription or res judicata. Under that rule, which is the generally accepted norm in all common and civil law jurisdictions,

⁵ The Lunsford's Supplemental Brief discusses Washington asbestos cases. This brief thus will not discuss the Washington cases.

the *Halphen* decision, which was silent as to its temporal application, must be applied retroactively, consistently with prescription and res judicata provisions.

Moreover, in Adams v. Owens-Corning Fibreglass, 923 So. 2d 118, 123 (2005), the Louisiana Court of Appeals adopted the Hulin holding. Thus, Hulin and Adams are contrary to Defendant's contentions in this appeal.

Missouri

In Elmore v. Owens-Illinois, 673 S.W.2d 434 (1984), the Missouri Supreme Court also dealt with retroactivity of strict liability in Missouri.

The Elmore Court first explained:

This Court, in *Keener v. Dayton Electric Manufacturing Company*, 445 S.W.2d 362 (Mo. 1969), adopted as the law of products liability in Missouri, *Restatement (Second) of Torts* § 402A.

673 S.W. 2d at 437. The Elmore Court then dealt with retroactivity, holding at p. 438:

Thus, plaintiffs established that Kaylo was "defective" when they proved that it was unreasonably dangerous as designed; they were not required to show additionally that the manufacturer or designer was "at fault," as that concept is employed in the negligence context. ... [citations omitted] The trial court properly denied the proffered state of the art argument, and there is no constitutional impediment to the retroactive application of *Keener v. Dayton Electric, supra*. See *Roth v. Roth*, 571 S.W.2d 659, 672 (Mo. App 1978).

Thus, the only two appellant opinions amicus has discovered dealing with retroactivity of strict liability in the asbestos context

supported retroactivity. The remaining cases discussed herein do not expressly deal with retroactivity, but they apply strict liability on behalf of asbestos plaintiffs in the context in which the asbestos exposure predated the adoption of strict liability in the respective states.

California

California established the strict liability doctrine in 1963. Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897 (1963). In Jenkins v. T&N, PLC, 45 Cal.App. 4th, 1224, 53 Cal. Rptr. 642 (1996), Mr. Jenkins was exposed to defendant's asbestos between 1942 to 1952. 45 Cal.App. 4th at 1225. He, in 1992, filed a complaint that contained a cause of action for strict liability. Id. 1227. The California Court of Appeals held that the supplier of the asbestos fiber to which Mr. Jenkins was exposed was liable under strict liability.

Florida

The Florida Supreme Court adopted §402A in 1976. West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). In an asbestos case decided in 1984 brought *inter alia* on the theory of "strict liability" but upheld on other grounds, the Florida Court of Appeal did not question the application of strict liability to a case in which the plaintiff was exposed to asbestos on board ships in the Navy between 1942 and 1951. Johns-

Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. Dist. Ct. App. 1st Dist. 1984); *rev. denied*, 467 So. 2d 999 (Fla. 1985).

Maryland

In 1976, the Maryland courts adopted §402A. Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976). In an asbestos case decided in 1996 involving two of three plaintiffs whose exposure to asbestos ended at the end of World War II in one case, the Maryland Court of Appeals discussed the parameters of strict liability in that appeal. ACandS v. Asner, 344 Md. 155,165-66, 686 A.2d 250 (1996).

New Jersey

In New Jersey, the courts adopted in 1965 the theory of strict liability in product liability cases without explicitly approving §402A. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). The Supreme Court of New Jersey did not question the application of strict liability to a case in which the plaintiff was exposed to asbestos while working in a plant which ground asbestos ore into fiber from 1938 to 1942 and in 1945. Fischer v. Johns-Manville Corp., 103 N.J. 643, 512 A.2d 466 (1986).⁶ In Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982) a case including many plaintiffs who had

⁶ New Jersey adopted legislation defining product liability causes of action in 1987, after the case was decided. N.J. Stat. §2A:58C-1 et seq. (2008).

worked around asbestos at various times beginning in the 1930s, the “sole question here is whether defendants in a product liability case based on strict liability for failure to warn may raise a “state of the art” defense.”

Texas

In Texas, the courts adopted §402 in 1969. Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969). The Fifth Circuit utilized Texas law on the issue of application of strict liability to a case in which the plaintiff was exposed to asbestos as an insulation warehouseman from 1944 to 1969. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1135 (5th Cir. 1985)⁷:

(6) whether there was insufficient evidence that the defendants’ products were unreasonably dangerous; discussed at VI, below...

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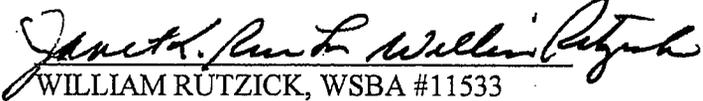
⁷ Texas adopted legislation defining product liability causes of action but not till 1993, after this case was decided. Tex. Civ. Prac. & Rem. Code §82.004 et seq.

III. CONCLUSION

SGB requests that Lunsford be affirmed.

DATED this 30th day of September, 2008.

SCHROETER, GOLDMARK & BENDER


WILLIAM RÜTZICK, WSBA #11533

Counsel for Appellants
810 Third Avenue, Suite 500
Seattle, Washington 98104
(206) 622-8000

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