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No. 57293-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

Ronald Lunsford and Esther Lunsford,
Plaintiffs-Appellants,

v.

SABERHAGEN HOLDINGS, INC.,
Defendant-Respondent.

BRIEF OF APPELLANTS

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I.

INTRODUCTION

The court below has fundamentally rewritten asbestos personal injury law by holding that individuals injured by asbestos products are precluded from recovering in strict products liability unless their exposure occurred after 1975 – just about the time that asbestos ceased being widely used. This bizarre outcome – which is at odds with the existing law of Washington and virtually all other states – is based on the proposition that when the Supreme Court decided to follow the national trend in favor of imposing strict liability on the manufacturers and suppliers of products unreasonably dangerous to consumers, it intended its decision to be “prospective only.” That proposition is unsupported by law or public policy, and if followed it would wreak havoc on all asbestos personal injury cases pending in this State. Appellants accordingly ask this Court to reinstate their strict liability claims against respondent, and to hold that strict liability is an available remedy in any timely suit for personal injuries caused by a defective product, regardless of when plaintiff’s “exposure” occurred.

II.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting partial summary judgment and dismissing Ronald and Esther Lunsford’s strict product liability

claims against Saberhagen Holdings, Inc.

2. The trial court erred in denying Ronald and Esther Lunsford's motion to strike hearsay evidence introduced by Saberhagen Holdings, Inc.

The common issue underlying the assignments of error is whether strict products liability applies to causes of action which did not accrue until after the Supreme Court's adoption of Restatement (Second) of Torts §402A.

III.

STATEMENT OF THE CASE

Ronald Lunsford suffers from mesothelioma, a terminal cancer of the lining of the lungs caused by exposure to asbestos. He and his wife Esther Lunsford (together, "Lunsford") contend that his injuries were caused at least in part by respirable asbestos released from insulation supplied by The Brower Company/Saberhagen Holdings, Inc. ("Saberhagen").¹ Mr. Lunsford's father, Oakley Lunsford – who died from mesothelioma – worked with Saberhagen's asbestos-containing insulation products when he was employed at the Anacortes Texaco refinery in 1958. When his father came home from work, young Lunsford was exposed to substantial

¹ Saberhagen concedes for purposes of these proceedings that it is the legal successor to The Brower Company. CP 53 n.3.

amounts of asbestos dust clinging to his father's clothing, tools, and the family car, in which he often slept. CP 138-39; *see Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn.App. 784, 787, 106 P.3d 808 (2005) ("*Lunsford I*").

Saberhagen first sought to avoid liability for Lunsford's injuries by seeking partial summary judgment on the theory that Lunsford was not a "user" or "consumer" of an asbestos product for purposes of strict products liability law. That argument was based on Restatement (Second) of Torts §402A ("§402A"), which provides in relevant part that,

(1) 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, 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.

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The trial court granted Saberhagen's motion, but its decision was reversed on appeal. In *Lunsford I*, this Court held that, based on the strong policy considerations for imposing strict liability, coverage should be expanded "to include bystanders and other persons that the manufacturer could reasonably foresee would come

into contact with its product.” 125 Wn.App. at 811-812. The Court declined to address Saberhagen’s argument, raised for the first time on that appeal, that strict liability should not apply to Lunsford’s case “because the court’s adoption of section 402A should not be given retroactive treatment,” *id.* at 813, noting that defendant could raise that issue on remand.

That is precisely what Saberhagen did. On October 21, 2005, the trial court heard Saberhagen’s second motion for partial summary judgment in which it argued that “because §402A was not the law of Washington in 1958,” when Lunsford was exposed, “and because there was no other applicable theory of strict liability at that time, as a matter of law Saberhagen cannot be held liable to plaintiffs under a strict liability theory.” CP 52. Saberhagen cited extensively to reports of proceedings of the American Law Institute, in which various speakers argued for and against the expansion of products liability law, for the proposition that “no one ... could have foreseen the ‘spectacular’ development of the law of strict liability that would ultimately lead to §402A,” CP 57-61, and that, according to Saberhagen, it would thus be unfair to impose such liability on it.

Lunsford opposed the motion, arguing that, “The doctrine of strict products liability was a logical reformulation of *existing law* holding manufacturers and sellers liable for dangerous defects in their products, and several appellate decisions in this State have,

without hesitation, applied it in situations precisely analogous to that presented here.” CP 141. Lunsford also asked the court to strike the numerous quotations from the ALI proceedings – reiterated in defense counsel’s oral argument (*see* RT 10/21/05 at 5-11) – because they were being introduced for an impermissible hearsay purpose. CP 130-37. The court denied that motion (CP 271-72), instead entering partial summary judgment for Saberhagen and ordering that “[a]ll of plaintiff’s claims against Saberhagen based upon theories of strict products liability are dismissed.” CP 273-75.

IV.

SUMMARY OF ARGUMENT

Numerous decisions of the Supreme Court and the Courts of Appeal have implicitly held, by affirming judgments finding manufacturers and suppliers of asbestos products strictly liable for injuries caused by exposure to their products prior to 1975 and 1969, that such causes of action are viable. *See, e.g., Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 935 P.2d 684 (1997); and other cases discussed below. Saberhagen’s motion, and the trial court’s decision, confuse the question of when a claim *arises* – in this case, when Lunsford was exposed to asbestos released from Saberhagen products – with when a cause of action *accrues, i.e.*, when the plaintiff learns that he has an asbestos-related disease and acquires

the right to sue for damages. Because Lunsford's claim did not accrue until he was diagnosed with mesothelioma in 2003, the application of strict products liability law is not "retroactive."

To the extent that the Court may nevertheless deem it appropriate to conduct a retroactivity analysis, such analysis demonstrates that the strict products liability doctrine was intended by the Court and should continue to be applied in all properly-filed latent personal injury cases. The important public policies which led to the imposition of strict liability are no less applicable to defendants such as Saberhagen, who are clearly members of the enterprise which profited from the marketing and distribution of the defective asbestos products which injured Lunsford, than they are to any other defective product manufacturer or supplier. Had the Supreme Court intended its decisions adopting the evolving strict liability standard not to apply to such cases, it had ample opportunity to say so. The Court's silence on that issue over the *three decades* since *Ulmer v. Ford Motor Company*, 75 Wn.2d 522, 452 P.2d 729 (1969) ("*Ulmer*," formally adopting §402A as the proper expression of Washington law as to manufacturers) and *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975) ("*Tabert*," holding §402A applicable to suppliers) were decided is a strong sign that the trial court's unprecedented decision is misguided.

V.

ARGUMENT

A. The Decision Below Is Not Entitled To Deference, But Should Be Reviewed De Novo

The appellate court “review[s] an order granting summary judgment de novo, making the same inquiry as the trial court” and “considering all facts and reasonable inferences in the light most favorable to the non-moving party.” *Hartley v. State*, 103 Wash.2d 768, 774, 698 P.2d 77 (1985); *Lunsford I*, 125 Wn.App. at 787; *Niven v. E.J. Bartells Co.*, 97 Wn.App. 507, 509, 983 P.2d 1193 (1998).

B. The Trial Court’s Decision Is At Odds With The Prior Decisions Of The Courts of Washington And With Established Public Policy

The purpose of strict products liability “is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 63, 377 P.2d 897 (1963). The economic rationale underlying the doctrine is that the cost of injuries from defective products should be internalized by the members of the enterprise who profit from their sale. *See Tabert, supra*, 86 Wn.2d at 148; *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 262, 391 P.2d 168 (1964). Those policies were recognized by

the drafters of §402A, who stated in their comment *c* that:

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper person to afford it are those who market the products.

In *Lunsford I*, this Court endorsed those comments and noted that in the absence of express authority on the issue before it, such “policy considerations are key in determining whether strict liability should extend to injuries to plaintiffs like Lunsford.” 125 Wn.App. at 812. Saberhagen did not offer any potentially competing policy rationale in support of its position, beyond a vague argument that insurance against strict liability claims was not available in 1958.²

² The case law and the Restatement make clear that the availability of liability insurance is not, as Saberhagen contended, the *sine qua non* of strict liability. (For example, even without insurance, retailers and suppliers have the right to seek contribution from manufacturers.) Further, Saberhagen failed to address the well-known facts that coverage under most commercial liability policies is based on the time that *claims are made*, and that a policy which insures against harm “neither expected nor intended from the standpoint of the insured” would, in 1958, potentially have

Saberhagen's argument below, that strict products liability represented such a "sudden" and "dramatic" development in the law that it would be unfair to apply it to previously-sold goods, is at odds with the very Supreme Court decision that formally adopted §402A as the law of the land. In *Ulmer*, the Court reversed a verdict in favor of the defendant manufacturer in an automobile accident case on the ground that the trial court erred in failing to instruct the jury on plaintiff's theory of strict liability, thus unfairly placing on her the burden of proving that defendant had been negligent. The Court surveyed a number of prior Washington decisions, dating back as early as 1932, which were decided on a theory of warranty, and in which the plaintiff was not required to prove fault on the part of the defendant. 75 Wn.2d at 525-28. It also noted that Dean Prosser had listed Washington "among the 18 states whose courts have imposed strict liability without negligence and without privity, as to manufacturers of all types of products." *Id.* at 529. The Court found that, at least with respect to manufacturers – the only issue before it – §402A "is in accord with the import of our cases which have been decided upon a theory of breach of implied warranty," although it had not previously been "expressed as such therein," and "adopt[ed]

covered claims for product-related injuries regardless of the theory of recovery. The court cannot grant summary judgment on the basis of alleged policies which have no demonstrated factual basis.

it as the law of this jurisdiction.” *Id.* at 531-32. In *Tabert*, the Court “join[ed] the prevailing, well reasoned majority of cases” holding that strict liability applies to design defects, and also to all those in the “chain of distribution,” including sellers and importers. 86 Wn.2d at 148-49. In neither *Ulmer* nor *Tabert* did the Court say anything about its decision being “prospective” only; to the contrary, by applying its holding to the prior jury trial and summary judgment motion before it, the Court made clear that its decision reflected the current state of the law, and was to be applied to all pending and future cases. *See* Part C below.

In its subsequent decisions, the Supreme Court has applied the principles of strict product liability in precisely that fashion. For example, in *Lockwood v. AC&S Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987), the Court affirmed judgment on a jury verdict in favor of a shipyard worker who alleged exposure to defendant’s asbestos-containing insulation products at the Puget Sound Naval Shipyard (“PSNS”) during the 1940s and 1950s. The jury was instructed on strict liability design defect, strict liability failure to warn, and negligence, and it found in favor of plaintiff on all of those claims.

In *Falk v. Keene Corporation*, 113 Wn.2d 645, 782 P.2d 974 (1989), the Supreme Court held that strict liability should be applied to a mesothelioma victim’s claims against a defendant who manufactured asbestos insulation to which plaintiff was exposed

during the period *1947 to 1953*. The Court held that the law that applied was the common law in effect prior to the passage of the 1981 Washington Product Liability Act (“WPLA”), *i.e.*, the consumer expectations test of *Tabert*, and that it was error to give the jury instructions allowing them to apply an ordinary negligence standard. 113 Wn.2d at 649, 655. That holding is directly contrary to the decision on review here.

The Courts of Appeals have consistently followed the same approach.³ The following cases – by no means an exhaustive list – are illustrative:

- In *Krivaneck v. Fibreboard Corporation*, 72 Wn.App. 632, 865 P.2d 527 (1993), *rev. den.* 124 Wn.2d 1005 (1994), decedent was another former shipyard worker exposed to asbestos through his work at PSNS in the *1950s and 1960s*. Like Lunsford, he was diagnosed with mesothelioma decades later. The jury was instructed, and it found against Owens Corning Fiberglas (“OCF”), on the common law theory of strict liability. The Court of Appeals affirmed.

³ In *Lunsford I*, this Court noted the absence of express precedent on the issue for decision, but held that prior cases discussing strict liability in the context of injured bystanders “do show that there is at least an assumption that a person in Lunsford’s position may bring suit under a theory of strict liability in Washington.” 125 Wn.App. at 790-91.

• *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn.App.22, 935 P.2d 684 (1997) involved a shipyard worker exposed to OCF's "Kaylo" asbestos insulation in the early 1950s, and again in 1957-1963. 86 Wn.App. at 26. The case was submitted to the jury on strict liability for selling a product not reasonably safe as designed, strict liability for selling a product without adequate warnings, and negligent failure to warn. The Court affirmed the plaintiff's verdict.

• In *Van Hout v Celotex Corp.*, 121 Wn.2d 697, 853 P.2d 908 (1993), a shipyard worker exposed to asbestos during the period 1946-1980 was allowed to recover under theories of negligence and strict liability, and the Court drew no distinction between his "pre-402A" and "post-402A" exposures.

• The plaintiff in *Viereck v. Fibreboard Corp.*, 81 Wn.App. 579, 915 P.2d 581, *rev. den.* 130 Wn.2d 1009 (1996), contracted mesothelioma from his work with OCF insulation at the Shell refinery in Anacortes in 1956-1960. The jury returned a verdict for plaintiff on strict liability only. 81 Wn.App. at 581. The Court of Appeals held that, "[t]he trial court correctly applied to this case the products liability law in effect prior to enactment of the ... WPLA," *i.e.*, common law strict liability. *Id.*

• In *Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn.App. 312, 14 P.3d 789 (2000), *rev. den.*, the Court reversed summary judgment for Saberhagen on a claim based on the Brower Company's

distribution of asbestos-containing products to PSNS when plaintiff worked there in 1942, and in 1945-1950.

- The Court in *Palmer v. Massey-Ferguson, Inc.*, 3 Wn.App. 508, 476 P.2d 713 (1970) reached the same conclusion in a product liability case involving not asbestos, but an allegedly defective truck which had passed through the hands of multiple owners, and was manufactured well prior to the adoption of §402A. The Court stated that the law of implied warranty had been “swallowed up and renamed in the adoption of §402A” and that such strict liability applied to plaintiff’s claims. 3 Wn.App. at 514.

- In a case involving a defective lawnmower which was purchased, and injured the plaintiff, prior to *Ulmer*, the Court again held that the jury should have been instructed on strict liability in *Simmons v. Koeteew*, 5 Wn.App. 572, 489 P.2d 364 (1971).

- Plaintiff in *Cantu v. John Deere Co.*, 24 Wn.App. 701, 603 P.2d 839 (1979) was injured in 1973 by a tractor manufactured in 1953. The Court held that the trial court properly instructed the jury in the strict liability language of *Tabert*, and affirmed over several allegations of instructional error.

In *none* of those cases did the courts intimate there was any question whether the defendants should be held to a strict liability standard in determining whether the plaintiffs, all exposed to asbestos or other hazardous products manufactured and sold many

years before §402A was drafted, could recover for their injuries. Appellants are not aware of any cases to the contrary, and neither Saberhagen nor the trial judge cited to any. There is no legal nor equitable reason for this Court to depart from that established approach now.

C. Lunsford's Strict Liability Causes Of Action Do Not Raise "Retroactivity" Concerns Because Strict Liability Was The Law In Effect At The Time His Claims Accrued

Lunsford anticipates that Saberhagen will argue that holding it to a strict liability standard would amount to a "retroactive" application of the law. Such an argument is misguided because Lunsford's claims did not accrue until after strict liability was well-entrenched as the law of Washington. Further, a defendant has no "vested interest" in or right to "rely" on an ability to injure innocent third parties with impunity.

It is well-established that a plaintiff's right to sue for strict products liability does not accrue until s/he "knew or should have known all of the essential elements of the cause of action. The rule of law postponing the accrual of the cause of action is known as the 'discovery rule.'" *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985). As explained in *Koker v. Armstrong Cork, Inc.*, 60 Wn.App. 466, 804 P.2d 659 (1991):

A products liability cause of action accrues when the plaintiff discovers or reasonably should have discovered that (1) he or she suffers physical harm from a product which has a defective condition making

it unreasonably dangerous; (2) the defendant seller is engaged in the business of selling such a product; and (3) the product is expected to and does reach plaintiff without substantial change in the condition in which it is sold.

60 Wn.App. at 473-44; see *Reichert v. Johns-Manville Corp.*, 107 Wn.2d 761, 771, 733 P.2d 530 (1987). In *Sahlie v. Johns-Manville Sales Corp.*, 99 Wn.2d 550, 663 P.2d 473, the Supreme Court expressly held that the plaintiff's products liability action against the manufacturers of asbestos products to which he was exposed *beginning in 1939* did not accrue until he knew or should have known of each of those factors. And in *White, supra*, the Court applied the discovery rule to preserve a surviving spouse's product liability suit for the death of her husband due to his exposure to asbestos "while working as a welder/burner in shipyards during 1942 and 1943."⁴ The courts would never have reached those issues under Saberhagen's view of the law. It simply makes no sense to apply the law existing decades before the plaintiff is injured, and before s/he has any right to sue, and thus to bar his/her later-accruing claims.

⁴ *Koker and Mavroudis, supra*, in which the courts were called upon to interpret the language of the WPLA making it inapplicable to cases "arising" prior to its enactment and held that a cause of action "arises" for those purposes when the plaintiff was exposed to asbestos, and not when he discovers his injury, do not alter that analysis. The WPLA does not affect a plaintiff's substantive right to sue in strict liability, but (when applicable) alters the common law rules respecting contribution and comparative fault.

Nor is there any due process bar to applying strict products liability law “retroactively” in this case. “The threshold factor necessary for prospective application is a finding that a court’s decision established a new principle of law *overruling past precedent on which litigants may have relied.*” *Carillo v. City of Ocean Shores*, 122 Wn.App. 592, 614, 94 P.3d 961 (2004) (emphasis added). *Ulmer* and *Tabert* do none of those things: they do not reverse prior law; they do not impose new obligations on manufacturers and suppliers, who have *always* had a duty to prevent foreseeable injury from their products; and defendants can hardly argue that they “relied” on the right to be free from liability when they put products likely to kill their users on the market without providing any warning.

This precise issue was addressed by the Supreme Court of Wyoming in *Harvey v. General Motors Corp.*, 739 P.2d 763 (Wy. 1987). Like *Saberhagen* here, the manufacturer in *Harvey* contended that strict liability was not a viable theory of recovery prior to the date, March 19, 1986, that the high court of Wyoming adopted the Restatement. The Court squarely rejected that contention, citing the “general rule ... that in civil cases decisions are to be applied retroactively” and noting that if the Court had intended its decision to apply prospectively only, it would have said so. 739 P.2d at 765.

Pennsylvania reached the same conclusion in *Leland v. J.T. Baker Chemical Co.*, 282 Pa.Super. 573, 423 A.2d 393 (1980). Plaintiff was injured by an exploding bottle of acid in December, 1964. She filed suit in December, 1966, asserting strict liability pursuant to §402A. The jury returned a verdict for defendant, and plaintiff moved for a new trial. While that motion was pending, the Pennsylvania Supreme Court published its opinion abandoning the “reasonable man standard” in product liability actions in favor of strict liability, and a new trial was granted on that basis. In affirming that decision, the Court aptly stated:

[A]ppellant, as a supplier of products, cannot seriously contend that it detrimentally relied upon the prior rule because: (1) parties do not alter their tortious conduct to conform to the most recent judicial pronouncements; (2) strict liability per the Restatement is not dependent upon the conduct of the defendant, but rather the condition of the product; and (3) under the facts of this case, the accident occurred before the adoption of section 402A in Pennsylvania.

423 A.2d 397-98.

Washington law regarding the retrospective application of judicial decisions requires the same result here. “Once retrospective application is chosen for any assertedly new rule,” in the sense that the court applies the rule announced *to the parties then before it*, “it is chosen for all others who might seek its prospective application. [citation]” *Robinson v. City of Seattle*, 119 Wn.2d 34, 76, 830 P.2d 318 (1992) (applying the reasoning of *James B. Beam Distilling Co.*

v. Georgia, 501 U.S. 529, 111 S.Ct. 2439 (1991), to state appellate decisions). In the analogous context of determining when a decision overruling prior precedent should be applied retroactively, the Supreme Court in *Haines v. Anaconda Aluminum Co.*, 87 Wn.2d 28, 34, 549 P.2d 13 (1976) and *State ex rel. Washington State Finance Comm. v. Martin*, 62 Wn.2d 645, 671, 384 P.2d 833 (1963) likewise held it to be the “general rule [that] an overruling decision is to be given retroactive effect, unless it is specifically provided otherwise. [citation].”

A similar issue was addressed by the Court of Appeals in *Amrine v. Murray*, 28 Wn.App. 650, 626 P.2d 24 (1981), in which the Court was called upon to determine whether the plaintiff, a passenger in defendant’s car, had to prove gross, or merely ordinary, negligence in order to recover for his injuries. Defendant argued that the law at the time of the accident required plaintiff to prove gross negligence, while plaintiff urged the Court to follow a subsequent Supreme Court case, *Roberts v. Johnson*, 91 Wn.2d 182, 588 P.2d 201 (1978), abrogating that higher standard. The Court rejected defendant’s characterization of *Roberts* as “imposing liability for an act for which there was no liability at the time of its occurrence,” 28 Wn.App. at 653, noting that:

The proper test of a retroactive statute’s constitutionality is whether an affected party has changed position in reliance upon preexisting law. [citation] *Because it is quite difficult to make a*

convincing showing of reliance upon tort law,
[citation], a statutory change in the guest-host tort
standard from gross to ordinary negligence probably
would not violate the due process clause.

Id., 653 n.1 (emphasis added). See also *Taskett v. KING
Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976) (decision
overruling prior precedent and holding that a private individual suing
a broadcaster for libel need not prove “actual malice” applied
retroactively); *Godfrey v. State*, 84 Wn.2d 959, 961-62, 530 P.2d 630
(1975) (holding that, “there is no vested right to a common law bar
to recovery that is provided by the affirmative defense of
contributory negligence,” and that the statutory amendments codified
at RCW 4.22.010 and 4.22.020 “apply retrospectively to causes of
action having arisen prior to the statute’s effective date of April 1,
1974, but in which trials have begun subsequent thereto.”)

There is nothing in the language of *Ulmer* or *Tabert* to
indicate that the Supreme Court intended strict liability to apply only
to plaintiffs exposed to defective products subsequently to those
opinions, and the Court’s later decisions applying strict liability to
claims involving prior exposures to asbestos strongly indicate that it
did not. Accordingly, there is no merit to Saberhagen’s contention
that the “law of 1958” applies to Lunsford’s claims.

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D. The ALI Reports On Which Saberhagen Relied In Support Of Its Position Were Hearsay, And It Was Error For The Trial Court To Deny Lunsford's Motion To Strike Them From The Record

Saberhagen's motion was premised on its contention that the promulgation and adoption of §402A was "a dramatic, entirely unforeseen development in American tort law." *E.g.*, CP 54-55. In support of that contention, Saberhagen cited extensively to excerpts from ALI proceedings in which the participants debated both the merits of incorporating the developing common law of strict products liability into the Restatement, and the standard which should be chosen (CP 57-60, 62). The excerpts were attached to the Declaration of Saberhagen's counsel as Exhibits 8 and 9 (CP 110-129). Lunsford moved to strike the exhibits and Saberhagen's references thereto (Saberhagen Memo. pp. 7:18-9:8, 9:9-10:15, 12:8-10, CP 57-60, 62) on the ground that they were hearsay and inadmissible under ER 801(c). (Motion to Strike, CP 130-37.) Saberhagen argued that the exhibits were not "evidence" but rather "materials submitted to assist the court in determining an issue of law," likening them to "legislative history." (CP 266-70.) The trial court concurred in that analysis.

The motion to strike should have been granted because Saberhagen did not cite the proceedings as one would a law review article, *i.e.*, as a persuasive articulation of a policy which the litigant wants the court to adopt, but for the truth of the statements

themselves. For example, during the oral argument (*see* RT 5-11) Saberhagen's counsel asserted that, "the commentary to the ALI proceedings that we've submitted, shows very clearly that William Prosser himself and the institute felt that what had happened between 1958 and 1965 was an ... unprecedented, spectacular ... and entirely unforeseen development in American tort law." (RT 11:7-15.) It also spoke with pretend authority, and no foundation, about what Dean Prosser "convinced the ALI to do" (CP 58); what Prosser deemed it "necessary to propose" (*id.*); Prosser's personal interpretation of the state of the law (CP 59, 60); and how Prosser felt (he was purportedly "abashed" and "stunned." RT 9:15-20). All of those unsupported statements were designed to sway the court by presenting as truth the out-of-court statements, and the imagined mental state, of eminent scholars on the pre-402A state of the law and, as Lunsford put it in his motion, as an "attempt to impress on the reader that strict liability was a big shock to everybody" (CP 131).

Nor can the "evidence" be admitted as legislative history. The ALI is not a legislative body, and its members are not lawmakers. Unsworn statements in the course of debate over the Institute's positions reflect solely the subjective beliefs – or the lobbying strategy – of the individual speakers. Especially where, as here, the trial court did not articulate the basis for its decision, Lunsford submits that Saberhagen's evidence must be deemed

inherently prejudicial, and that it was error for the court to consider it.

VI.

CONCLUSION

The trial court's decision represents a dramatic, unprecedented and unjustified departure from the prior decisions of this State, which have consistently recognized the unique attributes of latent asbestos personal injury claims and affirmed the right of those injured by unreasonably dangerous asbestos products to recover in strict liability. For all of the reasons discussed above, the partial summary judgment in favor of Saberhagen Holdings should be reversed, and the case remanded so that plaintiffs can proceed to trial.

Dated: June 16, 2006

Respectfully submitted,
BRAYTON PURCELL LLP

By:



Zachary Herschensohn
WSBA # 33568
Attorneys for Plaintiffs/Appellants
Ronald and Esther Lunsford

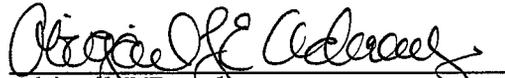
ABIGAIL J.E. ADAMS, states and declares as follows:

1. I am over the age of 18, am competent to testify, and make this declaration based on my personal knowledge and belief.
2. On June 16, 2006, I caused to be delivered as shown on below listed, a copy of Brief of Appellants:

Court of Appeals, Division I
of the State of Washington
600 University Street
Seattle, WA 98101
Original and 1 copy

Timothy K. Thorson
Neal J. Philip
Carney Badley Spellman
700 Fifth Avenue, Suite 5800
Seattle, WA 98104-5017

DATED this 16th day of June, 2006 at Portland, Oregon.


Abigail J.E. Adams
Legal Secretary

**APPENDIX OF FEDERAL AND OUT OF STATE
AUTHORITIES**

Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 63, 377 P.2d 897 (1963).

Harvey v. General Motors Corp., 739 P.2d 763 (Wy. 1987).

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439 (1991).

Leland v. J.T. Baker Chemical Co., 282 Pa.Super. 573, 423 A.2d 393 (1980).

Vandermark v. Ford Motor Co., 61 Cal.2d 256, 262, 391 P.2d 168 (1964).

EXHIBIT 1

▷

WILLIAM B. GREENMAN, Plaintiff and Appellant,
 v.
 YUBA POWER PRODUCTS, INC., Defendant and
 Appellant; THE HAYSEED, Defendant and
 Respondent.
 L. A. No. 26976.

Supreme Court of California

Jan. 24, 1963.

HEADNOTES

(1) Sales § 146--Warranties--Notice of Defects.
Civ. Code, § 1769, requiring a buyer of goods to give reasonable notice of a breach of warranty to the seller, deals with the rights of the parties to a contract of sale or a sale and does not provide that notice must be given of the breach of warranty that arises independent of a contract of sale between the parties.

Construction, application and effect of statutory provisions requiring notice of breach of warranty on sale of goods, note, 71 A.L.R. 1149. See also **Cal.Jur.2d**, Sales, § 264; **Am.Jur.**, Sales (1st ed § 714).

(2) Sales § 110--Warranties.

Warranties that arise independently of a contract of sale between the parties are not imposed by the sales act, but are the product of common-law decisions that have recognized them in a variety of situations.

(3) Sales § 146--Warranties--Notice of Defects.

The requirement of Civ. Code, § 1769, requiring a buyer of goods to give reasonable notice of a breach of warranty to the seller, is not an appropriate one for a court to adopt in actions by injured consumers against manufacturers with whom they have not dealt.

(4) Sales § 146--Warranties--Notice of Defects.

As between the immediate parties to a sale, the notice requirement of Civ. Code, § 1769, is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages, but as applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.

(5) Sales § 146--Warranties--Notice of Defects.

Even if the donee of a combination power tool who was injured while using it did not give the statutory timely notice of breach of warranty (Civ. Code, § 1769) to the manufacturer of the tool, the donee's cause of action based on representations contained in a brochure prepared by the manufacturer was not barred.

(6) Negligence § 56(1)--Care by Manufacturer.

A manufacturer is strictly liable in tort when an article he places on the market, knowing *58 that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

Manufacturer's liability for negligence causing injury to person or damage to property of ultimate consumer or user, note, 164 A.L.R. 569. See also **Cal.Jur.2d**, Negligence, § 85; **Am.Jur.**, Negligence (1st ed § 799).

(7) Negligence § 56(1)--Care by Manufacturers.

Although strict liability of a manufacturer has usually been based on the theory of an express or implied warranty running from manufacturer to plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

(8) Negligence § 56(1)--Care by Manufacturers.

Rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern manufacturers' liability to those injured by their defective products unless those rules also serve the purposes for which

such liability is imposed.

(9) Negligence § 56(1)--Care by Manufacturers.

The purpose of imposing strict liability on a manufacturer is to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves.

(10) Negligence § 56(1)--Care by Manufacturers.

In an action by the buyer's donee of a combination power tool against the manufacturer for personal injuries sustained while using the tool, the manufacturer's liability did not depend solely on the express warranties contained in its brochure where implicit in the tool's presence on the market was a representation that it would safely do the jobs for which it was built, since, under such circumstances, it was not controlling whether plaintiff selected the machine because of the statements of the brochure, because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the job it was built to do.

(11) Negligence § 141(1)--Evidence.

To establish the liability of the manufacturer of a combination power tool for injuries to the buyer's donee of the tool while using it, it was sufficient that the donee prove that he was injured while using the tool in a way it was intended to be used as a result of a defect in design and manufacture of which he was not aware that made the tool unsafe for its intended use.

SUMMARY

APPEALS from a judgment of the Superior Court of San Diego County. Robert W. Conyers, Judge. Affirmed. *59

Action by buyer's donee of a power tool for breach of express and implied warranties and for personal injuries sustained while using the power tool. Judgment for plaintiff against defendant manufacturer and for defendant retailer against plaintiff, affirmed.

COUNSEL

Reed, Brockway & Ruffin and William F. Reed for Plaintiff and Appellant.

Holt, Macomber, Graham & Baugh and William H. Macomber for Defendant and Appellant.

Moss, Lyon & Dunn, Gerold C. Dunn and Henry F. Walker as Amici Curiae on behalf of Defendant and Appellant.

No appearance for Defendant and Respondent.

TRAYNOR, J.

Plaintiff brought this action for damages against the retailer and the manufacturer of a Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe. He saw a Shopsmith demonstrated by the retailer and studied a brochure prepared by the manufacturer. He decided he wanted a Shopsmith for his home workshop, and his wife bought and gave him one for Christmas in 1955. In 1957 he bought the necessary attachments to use the Shopsmith as a lathe for turning a large piece of wood he wished to make into a chalice. After he had worked on the piece of wood several times without difficulty, it suddenly flew out of the machine and struck him on the forehead, inflicting serious injuries. About 10 1/2 months later, he gave the retailer and the manufacturer written notice of claimed breaches of warranties and filed a complaint against them alleging such breaches and negligence.

After a trial before a jury, the court ruled that there was no evidence that the retailer was negligent or had breached any express warranty and that the manufacturer was not liable for the breach of any implied warranty. Accordingly, it submitted to the jury only the cause of action alleging breach of implied warranties against the retailer and the causes of action alleging negligence and breach of express warranties against the manufacturer. The jury returned a verdict for the retailer against plaintiff and for plaintiff against the manufacturer in the amount of \$65,000. The trial court denied the manufacturer's motion for a new trial and *60 entered judgment on the verdict. The manufacturer

and plaintiff appeal. Plaintiff seeks a reversal of the part of the judgment in favor of the retailer, however, only in the event that the part of the judgment against the manufacturer is reversed.

Plaintiff introduced substantial evidence that his injuries were caused by defective design and construction of the Shopsmith. His expert witnesses testified that inadequate set screws were used to hold parts of the machine together so that normal vibration caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe. They also testified that there were other more positive ways of fastening the parts of the machine together, the use of which would have prevented the accident. The jury could therefore reasonably have concluded that the manufacturer negligently constructed the Shopsmith. The jury could also reasonably have concluded that statements in the manufacturer's brochure were untrue, that they constituted express warranties, [FN1] and that plaintiff's injuries were caused by their breach.

FN1 In this respect the trial court limited the jury to a consideration of two statements in the manufacturer's brochure. (1) "When Shopsmith Is in Horizontal Position-Rugged construction of frame provides rigid support from end to end. Heavy centerless-ground steel tubing insures perfect alignment of components." (2) "Shopsmith maintains its accuracy because every component has positive locks that hold adjustments through rough or precision work."

The manufacturer contends, however, that plaintiff did not give it notice of breach of warranty within a reasonable time and that therefore his cause of action for breach of warranty is barred by section 1769 of the Civil Code. Since it cannot be determined whether the verdict against it was based on the negligence or warranty cause of action or both, the manufacturer concludes that the error in presenting the warranty cause of action to the jury was prejudicial.

Section 1769 of the Civil Code provides: "In the absence of express or implied agreement of the parties,

acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."

(1) Like other provisions of the Uniform Sales Act (*61 Civ. Code, §§ 1721-1800), section 1769 deals with the rights of the parties to a contract of sale or a sale. It does not provide that notice must be given of the breach of a warranty that arises independently of a contract of sale between the parties. (2) Such warranties are not imposed by the sales act, but are the product of common-law decisions that have recognized them in a variety of situations. (See Gagne v. Bertran, 43 Cal.2d 481, 486-487 [275 P.2d 15], and authorities cited; Peterson v. Lamb Rubber Co., 54 Cal.2d 339, 348 [5 Cal.Rptr. 863, 353 P.2d 575]; Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 276-283 [93 P.2d 799]; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 695-696 [268 P.2d 1041]; Souza & McCue Constr. Co., Inc. v. Superior Court, 57 Cal.2d 508, 510-511 [20 Cal.Rptr. 634, 370 P.2d 338].) It is true that in many of these situations the court has invoked the sales act definitions of warranties (Civ. Code, §§ 1732, 1735) in defining the defendant's liability, but it has done so, not because the statutes so required, but because they provided appropriate standards for the court to adopt under the circumstances presented. (See Clinkscales v. Carver, 22 Cal.2d 72, 75 [136 P.2d 777]; Dana v. Sutton Motor Sales, 56 Cal.2d 284, 287 [14 Cal.Rptr. 649, 363 P.2d 881].)

(3) The notice requirement of section 1769, however, is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. (La Hue v. Coca-Cola Bottling, Inc., 50 Wn.2d 645 [314 P.2d 421, 422]; Chapman v. Brown, 198 F. Supp. 78, 85, affd. Brown v. Chapman, 304 F. 2d 149.) (4) "As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied

to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' [James, *Product Liability*, 34 Texas L. Rev. 44, 192, 197] and at least until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings." (Prosser, *Strict Liability to the Consumer*, 69 Yale L. J. 1099, 1130, footnotes omitted.) It is true that in *Jones v. Burgermeister Brewing Corp.*, 198 Cal.App.2d 198, 202-203 [18 Cal.Rptr. 311]; *Perry v. Thrifty Drug Co.*, 186 Cal.App.2d 410, 411 [9 Cal.Rptr. 50], *Arata v. Tonegato*, 152 Cal.App.2d 837, 841 [314 P.2d 130], and *62 *Maecherlein v. Sealy Mattress Co.*, 145 Cal.App.2d 275, 278 [302 P.2d 331], the court assumed that notice of breach of warranty must be given in an action by a consumer against a manufacturer. Since in those cases, however, the court did not consider the question whether a distinction exists between a warranty based on a contract between the parties and one imposed on a manufacturer not in privity with the consumer, the decisions are not authority for rejecting the rule of the *La Hue* and *Chapman* cases, *supra*. (*Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 343 [5 Cal.Rptr. 863, 353 P.2d 575]; *People v. Banks*, 53 Cal.2d 370, 389 [1 Cal.Rptr. 669, 348 P.2d 102].) (5) We conclude, therefore, that even if plaintiff did not give timely notice of breach of warranty to the manufacturer, his cause of action based on the representations contained in the brochure was not barred.

Moreover, to impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for plaintiff to establish an express warranty as defined in section 1732 of the Civil Code. [FN2] (6) A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective. (*Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 347 [5 Cal.Rptr. 863, 353 P.2d 575] [grinding wheel]; *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal.App.2d 35, 42-44 [11 Cal.Rptr. 823] [bottle]; *Jones v.*

Burgermeister Brewing Corp., 198 Cal.App.2d 198, 204 [18 Cal.Rptr. 311] [bottle]; *Gottsdanker v. Cutter Laboratories*, 182 Cal.App.2d 602, 607 [6 Cal.Rptr. 320] [vaccine]; *McOuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252, 254 [insect spray]; *Bowles v. Zimmer Manufacturing Co.*, 277 F. 2d 868, 875 [surgical pin]; *Thompson v. Reedman*, 199 F. Supp. 120, 121 [automobile]; *Chapman v. Brown*, 198 F. Supp. 78, 118, 119, *affd.* *Brown v. Chapman*, 304 F. 2d 149 [skirt]; *B. F. Goodrich Co. v. Hammond*, 269 F. 2d 501, 504 [automobile tire]; *Markovich v. McKesson & Robbins, Inc.*, 106 Ohio App. 265 [149 N.E. 2d 181, 186-188] *63 [home permanent]; *Graham v. Bottenfield's, Inc.*, 176 Kan. 68 [269 P.2d 413, 418] [hair dye]; *General Motors Corp. v. Dodson*, 47 Tenn.App. 438 [338 S.W. 2d 655, 661] [automobile]; *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 [161 A. 2d 69, 76-84, 75 A.L.R. 2d 1] [automobile]; *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31, 33 [airplane].)

FN2 Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

(7) Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law (see e.g., *Graham v. Bottenfield's, Inc.*, 176 Kan. 68 [269 P.2d 413, 418]; *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244 [147 N.E. 2d 612, 614, 75 A.L.R. 2d 103]; *Decker & Sons v. Capps*, 139 Tex. 609, 617 [164 S.W. 2d 828, 142 A.L.R. 1479]), and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 [161 A. 2d 69, 84-96, 75 A.L.R. 2d 1]; *General Motors Corp. v.*

Dodson, 47 Tenn.App. 438 [338 S.W. 2d 655, 658-661]; State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289 [110 N.W. 2d 449, 455-456]; Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476 [164 A. 2d 773, 778]; Linn v. Radio Center Delicatessen, 169 Misc. 879 [6 N.Y.S. 2d 110, 112]) make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. (8) Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.

We need not recanvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated in the cases cited above. (See also 2 Harper and James, Torts, §§ 28:15-28:16, pp. 1569-1574; Prosser, *Strict Liability to the Consumer*, 69 Yale L.J. 1099; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461 [150 P.2d 436], concurring opinion.) (9) The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose *64 fitfully at best. (See Prosser, *Strict Liability to the Consumer*, 69 Yale L.J. 1099, 1124-1134.) (10) In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. It should not be controlling whether the details of the sales from manufacturer to retailer and from retailer to plaintiff's wife were such that one or more of the implied warranties of the sales act arose. (Civ. Code, § 1735.) "The remedies of injured consumers ought not to be

made to depend upon the intricacies of the law of sales." (Ketterer v. Armour & Co., 200 F. 322, 323; Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 282 [93 P.2d 799].) (11) To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

The manufacturer contends that the trial court erred in refusing to give three instructions requested by it. It appears from the record, however, that the substance of two of the requested instructions was adequately covered by the instructions given and that the third instruction was not supported by the evidence.

The judgment is affirmed.

Gibson, C. J., Schauer, J., McComb, J., Peters, J., Tobriner, J., and Peek, J., concurred. *65

Cal., 1963.

Greenman v. Yuba Power Products, Inc.

END OF DOCUMENT

EXHIBIT 2

H

Supreme Court of Wyoming.
Gregory Allen HARVEY, By and Through his legal
guardian, Lyle Dean HARVEY,
Plaintiff,
v.
GENERAL MOTORS CORPORATION, Defendant.
No. 86-321.

July 22, 1987.

Products liability action was brought against
manufacturer of automobile. The United States
District Court for the District of Wyoming certified
question. The Supreme Court, Brown, C.J., held that
decision in *Ogle v. Caterpillar Tractor Co.*, should be
applied retrospectively as well as prospectively.

Question answered.

Thomas, J., filed a specially concurring opinion.

West Headnotes

Courts  100(1)

106k100(1) Most Cited Cases

Decision in *Ogle v. Caterpillar Tractor Co.* recognizing
cause of action in strict liability should be applied
retrospectively as well as prospectively.

*764 Jack Gage and Carole Shotwell of Whitehead,
Zunker, Gage, Davidson and Shotwell, P.C., Cheyenne,
for plaintiff.

Thomas G. Gorman and Glenn Parker of Hirst &
Applegate, Cheyenne, for defendant.

Robert W. Tiedeken with Terry W. Mackey, P.C., and
George Santini of Charles E. Graves & Associates,
Cheyenne, for amicus curiae Committee of the
Wyoming Trial Lawyers Assn.

Before BROWN, C.J., and THOMAS, CARDINE,
URBIGKIT and MACY, JJ.

BROWN, Chief Justice.

The United States District Court for the District of
Wyoming, pursuant to the Federal Court State Law
Certificate Procedure Act, §§ 1-13-104 through 1-
13-107, W.S.1977, and Rules 11.01 through 11.07,
Wyoming Rules of Appellate Procedure, certified to
this court the following question:

"1. Does a party in Wyoming state a claim for relief
in strict liability against a manufacturer for a cause of
action that arose prior to the issuance of the opinion
on 19 March 1986 by the Wyoming Supreme Court
in *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334
(Wyo.1986)?"

We hold that the decision in *Ogle v. Caterpillar
Tractor Co.*, Wyo., 716 P.2d 334 (1986), should be
applied both retrospectively, as well as prospectively.

The following facts are extracted from the certification
order of the United States District Court for the District
of Wyoming.

On July 6, 1985, Gregory Allen Harvey (plaintiff)
sustained serious injuries when his 1979 Chevrolet
Corvette T-top rolled while traveling south on
Wyoming Highway 72 in Carbon County, near Hanna,
Wyoming. At the time of the accident the automobile
was being driven by Christopher A. Schade and had
been designed, manufactured and assembled by General
Motors Corporation (defendant).

On February 27, 1986, an action was filed on behalf of
plaintiff against defendant in the United States District
Court for the District of Wyoming. Count I of plaintiff's
complaint purported to state a claim for relief against
defendant under the doctrine of strict liability. [FN1]

[FN1. Plaintiff's complaint stated "the
Defendant should be held strictly liable for all
damages sustained by Plaintiff herein."

Thereafter, defendant filed a Motion for Partial
Summary Judgment, together with a supporting

Memorandum of Law, requesting that the federal district court dismiss all portions of plaintiff's complaint alleging a claim for relief based upon strict liability for the reason that the doctrine of strict liability was not applicable law in Wyoming on July 6, 1985, the date that plaintiff's cause of action arose. Further, defendant filed a Request for Disposition of Motion for Partial Summary Judgment Based Strictly on the Pleadings as they existed on and before September 3, 1986. In response, plaintiff filed a Resistance to Defendant's Request for Disposition of Motion for Partial Summary Judgment. On November 17, 1986, the Federal District Court set the matter for hearing before the Honorable Clarence A. Brimmer.

Following the hearing, the United States District Court certified this legal issue to the Wyoming Supreme Court. The Federal District Court determined that the question certified involved important and undetermined questions of Wyoming law which would be determinative of the partial summary judgment motion pending in the federal court. [FN2]

[FN2]. Briefs were submitted by plaintiff, defendant, and by the Wyoming Trial Lawyers Association who filed a brief of amicus curiae.

Defendant, General Motors Corporation contends, under Wyoming law, that strict liability was not a viable theory of recovery before March 19, 1986, and that the application of the decision in Ogle v. Caterpillar Tractor Co., supra, regarding the adoption of strict liability is prospective only. The defendant argues that this court stated in the Ogle case, at 341, that

*765 "[t]oday we join the overwhelming majority of American jurisdictions and hold that strict liability in tort is a valid cause of action in Wyoming. * * * " (Emphasis added),

and such language implies and speaks to prospective application only. Simply, they contend that the word "today" is a word of futurity, which implies a continuity of action or condition from the present time forward and excludes all the past. We do not agree. The use of the word "today" is subject to more than one interpretation. The defendant contends it means that claims or causes of action which accrued after March 19, 1986, will be governed by the principles of Ogle v.

Caterpillar Tractor Co., supra, and that claims or causes of action which accrue before March 19, 1986, will be governed by prior law. However, the quotation could also be reasonably interpreted to mean that claims or causes of action based on strict liability and not barred by the statute of limitations were actionable as of March 19, 1986. The general rule is that in civil cases decisions are to be applied retroactively. The Tenth Circuit Court has stated:

"The ground rule, of course, is that retroactive effect is given to decisions overruling a prior holding. * * * " Benedict Oil Company v. United States, 582 F.2d 544 (10th Cir.1978).

Additionally, in Malan v. Lewis, Utah, 693 P.2d 661, 676 (1984), it is stated:

"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. In civil cases, at least, constitutional law neither requires nor prohibits retroactive operation of an overruling decision, [Citations.] but in the vast majority of cases a decision is effective both prospectively and retrospectively, even an overruling decision. [Citation.] Whether the general rule should be departed from depends on whether a substantial injustice would otherwise occur. [Citation.]" (Emphasis added.)

See also, Chevron Chemical Company v. Superior Court, 131 Ariz. 431, 641 P.2d 1975 (1982); International Studio Apartment Association, Inc. v. Lockwood, Fla.App., 421 So.2d 1119 (1982); In re Kloppenburg's Estate, 82 N.J.Super. 117, 196 A.2d 800 (1964); Marshall v. Marshall, Tenn., 670 S.W.2d 213 (1984).

In this case, we see no substantial injustice as a basis for us to depart from the general rule. In Ogle v. Caterpillar Tractor Co., supra, at 342, we stated:

"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. W. Prosser, *The Assault upon the Citadel*, 69 Yale L.J. 1099, 1120 (1960); W. Keeton [Prosser and Keeton on Torts, §§ 96-97 (1984)], at 692-693; Restatement, Second, Torts § 402A, comment c (1965)."

This court also noted:

" * * * the cause of action for strict liability in tort is necessary because of the inadequacies of breach of warranty actions when applied to claims in tort for personal injury." *Id.*, at 344.

No justification exists why such reasoning is any less applicable when applied before March 19, 1986.

Further, we find that if this court had intended that the rule in *Ogle v. Caterpillar Tractor Co.*, supra, should be applied only prospectively, it would have said so in clear terms. There is no clear prohibition in that case against retrospective application nor is there a clear mandate requiring only prospective application. We hesitate to mandate only a prospective application of *Ogle v. Caterpillar Tractor Co.*, supra, because of the use of the single word "today."

Accordingly, we hold that the rule enunciated in *Ogle v. Caterpillar Tractor Co.*, supra, that strict liability in tort is a valid cause of action in the State of Wyoming *766 should be applied retrospectively and prospectively.

THOMAS, J., filed a specially concurring opinion.

THOMAS, Justice, specially concurring.

I certainly agree with the result reached in the majority opinion in this case. I simply add that for me this disposition is consistent with the decisions of this court addressing the concern of prospective or retrospective application of the court's decisions. *Adkins v. Sky Blue, Inc.*, Wyo., 701 P.2d 549 (1985); *Nehring v. Russell*, Wyo., 582 P.2d 67 (1978); *Oroz v. Board of County Commissioners of Carbon County*, Wyo., 575 P.2d 1155 (1978). In those decisions and others, we have recognized that a court may restrict the effect of its decisions to prospective application only even though the traditional rule was one of retrospective application, particularly with respect to questions of substantive law.

A limitation to prospective application as outlined in *Adkins v. Sky Blue, Inc.*, supra; *Nehring v. Russell*, supra; and *Oroz v. Board of County Commissioners of Carbon County*, supra, would not be appropriate in this instance. Albeit the decision in *Ogle v. Caterpillar Tractor Company*, Wyo., 716 P.2d 334 (1986), would be considered one of first impression, its resolution clearly was foreshadowed by persuasive authority in other jurisdictions and the actual application of the rule of strict liability in the trial courts in some places in the State of Wyoming. There is no question that the rule of strict liability will be furthered by retrospective operation, and there is no indication that the retrospective application would produce any substantial inequities because of reliance upon the non-availability in Wyoming of the rule of strict liability. These Wyoming authorities support the majority decision, and they are consistent with the rules invoked from other jurisdictions.

739 P.2d 763, Prod.Liab.Rep. (CCH) P 11,491

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EXHIBIT 3

▼
Briefs and Other Related Documents

Supreme Court of the United States
 JAMES B. BEAM DISTILLING COMPANY,
 Petitioner
 v.
 GEORGIA et al.
 No. 89-680.

Argued Oct. 30, 1990.
 Decided June 20, 1991.

Distiller brought action to recover \$2.4 million in excise taxes that had been paid under Georgia excise tax statute that imposed greater tax on imported alcoholic beverages than was imposed on liquor manufactured from Georgia-grown products. The Fulton Superior Court, Ralph H. Hicks, J., determined that statute violated commerce clause but that its ruling would only be applied prospectively, and distiller appealed. The Georgia Supreme Court, 259 Ga. 363, 382 S.E.2d 95, affirmed, and distiller petitioned for certiorari. The Supreme Court, Justice Souter, held that prior ruling invalidating similar Hawaii tax scheme applied retroactively to present claim arising out of facts antedating that decision.

Reversed and remanded.

Justice White filed decision concurring in judgment.

Justice Blackmun filed opinion concurring in judgment, in which Justices Marshall and Scalia joined.

Justice Scalia filed opinion concurring in judgment in which Justices Marshall and Blackmun joined.

Justice O'Connor filed dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined.

West Headnotes

[1] Courts 106 ↪ 100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
 When Supreme Court has applied rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. (Per Souter, J., with one Justice concurring and four Justices concurring in judgment.)

[2] Courts 106 ↪ 100(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
 Supreme Court's decision in Bacchus Imports, Ltd. v. Dias, that Hawaii statute imposing greater excise tax on imported alcoholic products than was imposed on local alcoholic products violated commerce clause, applied retroactively to similar Georgia excise tax statute being challenged in action arising out of facts antedating that decision. (Per Souter, J., with one Justice concurring and four Justices concurring in judgment.) O.C.G.A. § 3-4-60; U.S.C.A. Const. Art. 1, § 8. cl. 3.
 **2439 *529 *Syllabus* ^{FN*}

^{FN*} The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Before 1985, Georgia law imposed an excise tax on imported liquor at a rate double **2440 that imposed on liquor manufactured from Georgia-grown products. In 1984, this Court, in Bacchus Imports, Ltd. v. Dias,

468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200, held that a similar Hawaii law violated the Commerce Clause. Petitioner, a manufacturer of Kentucky bourbon, thereafter filed an action in Georgia state court, seeking a refund of taxes it paid under Georgia's law for 1982, 1983, and 1984. The court declared the statute unconstitutional, but refused to apply its ruling retroactively, relying on Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, which held that a decision will be applied prospectively where it displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application. The State Supreme Court affirmed.

Held: The judgment is reversed, and the case is remanded.

259 Ga. 363, 382 S.E.2d 95 (Ga.1989), reversed and remanded.

Justice SOUTER, joined by Justice STEVENS, concluded that once this Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata. Pp. 2442-2448.

(a) Whether a new rule should apply retroactively is in the first instance a matter of choice of law, to which question there are three possible answers. The first and normal practice is to make a decision fully retroactive.

Second, there is the purely prospective method of overruling, where the particular case is decided under the old law but announces the new, effective with respect to all conduct occurring after the date of that decision. Finally, the new rule could be applied in the case in which it is pronounced, but then return to the old one with respect to all others arising on facts predating the pronouncement. The possibility of such modified, or selective, prospectivity was abandoned in the criminal context in Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649. Pp. 2442-2445.

(b) Because Bacchus did not reserve the question, and

remanded the case for consideration of remedial issues, it is properly understood to have followed the normal practice of applying its rule retroactively to the litigants there before the Court. Pp. 2445-2446.

*530 c) Because Bacchus thus applied its own rule, principles of equality and *stare decisis* require that it be applied to the litigants in this case. Griffith's equality principle, that similarly situated litigants should be treated the same, applies equally well in the civil context as in the criminal. Of course, retroactivity is limited by the need for finality, since equality for those whose claims have been adjudicated could only be purchased at the expense of the principle that there be an end of litigation. In contrast, parties, such as petitioner, who wait to litigate until after others have labored to create a new rule, are merely asserting a right that is theirs in law, is not being applied on a prospective basis only, and is not otherwise barred by state procedural requirements. Modified prospectivity rejected, a new rule may not be retroactively applied to some litigants when it is not applied to others. This necessarily limits the application of the Chevron Oil test, to the effect that it may not distinguish between litigants for choice-of-law purposes on the particular equities of their claims to prospectivity. It is the nature of precedent that the substantive law will not shift and spring on such a basis. Pp. 2446-2448.

(d) This opinion does not speculate as to the bounds or propriety of pure prospectivity. Nor does it determine the appropriate remedy in this case, since remedial issues were neither considered below nor argued to this Court. P. 2448.

**2441 Justice WHITE concluded that, under any one of several suppositions, the opinion in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200, may reasonably be read to extend the benefits of the judgment in that case to Bacchus Imports and that petitioner here should also have the benefit of Bacchus. If the Court in Bacchus thought that its decision was not a new rule, there would be no doubt that it would be retroactive to all similarly situated litigants. The Court in that case may also have thought that retroactivity was proper under the factors set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296.

And, even if the Court was wrong in applying *Bacchus* retroactively, there is no precedent in civil cases for applying a new rule to the parties of the case but not to others. Moreover, *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649, has overruled such a practice in criminal cases and should be followed on the basis of *stare decisis*. However, the propriety of pure prospectivity is settled in this Court's prior cases, see, e.g., *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647, which recognize that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court. To allow for the possibility of speculation as to the propriety of such prospectivity is to suggest that there may come a time when this Court's precedents on the issue will be overturned. Pp. 2448-2449.

*531 Justice BLACKMUN, joined by Justice MARSHALL and Justice SCALIA, concluded that prospectivity, whether "selective" or "pure," breaches the Court's obligation to discharge its constitutional function in articulating new rules for decision, which must comport with its duty to decide only cases and controversies. *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649. The nature of judicial review constrains the Court to require retroactive application of each new rule announced. Pp. 2449-2450.

Justice SCALIA, joined by Justice MARSHALL and Justice BLACKMUN, while agreeing with Justice SOUTER's conclusion, disagreed that the issue is one of choice of law, and concluded that both selective and pure prospectivity are impermissible, not for reasons of equity, but because they are not permitted by the Constitution. To allow the Judiciary powers greater than those conferred by the Constitution, as the fundamental nature of those powers was understood when the Constitution was enacted, would upset the division of federal powers central to the constitutional scheme. Pp. 2450-2451.

SOUTER, J., announced the judgment of the Court, and delivered an opinion, in which STEVENS, J., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 2448. BLACKMUN, J., filed an

opinion concurring in the judgment, in which MARSHALL and SCALIA, JJ., joined, *post*, p. 2449.

SCALIA, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 2450. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY, J., joined, *post*, p. 2451.

Morton Siegel argued the cause for petitioner. With him on the briefs were *John L. Taylor, Jr.*, and *Richard Schoenstadt*.

Amelia Waller Baker, Assistant Attorney General of Georgia, argued the cause for respondents. With her on the brief were *Michael J. Bowers*, Attorney General, *H. Perry Michael*, Executive Assistant Attorney General, *Harrison Kohler*, Deputy Attorney General, *Daniel M. Formby*, Senior Assistant Attorney General, and *Warren R. Calvert*, Assistant Attorney General.*

*Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Mary Sue Terry*, Attorney General of Virginia, *H. Lane Kneedler*, Chief Deputy Attorney General, *Gail Starling Marshall*, Deputy Attorney General, and *Peter W. Low*, joined by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Robert K. Corbin* of Arizona, *Steve Clark* of Arkansas, *Duane Woodard* of Colorado, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *Robert J. Del Tufo* of New Jersey, *Robert Abrams* of New York, *R. Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, and *Don Hanaway* of Wisconsin; for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Richard F. Finn*, Supervising Deputy Attorney General, and *Eric J. Coffill*, *Clarine Nardi Riddle*, Attorney General of Connecticut, *Robert A. Butterworth*, Attorney General of Florida, *Warren Price III*, Attorney General of Hawaii, *James T. Jones*, Attorney General of Idaho, *Frank J. Kellev*, Attorney General of Michigan, *Robert M. Spire*, Attorney General of Nebraska, *Hal Stratton*, Attorney General of New Mexico, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *R. Paul Van Dam*, Attorney General of Utah, *Kenneth O.*

Eikenberry, Attorney General of Washington, *Roger W. Thompkins*, Attorney General of West Virginia, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Herbert O. Reid, Sr.*; and for the Council of State Governments et al. by *Charles Rothfeld* and *Benna Ruth Solomon*.

*532 Justice SOUTER announced the judgment of the Court and delivered an opinion, in which Justice STEVENS joins.

The question presented is whether our ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), should apply retroactively to claims arising on facts antedating that decision. We hold that application of the rule in that case requires its application retroactively in later cases.

**2442 I

Prior to its amendment in 1985, Georgia state law imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from Georgia-grown products. See *Ga.Code Ann. § 3-4-60* (1982). In 1984, a Hawaii statute that similarly distinguished between imported and local alcoholic products was held in *Bacchus* to violate the Commerce Clause. *Bacchus*, 468 U.S., at 273, 104 S.Ct., at 3056. It proved no bar to our finding of unconstitutionality that the discriminatory tax involved intoxicating liquors, with respect to which the States have heightened *533 regulatory powers under the Twenty-first Amendment. *Id.*, at 276, 104 S.Ct., at 3057.

In *Bacchus'* wake, petitioner, James B. Beam Distilling Co., a Delaware corporation and Kentucky bourbon manufacturer, claimed Georgia's law likewise inconsistent with the Commerce Clause, and sought a refund of \$2.4 million, representing not only the differential taxation but the full amount it had paid under § 3-4-60 for the years 1982, 1983, and 1984. Georgia's Department of Revenue failed to respond to the request, and Beam thereafter brought a refund action against the State in the Superior Court of Fulton County. On cross-motions for summary judgment, the trial court agreed that § 3-4-60 could not withstand a *Bacchus* attack for the years in question, and that the

tax had therefore been unconstitutional. Using the analysis described in this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the court nonetheless refused to apply its ruling retroactively. It therefore denied petitioner's refund request.

The Supreme Court of Georgia affirmed the trial court in both respects. The court held the pre-1985 version of the statute to have violated the Commerce Clause as, in its words, an act of "simple economic protectionism." See 259 Ga. 363, 364, 382 S.E.2d 95, 96 (1989) (citing *Bacchus*). But it, too, applied that finding on a prospective basis only, in the sense that it declined to declare the State's application of the statute unconstitutional for the years in question. The court concluded that but for *Bacchus* its decision on the constitutional question would have established a new rule of law by overruling past precedent, see *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939) (upholding predecessor to § 3-4-60 against Commerce Clause objection), upon which the litigants may justifiably have relied. See 259 Ga., at 365, 382 S.E.2d at 96. That reliance, together with the "unjust results" that would follow from retroactive application, was thought by the court to satisfy the *Chevron Oil* test for prospectivity. To the dissenting argument of two justices *534 that a statute found unconstitutional is unconstitutional *ab initio*, the court observed that while it had "declared statutes to be void from their inception when they were contrary to the Constitution at the time of enactment, ... those decisions are not applicable to the present controversy, as the original ... statute, when adopted, was not violative of the Constitution under court interpretations of that period." 259 Ga., at 366, 382 S.E.2d at 97 (quoting *Adams v. Adams*, 249 Ga. 477, 478-479, 291 S.E.2d 518, 520 (1982)).

Beam sought a writ of certiorari from the Court on the retroactivity question.^{FN1} We granted the petition, 496 U.S. 924, 110 S.Ct. 2616, 110 L.Ed.2d 637 (1990), and now reverse.

^{FN1} Although petitioner expends some effort, see Brief for Petitioner 5-8, in asserting the

unconstitutionality under *Bacchus* of the Georgia law as amended, see *Ga. Code Ann. § 3-4-60* (1990), an argument rejected by the Georgia Supreme Court in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), that issue is neither before us nor relevant to the issue that is.

II

In the ordinary case, no question of retroactivity arises.

Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. See Mishkin, Foreword: The High Court, The Great Writ, and the **2443 Due Process of Time and Law, 79 *Harv.L.Rev.* 56, 60 (1965). Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.

It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is *535 properly seen in the first instance as a matter of choice of law, "a choice ... between the principle of forward operation and that of relation backward." *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932). Once a rule is found to apply "backward," there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court. See *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 210, 110 S.Ct. 2323, 2348, 110 L.Ed.2d 148 (1990) (STEVENS,

J., dissenting). But the antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise. See *Smith, supra*, at 177-178, 110 S.Ct., at 2330-2331 (plurality opinion); cf. *United States v. Estate of Donnelly*, 397 U.S. 286, 297, n., 90 S.Ct. 1033, 1039, n., 25 L.Ed.2d 312 (1970) (Harlan, J., concurring).

As a matter purely of judicial mechanics, there are three ways in which the choice-of-law problem may be resolved. First, a decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with *res judicata* and procedural barriers such as statutes of limitations. This practice is overwhelmingly the norm, see *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed. 228 (1910) (Holmes, J., dissenting), and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law. See *Mackey v. United States*, 401 U.S. 667, 679, 91 S.Ct. 1160, 1173, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). It also reflects the declaratory theory of law, see *Smith, supra*, at 201, 110 S.Ct., at 2343 (1990) (SCALIA, J., concurring in judgment); *Linkletter v. Walker*, 381 U.S. 618, 622-623, 85 S.Ct. 1731, 1733-1734, 14 L.Ed.2d 601 (1965), according to which the courts *536 are understood only to find the law, not to make it. But in some circumstances retroactive application may prompt difficulties of a practical sort. However much it comports with our received notions of the judicial role, the practice has been attacked for its failure to take account of reliance on cases subsequently abandoned, a fact of life if not always one of jurisprudential recognition. See, *e.g.*, *Mosser v. Darrow*, 341 U.S. 267, 276, 71 S.Ct. 680, 684, 95 L.Ed. 927 (1951) (Black, J., dissenting).

Second, there is the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all

conduct occurring after the date of that decision. This Court has, albeit infrequently, resorted to pure prospectivity, see Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); **2444 Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); Buckley v. Valeo, 424 U.S. 1, 142-143, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422, 84 S.Ct. 461, 468, 11 L.Ed.2d 440 (1964); see also Smith, *supra*, at 221, n. 11, 110 S.Ct., at 2354, n. 11 (STEVENS, J., dissenting); Linkletter, *supra*, 381 U.S., at 628, 85 S.Ct., at 1737, although in so doing it has never been required to distinguish the remedial from the choice-of-law aspect of its decision.

See Smith, *supra*, at 210, 110 S.Ct., at 2348 (STEVENS, J., dissenting). This approach claims justification in its appreciation that “[t]he past cannot always be erased by a new judicial declaration,” Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940), see also Lemon v. Kurtzman, 411 U.S. 192, 199, 93 S.Ct. 1463, 1468, 36 L.Ed.2d 151 (1973) (plurality opinion), and that to apply the new rule to parties who relied on the old would offend basic notions of justice and fairness. But this equitable method has its own drawback: it tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures. See *537 United States v. Johnson, 457 U.S. 537, 554-555, 102 S.Ct. 2579, 2589-2590, 73 L.Ed.2d 202 (1982); James v. United States, 366 U.S. 213, 225, 81 S.Ct. 1052, 1058, 6 L.Ed.2d 246 (1961) (Black, J., dissenting).

Finally, a court may apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement. This method, which we may call modified, or selective, prospectivity, enjoyed its temporary ascendancy in the criminal law during a period in which the Court formulated new rules, prophylactic or otherwise, to insure protection of the rights of the accused. See, e.g., Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967); Daniel v.

Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975); see also Smith, *supra*, at 198, 110 S.Ct., at 2341 (“During the period in which much of our retroactivity doctrine evolved, most of the Court’s new rules of criminal procedure had expanded the protections available to criminal defendants”). On the one hand, full retroactive application of holdings such as those announced in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), would have “seriously disrupt[ed] the administration of our criminal laws[,] ... requir[ing] the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards.” Johnson, *supra*, 384 U.S., at 731, 86 S.Ct., at 1780. On the other hand, retroactive application could hardly have been denied the litigant in the law-changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether.

But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally. See R. Wasserstrom, *The Judicial Decision 69-72* (1961). “We depart from this basic judicial tradition when *538 we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a ‘new’ rule of constitutional law.” Desist v. United States, 394 U.S. 244, 258-259, 89 S.Ct. 1030, 1039, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting); see also Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 *Harv.L.Rev.* 409, 425 (1924). For this reason, we abandoned the possibility of selective prospectivity in **2445 the criminal context in Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), even where the new rule constituted a “clear break” with previous law, in favor of completely retroactive application of all decisions to cases pending on direct review. Though Griffith was held not to

dispose of the matter of civil retroactivity, see *id.*, at 322, n. 8, 107 S.Ct., at 712, n. 8, selective prospectivity appears never to have been endorsed in the civil context. *Smith*, 496 U.S., at 200, 110 S.Ct., at 2342 (plurality opinion). This case presents the issue.

III

[1][2] Both parties have assumed the applicability of the *Chevron Oil* test, under which the Court has accepted prospectivity (whether in the choice-of-law or remedial sense, it is not clear) where a decision displaces a principle of law on which reliance may reasonably have been placed, and where prospectivity is on balance warranted by its effect on the operation of the new rule and by the inequities that might otherwise result from retroactive application. See *Chevron Oil*, 404 U.S., at 106-107, 92 S.Ct., at 355. But we have never employed *Chevron Oil* to the end of modified civil prospectivity.

The issue is posed by the scope of our disposition in *Bacchus*. In most decisions of this Court, retroactivity both as to choice of law and as to remedy goes without saying. Although the taxpaying appellants prevailed on the merits of their Commerce Clause claim, however, the *Bacchus* Court did not grant outright their request for a refund of taxes paid under the law found unconstitutional. Instead, we remanded the case for consideration of the State's arguments that appellants were "not entitled to refunds since they did *539 not bear the economic incidence of the tax but passed it on as a separate addition to the price that their customers were legally obligated to pay." *Bacchus*, 468 U.S., at 276-277, 104 S.Ct., at 3058. "These refund issues, ... essentially issues of remedy," had not been adequately developed on the record nor passed upon by the state courts below, and their consideration may have been intertwined with, or obviated by, matters of state law. *Id.*, at 277, 104 S.Ct., at 3058.

Questions of remedy aside, *Bacchus* is fairly read to hold as a choice of law that its rule should apply retroactively to the litigants then before the Court. Because the *Bacchus* opinion did not reserve the question whether its holding should be applied to the

parties before it, cf. *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 297-298, 107 S.Ct. 2829, 2847-2848, 97 L.Ed.2d 226 (1987) (remanding case to consider whether ruling "should be applied retroactively and to decide other remedial issues"), it is properly understood to have followed the normal rule of retroactive application in civil cases. If the Court were to have found prospectivity as a choice-of-law matter, there would have been no need to consider the pass-through defense; if the Court had reserved the issue, the terms of the remand to consider "remedial" issues would have been incomplete. Indeed, any consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court. See *McKesson*, 496 U.S., at 46-49, 110 S.Ct., at 2255-2256 (pass-through defense considered as remedial question). Because the Court in *Bacchus* remanded the case solely for consideration of the pass-through defense, it thus should be read as having retroactively applied the rule there decided.^{FN2} See also *540**2446 *Williams v. Vermont*, 472 U.S. 14, 28, 105 S.Ct. 2465, 2474, 86 L.Ed.2d 11 (1985); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-197, 103 S.Ct. 2296, 2308-2309, 76 L.Ed.2d 497 (1983); cf. *Davis v. Michigan Dept. of Treasurv.*, 489 U.S. 803, 817, 109 S.Ct. 1500, 1508, 103 L.Ed.2d 891 (1989).

FN2. In fact, the state defendant in *Bacchus* argued for pure prospectivity under the criteria set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

See Brief for Appellee in *Bacchus Imports Ltd. v. Dias*, O.T.1983, No. 82-1565, p. 19. It went on to argue that "even if" the challenged tax were held invalid and the decision were not limited to prospective application, the challengers should not be entitled to refunds because any taxes paid would have been passed through to consumers. *Id.*, at 46. Though unnecessary to our ruling here, the prospectivity issue can thus be said actually to have been litigated and by implication actually to have been decided by the Court by the fact of its consideration of the pass-through defense. See *Clemons v.*

Mississippi, 494 U.S. 738, 747-748, n. 3, 110 S.Ct. 1441, 1448, n. 3, 108 L.Ed.2d 725 (1990).

Bacchus thus applied its own rule, just as if it had reversed and remanded without further ado, and yet of course the Georgia courts refused to apply that rule with respect to the litigants in this case. Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and *stare decisis* here prevailing over any claim based on a Chevron Oil analysis.

Griffith cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. See Estate of Donnelly, 397 U.S., at 296, 90 S.Ct., at 1039 (Harlan, J., concurring). Its strength is in fact greater in the latter sphere. With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the Court directly and those that come here in collateral proceedings. See Griffith, supra, 479 U.S., at 331-332, 107 S.Ct., at 717-718 (WHITE, J., dissenting). Whereas Griffith held that new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). No such difficulty exists in the civil arena, in which there is little opportunity for collateral attack of final judgments.

Nor is selective prospectivity necessary to maintain incentives to litigate in the civil context as it may have been in the criminal before Griffith's rule of absolute retroactivity. In the civil context, "even a party who is deprived of the full retroactive*541 benefit of a new decision may receive some relief." Smith, 496 U.S., at 198-199, 110 S.Ct., at 2342. Had the appellants in Bacchus lost their bid for retroactivity, for example, they would nonetheless have won protection from the future imposition of discriminatory taxes, and the same goes for the petitioner here. Assuming that pure prospectivity may be had at all, moreover, its scope must necessarily be limited to a small number of cases;

its possibility is therefore unlikely to deter the broad class of prospective challengers of civil precedent. See generally Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va.L.Rev. 201, 215 (1965).

Of course, retroactivity in civil cases must be limited by the need for finality, see Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, just as some have done in the criminal context with respect to the distinction between direct review and habeas: why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring? It is also objected that in civil cases unlike criminal there is more potential for litigants to freeload on those without whose labor the new rule would never have come into being. (Criminal defendants are already potential litigants by virtue of their offense, and invoke retroactivity only by way of defense; civil beneficiaries of new rules may become litigants as a result of the law change alone, and use it as a weapon.) That is true of the petitioner now before us, which did not challenge the Georgia law until after its fellow liquor distributors had won their battle in Bacchus. To apply the rule of Bacchus to **2447 the parties in that case but not in this one would not, therefore, provoke Justice Harlan's attack on modified prospectivity as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a *542 stream of similar cases to flow by unaffected by that new rule." Mackey, 401 U.S., at 679, 91 S.Ct., at 1173 (opinion concurring in judgments in part and dissenting in part); see also Smith, supra, at 214-215, 110 S.Ct., at 2350-2351 (STEVENS, J., dissenting). Beam had yet to enter the waters at the time of our decision in Bacchus, and yet we give it Bacchus' benefit. Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicata; and that it should not be applied to those who only exploit others' efforts by litigating in the new rule's wake.

As to the former, independent interests are at stake; and with respect to the latter, the distinction would be too readily and unnecessarily overcome. While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties." Federated Department Stores, Inc. v. Moittie, 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103 (1981) (quoting Baldwin v. Iowa State Traveling Men's Assn., 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931)). Finality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time. As for the putative hangers-on, they are merely asserting a right that the Court has told them is theirs in law, that the Court has not deemed necessary to apply on a prospective basis only, and that is not otherwise barred by state procedural requirements. They cannot be characterized as freeloaders any more than those who seek vindication under a new rule on facts arising after the rule's announcement. Those in each class rely on the labors of the first successful litigant. We might, of course, limit retroactive application to those who at least tried to fight their own battles by litigating before victory was certain. To this possibility, it is *543 enough to say that distinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review.

Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible applications of the Chevron Oil analysis, however irrelevant Chevron Oil may otherwise be to this case. Because the rejection of modified prospectivity

precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case. See Simpson v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor, 681 F.2d 81, 85-86 (CA1 1982), cert. denied *sub nom. Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, United States Dept. of Labor*, 459 U.S. 1127, 103 S.Ct. 762, 74 L.Ed.2d 977 (1983); see also Note, 1985 U.Ill.L.Rev. 117, 131-132. Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. **2448 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. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we *544 say here precludes consideration of individual equities when deciding remedial issues in particular cases.

IV

The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in McKesson. As we have observed repeatedly, federal "issues of remedy ... may well be intertwined with, or their consideration obviated by, issues of state law." Bacchus, 468 U.S., at 277, 104 S.Ct., at 3058. Nothing we say here deprives respondents of their opportunity to raise procedural bars

to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal. See *Estate of Donnelly*, 397 U.S., at 296, 90 S.Ct., at 1039 (Harlan, J., concurring); cf. *Lemon*, 411 U.S., at 203, 93 S.Ct., at 1471.

The judgment is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice WHITE, concurring in the judgment.

I agree with Justice SOUTER that the opinion in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), may reasonably be read as extending the benefit of the judgment in that case to the appellant Bacchus Imports. I also agree that the decision is to be applied to other litigants whose cases were not final at the time of the *Bacchus* decision.

This would be true under any one of several suppositions. First, if the Court in that case thought its decision to have been reasonably foreseeable and *545 hence not a new rule, there would be no doubt that it would be retroactive to all similarly situated litigants. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), would not then have been implicated. Second, even if retroactivity depended upon consideration of the *Chevron Oil* factors, the Court may have thought that retroactive application was proper. Here, it should be noted that although the dissenters in *Bacchus*—including Justice O'CONNOR—agreed that the Court erred in deciding the Twenty-first Amendment issue against the State, they did not argue that the Court erred in giving the appellant the benefit of its decision. *Bacchus, supra*, at 278, 104 S.Ct., at 3059 (STEVENS, J., dissenting).

Third, even if—as Justice O'CONNOR now argues—the Court was quite wrong in doing so, *post*, at 2453-2456, that is water over the dam, irretrievably it seems to me.

There being no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated,^{FN*} and **2449 *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), having overruled such a practice in criminal cases (a decision from which I dissented and still believe wrong, but which I now follow on the basis of *stare decisis*),

I agree that the petitioner here should have the benefit of *Bacchus*, just as Bacchus Imports did. Hence I concur in the judgment of the Court.

FN* See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-143, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969); *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25, 84 S.Ct. 1051, 1058-1059, 12 L.Ed.2d 98 (1964); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 422, 84 S.Ct. 461, 468, 11 L.Ed.2d 440 (1964); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940).

Nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court. See, e.g., *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969).

This *546 was what Justice Stewart wrote for the Court in *Chevron Oil*, summarizing what was deemed to be the essence of those cases. *Chevron Oil, supra*, at 105-109, 92 S.Ct., at 355-357. This was also what Justice O'CONNOR wrote for the plurality in *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990). I joined that opinion and would not depart from it. Nor, without overruling *Chevron Oil* and those other cases before and after *Chevron Oil*, holding that certain decisions will be applied prospectively only, can anyone sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system.

Hence, I do not understand how Justice SOUTER can

cite the cases on prospective operation, *ante*, at 2443-2444, and yet say that he need not speculate as to the propriety of pure prospectivity, *ante*, at 2448. The propriety of prospective application of decision in this Court, in both constitutional and statutory cases, is settled by our prior decisions. To nevertheless "speculate" about the issue is only to suggest that there may come a time when our precedents on the issue will be overturned.

Plainly enough, Justices SCALIA, MARSHALL, and BLACKMUN would depart from our precedents. Justice SCALIA would do so for two reasons, as I read him. *Post*, at 2450. First, even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them. Second, Justice SCALIA, fearful of our ability and that of other judges to resist the temptation to overrule prior cases, would maximize the injury to the public interest when overruling occurs, which would tend to deter them from departing from established precedent.

*547 I am quite unpersuaded by this line of reasoning and hence concur in the judgment on the narrower ground employed by Justice SOUTER. Justice BLACKMUN, with whom Justice MARSHALL and Justice SCALIA join, concurring in the judgment. I join Justice SCALIA's opinion because I agree that failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication. It seems to me that our decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), makes clear that this Court's function in articulating new rules of decision must comport with its duty to decide only "Cases" and "Controversies." See U.S. Const., Art. III, § 2, cl. 1. Unlike a legislature, we do not promulgate new rules to "be applied prospectively only," as the dissent, *post*, at 2451, and perhaps Justice Souter, would have it. The nature of **2450 judicial review constrains us to consider the case that is actually before us, and, if it requires us to announce a new rule, to do so in the

context of the case and apply it to the parties who brought us the case to decide. To do otherwise is to warp the role that we, as judges, play in a Government of limited powers.

I do not read Justice SCALIA's comments on the division of federal powers to reject the idea expressed so well by the last Justice Harlan that selective application of new rules violates the principle of treating similarly situated defendants the same. See *Mackey v. United States*, 401 U.S. 667, 678-679, 91 S.Ct. 1160, 1172-1173, 28 L.Ed.2d 404 (1971), and *Desist v. United States*, 394 U.S. 244, 258-259, 89 S.Ct. 1030, 1038-1039, 22 L.Ed.2d 248 (1969) (dissenting opinion), on which *Griffith* relied. This rule, which we have characterized as a question of equity, is not the remedial equity that the dissent seems to believe can trump the role of adjudication in our constitutional scheme. See *post*, at 2451-2452. It derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still *548 come to court. We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce.

Application of new decisional rules does not thwart the principles of *stare decisis*, as the dissent suggests. See *post*, at 2452. The doctrine of *stare decisis* profoundly serves important purposes in our legal system. Nearly a half century ago, Justice Roberts cautioned: "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113, 64 S.Ct. 455, 463, 88 L.Ed. 561 (1944) (dissenting opinion). The present dissent's view of *stare decisis* would rob the doctrine of its vitality through eliminating the tension between the current controversy and the new rule. By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.

Like Justice SCALIA, I conclude that prospectivity, whether “selective” or “pure,” breaches our obligation to discharge our constitutional function.

Justice SCALIA, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in the judgment. I think I agree, as an abstract matter, with Justice SOUTER's reasoning, but that is not what leads me to agree with his conclusion. I would no more say that what he calls “selective prospectivity” is impermissible because it produces inequitable results than I would say that the coercion of confessions is impermissible for that reason. I believe that the one, like the other, is impermissible simply because it is not allowed by the Constitution. Deciding between a constitutional course and an unconstitutional one does not pose a question of choice of law.

*549 If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to “tak [ing] Care that the Laws be faithfully executed,” Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of “[t]he Executive power” may be familiar to other legal systems, but is alien to our own. So also, I think, “[t]he judicial Power of the United States” conferred upon this Court and such inferior courts as Congress may establish, Art. III, **2451 § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power “to say what the law is,” Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses “difficulties of a ... practical sort,” *ante*, at 2443, when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law-making; to eliminate them is to render courts substantially more free to “make new law,” and thus to alter in a fundamental way the assigned balance

of responsibility and power among the three branches.

For this reason, and not reasons of equity, I would find both “selective prospectivity” and “pure prospectivity” beyond our power.

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice KENNEDY join, dissenting. The Court extends application of the new rule announced in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), retroactively to all parties, without consideration of the analysis *550 described in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Justice SOUTER bases this determination on “principles of equality and *stare decisis*.” *Ante*, at 2446. To my mind, both of these factors lead to precisely the opposite result.

Justice BLACKMUN and Justice SCALIA concur in the judgment of the Court but would abrogate completely the Chevron Oil inquiry and hold that all decisions must be applied retroactively in all cases. I explained last Term that such a rule ignores well-settled precedent in which this Court has refused repeatedly to apply new rules retroactively in civil cases. See American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 188-200, 110 S.Ct. 2323, 2336-2343, 110 L.Ed.2d 148 (plurality opinion). There is no need to repeat that discussion here. I reiterate, however, that precisely because this Court has “the power ‘to say what the law is,’” Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803),” *ante*, at 2451 (SCALIA, J., concurring in judgment), when the Court changes its mind, the law changes with it. If the Court decides, in the context of a civil case or controversy, to change the law, it must make the subsequent determination whether the new law or the old is to apply to conduct occurring before the law-changing decision. Chevron Oil describes our long-established procedure for making this inquiry.

I

I agree that the Court in Bacchus applied its rule retroactively to the parties before it. The Bacchus opinion is silent on the retroactivity question. Given

that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of silence is that the Court followed its customary practice.

The *Bacchus* Court erred in applying its rule retroactively. It did not employ the *Chevron Oil* analysis, but should have. Had it done so, the Court would have concluded that the *Bacchus* rule should be applied prospectively only. Justice SOUTER today concludes that, even in the absence of an independent examination of retroactivity, once the Court applies *551 a new rule retroactively to the parties before it, it must thereafter apply the rule retroactively to everyone. I disagree. Without a determination that retroactivity is appropriate under *Chevron Oil*, neither equality nor *stare decisis* leads to this result.

As to "equality," Justice SOUTER believes that it would be unfair to withhold the benefit of the new rule in *Bacchus* to litigants **2452 similarly situated to those who received the benefit in that case. *Ante*, at 2444, 2446. If Justice SOUTER is concerned with fairness, he cannot ignore *Chevron Oil*; the purpose of the *Chevron Oil* test is to determine the equities of retroactive application of a new rule. See *Chevron Oil*, *supra*, 404 U.S., at 107-108, 92 S.Ct., at 355-356; *American Trucking*, *supra*, at 191, 110 S.Ct., at 2337.

Had the *Bacchus* Court determined that retroactivity would be appropriate under *Chevron Oil*, or had this Court made that determination now, retroactive application would be fair. Where the *Chevron Oil* analysis indicates that retroactivity is not appropriate, however, just the opposite is true. If retroactive application was inequitable in *Bacchus* itself, the Court only hinders the cause of fairness by repeating the mistake. Because I conclude that the *Chevron Oil* test dictates that *Bacchus* not be applied retroactively, I would decline the Court's invitation to impose liability on every jurisdiction in the Nation that reasonably relied on pre-*Bacchus* law.

Justice SOUTER also explains that "*stare decisis*" compels his result. *Ante*, at 2446. By this, I assume he means that the retroactive application of the *Bacchus* rule to the parties in that case is itself a decision of the Court to which the Court should now defer in deciding

the retroactivity question in this case. This is not a proper application of *stare decisis*. The Court in *Bacchus* applied its rule retroactively to the parties before it without any analysis of the issue. This tells us nothing about how this case—where the *Chevron Oil* question is squarely presented—should come out.

Contrary to Justice SOUTER's assertions, *stare decisis* cuts the other way in this case. At its core, *stare decisis* allows*552 those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. A decision *not* to apply a new rule retroactively is based on principles of *stare decisis*. By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law. See, *American Trucking*, 496 U.S., at 197, 110 S.Ct., at 2341 (plurality opinion). ("[P]rospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding"); *id.*, at 205, 110 S.Ct., at 2345 (SCALIA, J., concurring in judgment) (imposition of retroactive liability on a litigant would "upset that litigant's settled expectations because the earlier decision for which *stare decisis* effect is claimed ... overruled prior law. That would turn the doctrine of *stare decisis* against the very purpose for which it exists"). If a *Chevron Oil* analysis reveals, as it does, that retroactive application of *Bacchus* would unjustly undermine settled expectations, *stare decisis* dictates strongly against Justice SOUTER's holding.

Justice SOUTER purports to have restricted the application of *Chevron Oil* only to a limited extent. *Ante*, at 2447. The effect appears to me far greater. Justice SOUTER concludes that the *Chevron Oil* analysis, if ignored in answering the narrow question of retroactivity as to the parties to a particular case, must be ignored also in answering the far broader question of retroactivity as to all other parties. But it is precisely in determining general retroactivity that the *Chevron Oil* test is most needed; the broader the potential reach of a new rule, the greater the potential disruption of settled expectations. The inquiry the Court summarized in *Chevron Oil* represents longstanding doctrine on the application of nonretroactivity to civil cases. See *American Trucking*, *supra*, at 188-200, 110

S.Ct., at 2336. Justice SOUTER today ignores this well-established precedent and seriously curtails the Chevron Oil inquiry. His reliance upon *stare decisis* in reaching this conclusion becomes all the more ironic.

****2453 *553 II**

Faithful to this Court's decisions, the Georgia Supreme Court in this case applied the analysis described in Chevron Oil in deciding the retroactivity question before it. Subsequently, this Court has gone out of its way to ignore that analysis. A proper application of Chevron Oil demonstrates, however, that Bacchus should not be applied retroactively.

Chevron Oil describes a three-part inquiry in determining whether a decision of this Court will have prospective effect only:

"First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, ... we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weigh [h] the inequity imposed by retroactive application, for [w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S., at 106-107, 92 S.Ct., at 355 (citations and internal quotation marks omitted).

Bacchus easily meets the first criterion. That case considered a Hawaii excise tax on alcohol sales that exempted certain locally produced liquor. The Court held that the tax, by discriminating in favor of local products, violated the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, by interfering with interstate commerce. 468 U.S., at 273, 104 S.Ct., at 3056. The Court rejected the State's argument that any violation of ordinary Commerce Clause principles was, in the case of alcohol sales, overborne by the State's plenary

powers under § 2 of the *554 Twenty-first Amendment to the United States Constitution. That section provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Court noted that language in some of our earlier opinions indicated that § 2 did indeed give the States broad power to establish the terms under which imported liquor might compete with domestic. See 468 U.S., at 274, and n. 13, 104 S.Ct., at 3057, and n. 13. Nonetheless, the Court concluded that other cases had by then established that "the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." Id., at 275, 104 S.Ct., at 3057. Relying on Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964), California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984), the Court concluded that § 2 did not protect the State from liability for economic protectionism. 468 U.S., at 275-276, 104 S.Ct., at 3057-3058.

The Court's conclusion in Bacchus was unprecedented.

Beginning with State Board of Equalization of California v. Young's Market Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), an uninterrupted line of authority from this Court held that States need not meet the strictures of the so-called "dormant" or "negative" Commerce Clause when regulating sales and importation of liquor within the State. Young's Market is directly on point. There, the Court rejected precisely the argument it eventually accepted in Bacchus. The California statute at issue in Young's Market imposed a license fee for the privilege of importing beer into the State. The Court concluded that "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege" because doing so directly burdens interstate commerce. 299 U.S., at 62, 57 S.Ct., at 78. Section 2 **2454 changed all of that. The Court answered

appellees' assertion that § 2 did not abrogate*555 negative Commerce Clause restrictions. The contrast between this discussion and the Court's rule in Bacchus is stark:

"[Appellees] request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

"The plaintiffs argue that, despite the Amendment, a State may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" Id., at 62-63, 57 S.Ct., at 78-79.

Numerous cases following Young's Market are to the same effect, recognizing the States' broad authority to regulate commerce in intoxicating beverages unconstrained by negative Commerce Clause restrictions. See, e.g., Ziffirin, Inc. v. Reeves, 308 U.S. 132, 138, 60 S.Ct. 163, 166, 84 L.Ed. 128 (1939); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951 (1945); Joseph B. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966); Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275, 283-284, 93 S.Ct. 483, 488-489, 34 L.Ed.2d 472 (1972); see generally Bacchus, supra, at 281-282, 104 S.Ct., at 3060-3061 (STEVENS, J., dissenting).

The cases that the Bacchus Court cited in support of its new rule in fact provided no notice whatsoever of the impending change. Idlewild, Midcal, and Capital Cities, supra, all involved States' authority to regulate the sale and importation*556 of alcohol when doing so conflicted directly with legislation passed by Congress

pursuant to its powers under the Commerce Clause. The Court in each case held that § 2 did not give States the authority to override congressional legislation. These essentially were Supremacy Clause cases; in that context, the Court concluded that the Twenty-first Amendment had not "repealed" the Commerce Clause. See Idlewild, supra, 377 U.S., at 331-332, 84 S.Ct., at 1297-1298; Midcal, supra, 445 U.S., at 108-109, 100 S.Ct., at 944-945; Capital Cities, supra, 467 U.S., at 712-713, 104 S.Ct., at 2707.

These cases are irrelevant to Bacchus because they involved the relation between § 2 and Congress' authority to legislate under the (positive) Commerce Clause. Bacchus and the Young's Market line concerned States' authority to regulate liquor unconstrained by the negative Commerce Clause in the absence of any congressional pronouncement. This distinction was clear from Idlewild, Midcal, and Capital Cities themselves. Idlewild and Capital Cities acknowledged explicitly that § 2 trumps the negative Commerce Clause. See Idlewild, supra, 377 U.S., at 330, 84 S.Ct., at 1296 (" 'Since the Twenty-first Amendment, ... the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause...' "), quoting Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394, 59 S.Ct. 254, 255, 83 L.Ed. 243 (1939); Capital Cities, supra, 467 U.S., at 712, 104 S.Ct., at 2707 (" 'This Court's decisions ... have confirmed that the [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause.' ... [Section] 2 reserves to the States power to impose burdens on interstate **2455 commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause"), quoting Craig v. Boren, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976).

In short, Bacchus' rule that the Commerce Clause places restrictions on state power under § 2 in the absence of any congressional action came out of the blue. Bacchus overruled the Young's Market line in this regard and created a new rule. See *557Bacchus, 468 U.S., at 278-287, 104 S.Ct., at 3059-3064 (STEVENS, J., dissenting) (explaining just how new the rule of that case was).

There is nothing in the nature of the *Bacchus* rule that dictates retroactive application. The negative Commerce Clause, which underlies that rule, prohibits States from interfering with interstate commerce. As to its application in *Bacchus*, that purpose is fully served if States are, from the date of that decision, prevented from enacting similar tax schemes. Petitioner James Beam argues that the purposes of the Commerce Clause will not be served fully unless *Bacchus* is applied retroactively. The company contends that retroactive application will further deter States from enacting such schemes. The argument fails. Before our decision in *Bacchus*, the State of Georgia was fully justified in believing that the tax at issue in this case did not violate the Commerce Clause.

Indeed, before *Bacchus* it did not violate the Commerce Clause. The imposition of liability in hindsight against a State that, acting reasonably would do the same thing again, will prevent no unconstitutionality. See *American Trucking*, 496 U.S., at 180-181, 110 S.Ct. at 2332-2333 (plurality opinion).

Precisely because *Bacchus* was so unprecedented, the equities weigh heavily against retroactive application of the rule announced in that case. "Where a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern.... By contrast, because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *American Trucking*, *supra*, at 182, 110 S.Ct., at 2333 (plurality opinion). In this case, Georgia reasonably relied not only on the *Young's Market* line of cases from this Court, but a Georgia Supreme Court decision upholding the predecessor to the tax statute at issue. See *Scott v. Georgia*, 187 Ga. 702, 705, 2 S.E.2d 65, 66 (1939), relying on *Young's Market* and *Indianapolis Brewing*.

*558 Nor is there much to weigh in the balance. Before *Bacchus*, the legitimate expectation of James Beam and other liquor manufacturers was that they had to pay the tax here at issue and that it was constitutional. They made their business decisions accordingly. There is little hardship to these companies from not receiving a tax refund they had no

reason to anticipate.

The equitable analysis of *Chevron Oil* places limitations on the liability that may be imposed on unsuspecting parties after this Court changes the law. James Beam claims that if *Bacchus* is applied retroactively, and the Georgia excise tax is declared to have been collected unconstitutionally from 1982 to 1984, the State owes the company a \$2.4 million refund. App. 8. There are at least two identical refund actions pending in the Georgia courts. These plaintiffs seek refunds of almost \$28 million. See *Heublein, Inc. v. Georgia*, Civ.Action No. 87-3542-6 (DeKalb Super.Ct., Apr. 24, 1987); *Joseph E. Seagram & Sons, Inc. v. Georgia*, Civ.Action No. 87-7070-8 (DeKalb Super.Ct., Sept. 4, 1987); Brief for Respondents 26, n. 8. The State estimates its total potential liability to all those taxed at \$30 million. *Id.*, at 9. To impose on Georgia and the other States that reasonably relied on this Court's established precedent such extraordinary retroactive liability, at a time when most States are struggling to fund even the most basic services, is the height of unfairness.

**2456 We are not concerned here with a State that reaped an unconstitutional windfall from its taxpayers. Georgia collected in good faith what was at the time a constitutional tax. The Court now subjects the State to potentially devastating liability without fair warning. This burden will fall not on some corrupt state government, but ultimately on the blameless and unexpecting citizens of Georgia in the form of higher taxes and reduced benefits. Nothing in our jurisprudence compels that result; our traditional analysis of retroactivity dictates against it.

*559 A fair application of the *Chevron Oil* analysis requires that *Bacchus* not be applied retroactively. It should not have been applied even to the parties in that case. That mistake was made. The Court today compounds the problem by imposing widespread liability on parties having no reason to expect it. This decision is made in the name of "equality" and "*stare decisis*." By refusing to take into account the settled expectations of those who relied on this Court's established precedents, the Court's decision perverts the meaning of both those terms. I respectfully dissent.

U.S.Ga.,1991.
James B. Beam Distilling Co. v. Georgia
501 U.S. 529, 111 S.Ct. 2439, 59 USLW 4735, 115
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Briefs and Other Related Documents ([Back to top](#))

- [1990 WL 601353](#) (Oral Argument) Oral Argument (Oct. 30, 1990)
- [1990 WL 10022364](#) (Appellate Brief) Reply Brief for Petitioner (Oct. Term 1990)
- [1990 WL 10022362](#) (Appellate Brief) Amicus Curiae Brief of the States of California, Wisconsin, New Mexico, Ohio, Michigan, Nebraska, Hawaii West Virginia, Washington, South Dakota, Utah, Connecticut, Florida, Idaho, and the District of Columbia in Support of Respondents (Aug. 29, 1990)
- [1990 WL 10022363](#) (Appellate Brief) Brief of Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Maine, Maryland, Minnesota, New Jersey, New York, Utah, Vermont, Virginia and Wisconsin as Amici Curiae in Support of Respondents (Aug. 29, 1990)
- [1990 WL 505738](#) (Appellate Brief) BRIEF FOR RESPONDENTS (Aug. 29, 1990)
- [1990 WL 505737](#) (Appellate Brief) BRIEF FOR THE PETITIONER (Jul. 26, 1990)
- [1989 WL 1128055](#) (Appellate Brief) Petitioner's Reply Brief (Dec. 11, 1989)

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EXHIBIT 4

C

Superior Court of Pennsylvania.
 Arlene B. LELAND and Donald C. Leland
 v.
 J. T. BAKER CHEMICAL CO., Appellant.
 Argued June 12, 1980.
 Filed Dec. 5, 1980.

Injured lab technician brought products liability action against manufacturer for alleged defect in manufacture of glass bottle containing sulfuric acid. The Court of Common Pleas entered a verdict for manufacturer and lab technician filed for a new trial or judgment n. o. v. The Court of Common Pleas, Civil Division, Philadelphia County, Nos. 447 and 448 December Term, 1966, Takiff, J., granted lab technician's motion for a new trial and the manufacturer appealed. The Superior Court, Nos. 506-507 October Term, 1979, Hoffman, J., held that: (1) trial court did not err in applying decision of Supreme Court, which provided that the term "unreasonably dangerous" would be improper in jury instruction in products liability case, to grant new trial to lab technician, despite fact that Supreme Court decision was made after trial but before trial court ruled on motion for new trial; (2) retroactive application of Supreme Court decision to grant new trial to lab technician did not result in a substantially inequitable result, as the inordinate delay of the trial court in disposing of lab technician's motion was equally prejudicial to both parties, manufacturer did not detrimentally rely upon the prior rule, and it was not inequitable to deprive manufacturer of the unanimous verdict which followed from a misleading instruction; and (3) Supreme Court decision did not expressly limit its holding to cases involving manufacturing and/or design defects, thus the trial court correctly applied the decision to a case involving conscious design choices.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪ 1107

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(A) Decision in General

30k1107 k. Effect of Change in Law. Most

Cited Cases

An intervening change in law must be applied to cases which are on direct appeal when change occurred.

[2] Appeal and Error 30 ↪ 1107

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(A) Decision in General

30k1107 k. Effect of Change in Law. Most

Cited Cases

Trial court did not err in applying decision of Supreme Court, which provided that the term "unreasonably dangerous" would be improper in jury instruction in products liability case, to grant new trial to lab technician injured by alleged defect in manufacturer's product, despite fact that Supreme Court decision was made after trial but before ruling was made on motion for new trial.

[3] Courts 106 ↪ 100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
 Retroactive application of Supreme Court decision to grant new trial to lab technician injured by alleged defect in manufacturer's product did not result in a substantially inequitable result, as the four-year inordinate delay of the trial court in disposing of lab technician's motion was equally prejudicial to both parties, manufacturer did not detrimentally rely upon the prior rule, and it was not inequitable to deprive manufacturer of the unanimous verdict which followed from a misleading instruction.

[4] Appeal and Error 30 ↪ 1031(1)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)1 In General

30k1031 Presumption as to Effect of Error

30k1031(1) k. In General. Most Cited

Cases

Lapse of time in ruling on motion for new trial is presumptively prejudicial to all parties, not only the party opposing a motion for a new trial.

[5] New Trial 275 ↪ 155

275 New Trial

275III Proceedings to Procure New Trial

275k155 k. Time for Hearing and Decision. Most

Cited Cases

Where delay in ruling on motion for a new trial in products liability action by injured lab technician against manufacturer of sulfuric acid bottle could not be traced to the laches of the lab technician, the party moving for new trial, trial court did not err in granting new trial.

[6] Appeal and Error 30 ↪ 1177(2)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1177 Necessity of New Trial

30k1177(2) k. Defects in Proceedings in

Lower Court in General. Most Cited Cases

Appellate court's unhappiness with delay is not a sufficient ground for ordering a new trial.

[7] Courts 106 ↪ 100(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

106k100 In General

106k100(1) k. In General; Retroactive or

Prospective Operation. Most Cited Cases

Supreme Court decision, which provided that the term "unreasonably dangerous" would be improper in a jury

instruction in a products liability case, did not expressly limit its holding to cases involving manufacturing and/or design defects; thus the trial court correctly applied the decision retroactively to a case involving conscious design choices.

****394 *575** George J. Lavin, Jr., Philadelphia, for appellant.

Keith S. Erbstein, Philadelphia, for appellees.

Before BROSKY, HOFFMAN and CIRILLO, JJ. [FN*]

[FN* Judge VINCENT A. CIRILLO, of the Court of Common Pleas of Montgomery County, Pennsylvania is sitting by designation.

HOFFMAN, Judge:

Appellant contends that Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978), which barred the use of the words "unreasonably dangerous" in jury instructions in cases involving strict products liability, should not have been applied retroactively. We disagree and, accordingly, affirm ****395** the order of the lower court granting a new trial.

***576** Appellee Arlene B. Leland was employed as a laboratory technician at a Philadelphia hospital. Her duties included cleaning utensils in reagent grade sulfuric acid manufactured by appellant. On December 11, 1964, appellee obtained two glass bottles of this acid from a store-room. When she returned to her station, Mrs. Leland placed one of the one-gallon bottles onto the counter. While lifting the other, she heard the sound of breaking glass. The next thing she remembered was lying on the floor in a pool of sulfuric acid. Mrs. Leland testified that she did not strike the bottle against the counter top, that she did not see the bottle break, and that she believed that it had broken spontaneously in mid-air.

In December, 1966, appellees instituted this action, asserting, inter alia, that appellant was strictly liable under the Restatement (Second) of Torts s 402A (1965). [FN1] At the trial, which commenced on January 22, 1975, [FN2] appellees' expert witness

opined that the glass bottle was defective and could have broken spontaneously because of internal stresses, improper annealing, or minute scratches on the surface of the glass, each of which might have weakened the bottle. The expert testified also that the product was not packaged safely because there was technology available in 1964 to provide secure packaging for such a potentially lethal product. Thus, appellees asserted alternative theories of defectiveness. After the jury returned a unanimous verdict for appellant, appellees filed a motion for a new trial or judgment n. o. v. The lower court granted the motion for a new trial. This appeal followed.

FN1. Appellees also commenced a concurrent action in the United States District Court for the Eastern District of Pennsylvania. That action was dismissed without prejudice ostensibly because the state action was pending and certain defendants could not be joined in the federal action.

FN2. The record does not reveal the reason for the extreme delay before trial.

At the time of trial, Pennsylvania law required that a plaintiff in a products liability case based upon strict liability prove that the "product (was) in a defective condition *577 unreasonably dangerous to the user or consumer" Restatement (Second) of Torts s 402A (1965) (emphasis added). See Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966) (adopting section 402A). In the present case, the lower court instructed the jury as follows:

If you find that an unsafe and improper use of the product was the legal cause of the accident rather than any alleged defective condition, then you must find for the defendant. But, if you find that the product was defective, and that the defect was the legal cause of an unreasonable danger resulting in injury to the plaintiff, then you must find for the plaintiff.

Appellees repeatedly excepted to that charge and based their motion for a new trial upon the ground that the "unreasonably dangerous" language had no place in a jury charge on the issue of strict liability. After

appellees' motion was filed but before it was determined, our Supreme Court decided Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975), and Azzarello v. Black Bros. Co., supra. In Berkebile, the late Chief Justice JONES, joined by Justice NIX, with five Justices concurring in the result, stated "that the 'reasonable man' standard in any form has no place in a strict liability case." Id. at 96-97, 337 A.2d at 900. Later, a unanimous Court echoed the pronouncement of Chief Justice JONES: For the term guarantor to have any meaning in this context the supplier must at least provide a product which is designed to make it safe for the intended use. Under this standard, in this type of case, the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use. It is clear that the term "unreasonably dangerous" has no place in the instructions to a jury as to the question of "defect" in this type of case. We therefore agree with the court en banc that the use of the term "unreasonably dangerous" in the charge was misleading and that the appellee was entitled to a new trial.

*578 Azzarello v. Black Bros. Co., supra 480 Pa. at 559-60, 391 A.2d at 1026-1027 (footnotes omitted). When the lower court ultimately granted appellees' motion for a new trial, it based its decision upon Berkebile and Azzarello.

[1][2] Appellant contends that Azzarello should not be retroactively applied. We disagree.

It is the settled common law tradition that judicial precedents normally have retroactive as well as prospective effect. That is, what the court holds to be the law for today for the litigants before it, is the law for persons who come into court hereafter, even though the alleged wrong was committed before today's decision, and today's decision declares illegal what appeared to be legal when it was done.

Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va.L.Rev. 201, 205-06 & n.8 (1965) (footnote omitted). [FN3] Accordingly, our cases have held, in a variety of contexts, that an intervening change in the law must be applied to cases

which are in the throes of direct appeal when the change occurred. [FN4] Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1965), was tried under Georgia law which required a guest to prove gross negligence before recovering damages from his host. Because Pennsylvania had no guest statute, plaintiffs would have recovered if Pennsylvania law were applied. After losing at trial, plaintiffs appealed, claiming that an intervening change of Pennsylvania conflict of laws theory dictated that Pennsylvania, and not Georgia law, should have governed the case. Our Supreme Court stated:

FN3. Accord, Note, The Retroactivity of Minnesota Supreme Court Personal Injury Decisions, 6 Wm. Mitchell L.Rev. 179, 182-88 (1980). See generally, Annot., 111 A.L.R. 1317, 1342-45 (1937).

FN4. In Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1975), the Supreme Court of the United States observed the distinction between cases which are on direct appeal and those subject to collateral attack. When a case is on direct review, the change in the law will be given effect. Id. at 627, 85 S.Ct. at 1736. When, however, the judgment is collaterally attacked on the basis of the subsequent decision, there is no settled rule of retroactive application. Id.

*579 While there are no cases in Pennsylvania dealing with the effect of a change in decisional law pending appeal, there is authority in a closely related field. Unless vested rights are affected, a court's interpretation of a statute is considered to have been the law from its enactment date, despite contrary intervening holdings. Buradus v. General Cement Prods. Co., 159 Pa.Super. 501, 48 A.2d 883 (1946), aff'd 356 Pa. 349, 52 A.2d 205 (1947). In such circumstances, the latest interpretation is applicable to a case whose appeal has not yet been decided.

Moreover, there are occasions when a party is given the benefit of a change in the law in order to prevent an injustice, especially when, as here, the other party could not have changed his position in reliance on the initial

decision. Thus in Reamer's Estate, 331 Pa. 117, 200A.35 (1938), we were willing to correct a decision in a previous appeal of the same case which had been made palpably erroneous by an intervening decision despite the law of the case doctrine. Recently in Brubaker v. Reading Eagle Co., 422 Pa. 63, 221 A.2d 190 (1966), we ordered a new trial to permit the plaintiff to bring his allegations within the actual malice requirement of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Although in Brubaker, the plaintiff was deprived of his original verdict by the change in law, and it thus is the converse of the present problem, it is illustrative of our goal of assuring each litigant a fair adjudication on the merits.

422 Pa. at 625-26, 222 A.2d at 900-901 (footnotes omitted): Thus, the Court held that it was not unfair to grant a new trial **397 based upon the intervening decision even though the plaintiffs had failed to object at the time of trial. [FN5] Similarly, in In re Estate of Riley, 459 Pa. 428, 430, 329 A.2d 511, 512-513 (1974), the Court affirmed an order which granted reconsideration and reargument of an auditor's proposed distribution because another jurisdiction had construed a statute similar to that of Pennsylvania in the interim. In *580 Commonwealth v. Lee, 470 Pa. 401, 404-405, 368 A.2d 690, 692 (1977), the Court stated:

FN5. See also Azzarello v. Black Bros. Co., supra at 552, 391 A.2d at 1023.

We recognize that various inequities arise in all three standards (which determine the effective date of a decision) when one litigant benefits from a decision and another, seemingly similarly situated, is denied the same benefit. We are of the opinion that the Little-Linkletter finality approach, which was first announced in United States v. Schooner Peggy, 1 Cranch 103, (5 U.S. 103), 2 L.Ed. 49 (1801), should remain as the standard for issues of applicability in this Commonwealth. ([FN6])

FN6. In United States v. Schooner Peggy, 1 Cranch (5 U.S.) 103, 110, 2 L.Ed. 49, 51 (1801), Chief Justice MARSHALL stated:

It is, in the general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervened and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation.... In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.

Thus, we hold that the lower court correctly applied Azzarello retroactively. [FN7]

[FN7]. There are many sound reasons for applying judicial pronouncements retroactively. As one writer has stated: On the basis of public policy and fairness, retroactive overruling is the most equitable approach in the area of tort law. The arguments supporting this view are clear and numerous. First, it is not necessary to use the prophylactic doctrine of prospective overruling in the tort area since reliance is generally not a viable argument. Second, by applying the new law to the case before the court, the policy of providing incentive for challenging outmoded legal doctrines is served. Third, the fear that the new rule becomes pure dicta if it is not applied to the case before the court is eliminated. Finally, applying the new rule to cases still in the judicial process promotes the interests of fairness and judicial administration. By accepting review of cases that reach the court after a change in the law, the court avoids the cumbersome task of deciding cases under the old law after the rejection of that law. Because of the delays in legal process, discredited rules of law live on for many years

under prospective overruling.

Note, supra, 6 Wm. Mitchell L.Rev. at 196-97 (footnotes omitted).

*581 [3][4][5][6][7] Appellant also argues, citing Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), that because substantial inequitable results would obtain, retroactive application should be denied. [FN8] We disagree. The inordinate and unexplained delay of the trial court in disposing of appellees' motion was equally prejudicial to both parties. Moreover, appellant, as a supplier of products, cannot seriously contend that it detrimentally relied upon the prior rule because: (1) parties do not alter their tortious conduct to conform to the most recent judicial pronouncements; (2) strict liability per the Restatement**398 is not dependent upon the conduct of the defendant, but rather the condition of the product; and (3) under the facts of this case, the accident occurred before the adoption of section 402A in Pennsylvania. [FN9] Finally, it is not inequitable to deprive appellant of a unanimous verdict which follows from a misleading instruction. Our Supreme Court has cogently stated that the supplier's duty to provide safe products is not determined by any standard of reasonableness. Were we to deny retroactive application, we would be ignoring the very policies that underlie the doctrine of strict liability, and creating one more arbitrary limitation upon a plaintiff's right of recovery. Thus, we hold that Chevron Oil has not been satisfied, see *582 Schreiber v. Republic Intermodal Corp., supra 473 Pa. at 622, 375 A.2d at 1289, and that Azzarello should be retroactively applied. [FN10]

[FN8]. Assuming, arguendo, that Chevron Oil properly applies to common law actions in tort, appellant misconstrues its effect. Appellant suggests that Chevron Oil sets forth a tripartite test which must be met before a decision may be retroactively applied. On the contrary, we read Chevron Oil to require retroactive application unless each of the enumerated criteria are present. 404 U.S. at 105-09, 92 S.Ct. at 354-56. See Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 375 A.2d 1285 (1977). Under Chevron Oil, the

three elements which must appear before the decision will be denied retroactive application are: (1) whether the decision establishes a new principle of law which was not clearly foreshadowed; (2) whether, considering the history and policies underlying the rule, retroactive application will further or retard its operation; and (3) whether retroactive application would produce substantial inequitable results. 404 U.S. at 106-07, 92 S.Ct. at 355.

FN9. Interestingly, appellant does not argue that *Webb v. Zern*, supra, should not be retroactively applied.

FN10. Appellant raises three additional issues which lack merit.

Appellant contends that appellees are not entitled to a new trial because the four year delay in disposing of appellees' motion for a new trial is presumptively prejudicial to it. Although appellant strenuously argues that justice should not be delayed, the case upon which it principally relies states that "a lapse of time is presumptively prejudicial to all parties," not only the party opposing a motion for a new trial. *Shrum v. Pennsylvania Electric Co.*, 440 Pa. 383, 386, 269 A.2d 502, 504 (1970) (emphasis added). In *Shrum*, disposition of plaintiff's motion for a new trial was delayed for seven years because, inter alia, the plaintiff failed to obtain a transcript of the trial proceedings. Thus, *Shrum* does not apply to this case because the delay cannot be traced to the laches of the moving party. We also note that an appellate court's "unhappiness ... with ... delay is not ... a sufficient ground for ordering a new trial" *Exton Drive-In Inc. v. Home Indemnity Co.*, 436 Pa. 480, 486, 261 A.2d 319, 323 (1969). Likewise, we believe that our unhappiness with the delay is not a sufficient reason to reverse an order granting a new trial. Appellant next contends that the jury was properly charged under *Azzarello*. Because the jury was charged in terms of

"unreasonable danger," and because *Azzarello* holds that it is reversible error to use negligence terms in a strict liability instruction, this contention is meritless.

Appellant finally contends that *Azzarello* should not be applied to a case involving conscious design choices. We decline to so limit *Azzarello*. The Supreme Court did not expressly limit its holding to cases involving manufacturing and/or design defects. Indeed, were we to adopt the rule urged by appellant, we would only compound the confusion created by the "unreasonably dangerous" standard in cases such as this which involve both manufacturing defects and conscious design defects.

Order affirmed.

Pa.Super., 1980.

Leland v. J. T. Baker Chemical Co.
282 Pa.Super. 573, 423 A.2d 393.

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EXHIBIT 5

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CHESTER M. VANDERMARK et al., Plaintiffs and Appellants,
v.
FORD MOTOR COMPANY et al., Defendants and Respondents.
L.A. No. 27674.

Supreme Court of California

April 21, 1964.

HEADNOTES

(1) Products Liability--Evidence.

In an action against an automobile manufacturer and an automobile retailer for injuries sustained in an accident allegedly caused by the sudden failure of the automobile's braking system, it was error to strike an expert's testimony as to the possible causes of the braking system's failure and to reject plaintiffs' offer to prove that all of the possible causes were attributable to defendants, particularly where damage to the car precluded determining whether or not the brake master cylinder assembly had been properly installed and adjusted before the accident.

(2) Products Liability--Strict Liability of Manufacturer.

A manufacturer is strictly liable in tort when he places an article on the market knowing that it is to be used without inspection for defects and the article proves to have a defect that causes injury to a human being; such liability, being strict, encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, and equipment, note, 78 A.L.R.2d 460.
See also Am.Jur.2d, Automobiles and Highway

Traffic, § 646; Am.Jur., Sales (1st ed § 799).

(3) Products Liability--Strict Liability of Manufacturer.

The rules relating to strict liability of a manufacturer for injuries caused by a defective completed product focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product, and they apply regardless *257 of what part of the manufacturing process the manufacturer chooses to delegate to third parties.

(4) Products Liability--Strict Liability of Manufacturer.

An automobile manufacturer who delivers cars to its dealers that are not ready to be driven away by the ultimate purchasers but relies on its dealers to make the final inspections, corrections, and adjustments necessary to make the cars ready for use cannot delegate its duty to have its cars delivered to the ultimate consumer free from dangerous defects, and thus it cannot escape liability on the ground that a defect in a particular car may have been caused by something one of its authorized dealers did or failed to do.

(5) Products Liability--Strict Liability of Manufacturer--Nonsuit.

In an action against an automobile manufacturer for injuries sustained in an accident allegedly caused by the sudden failure of the automobile's braking system, it was error to grant a nonsuit on causes of action based on strict liability where plaintiffs introduced or offered substantial evidence that they were injured as a result of a defect that was present in the car when the manufacturer's authorized dealer delivered it to plaintiff driver.

(6) Negligence § 177(8)--Trial--Nonsuit.

In an action against an automobile manufacturer for injuries sustained in an accident allegedly caused by the sudden failure of the automobile's braking system, it was error to grant a nonsuit on causes of action based on negligence where plaintiffs introduced or offered substantial evidence that the defect was caused by some negligent conduct for which the manufacturer was

responsible.

(7) Products Liability--Strict Liability of Retailer.

Retailers, like manufacturers, are engaged in the business of distributing goods to the public and are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries from defective products.

(8) Products Liability--Strict Liability of Retailer.

As a retailer engaged in the business of distributing goods to the public, an automobile dealer is strictly liable in tort for personal injuries caused by defects in cars sold by it.

(9) Products Liability--Strict Liability of Retailer.

In an action against an automobile retailer for injuries sustained in an accident allegedly caused by the sudden failure of the automobile's braking system, it was immaterial that defendant restricted its contractual liability to the purchaser of the car, since it was strictly liable in tort.

(10) Products Liability--Strict Liability of Retailer.

The requirement of timely notice of breach of warranty (Civ. Code, § 1769) is not applicable to the strict tort liability of an automobile dealer who sells a defective automobile. *258

(11) Products Liability--Strict Liability of Retailer--Directed Verdict.

In an action against an automobile retailer for injuries sustained in an accident allegedly caused by the sudden failure of the automobile's braking system, although plaintiffs sought to impose strict liability on the retailer on the theory of sales-act warranties which allegedly were not applicable due to a disclaimer in the retailer's contract with the purchaser of the car and failure to give timely notice of breach of warranty, it was error to direct a verdict for the retailer where plaintiffs pleaded and introduced substantial evidence of all of the facts necessary to establish strict liability in tort.

SUMMARY

APPEAL from judgments of the Superior Court of Los Angeles County. Arthur Crum, Judge. One judgment

affirmed in part and reversed in part; other judgment reversed.

Action for personal injuries sustained by plaintiffs in an automobile accident allegedly caused by the sudden failure of the car's braking system. Judgment of nonsuit in favor of defendant automobile manufacturer reversed; judgment for defendant automobile dealer affirmed in part and reversed in part.

COUNSEL

Edward L. Lascher and Donald C. Lozano for Plaintiffs and Appellants.

Eugene P. Fay, Edward I. Pollock and Pollock, Pollock & Fay as Amici Curiae on behalf of Plaintiffs and Appellants.

Dryden, Harrington, Horgan & Swartz, Vernon G. Foster, Moss, Lyon & Dunn, Gerold C. Dunn and Henry F. Walker for Defendants and Respondents.

TRAYNOR, J.

In October 1958 plaintiff Chester Vandermark bought a new Ford automobile from defendant Lorimer Diesel Engine Company, an authorized Ford dealer doing business as Maywood Bell Ford. About six weeks later, while driving on the San Bernardino Freeway, he lost control of the car. It went off the highway to the right and collided with a light post. He and his sister, plaintiff Mary Tresham, suffered serious injuries. They brought this action for damages against Maywood Bell Ford and the Ford Motor Company, which manufactured and assembled the car. They pleaded causes of action for breach of warranty and negligence. The trial court granted Ford's motion for a nonsuit on all causes of action and directed a verdict in favor of Maywood Bell on *259 the warranty causes of action. The jury returned a verdict for Maywood Bell on the negligence causes of action, and the trial court entered judgment on the verdict. Plaintiffs appeal.

Vandermark had driven the car approximately 1,500 miles before the accident. He used it primarily in town, but drove it on two occasions from his home in

Huntington Park to Joshua Tree in San Bernardino County. He testified that the car operated normally before the accident except once when he was driving home from Joshua Tree. He was in the lefthand westbound lane of the San Bernardino Freeway when traffic ahead slowed. He applied the brakes and the car "started to make a little dive to the right and continued on across the two lanes of traffic till she hit the shoulder. Whatever it was then let go and I was able to then pull her back into the road." He drove home without further difficulty, but before using the car again, he took it to Maywood Bell for the regular 1,000-mile new car servicing. He testified that he described the freeway incident to Maywood Bell's service attendant, but Maywood Bell's records do not indicate that any complaint was made.

After the car was serviced, Vandermark drove it in town on short trips totaling approximately 300 miles. He and his sister then set out on another trip to Joshua Tree. He testified that while driving in the right-hand lane of the freeway at about 45 to 50 miles per hour, "the car started to make a little shimmy or weave and started pulling to the right. ... I tried to pull back, but it didn't seem to come, so I applied my brakes gently to see if I could straighten her up, but I couldn't seem to pull her back to the left. So, I let off on the brakes and she continued to the right, and I tried again to put on the brakes and she wouldn't come back, and all of a sudden this pole was in front of me and we smashed into it." Plaintiff Tresham testified to a substantially similar version of the accident. A witness for plaintiffs, who was driving about 200 feet behind them, testified that plaintiffs' car was in the right-hand lane when he saw its taillights come on. The car started to swerve and finally skidded into the light post. An investigating officer testified that there were skid marks leading from the highway to the car.

Plaintiffs called an expert on the operation of hydraulic automobile brakes. In answer to hypothetical questions based on evidence in the record and his own knowledge of the braking system of the car, the expert testified as to the cause of the accident. It was his opinion that the brakes applied themselves *260 owing to a failure of the piston in the master cylinder to retract far enough when the brake pedal was released to uncover a bypass

port through which hydraulic fluid should have been able to escape into a reservoir above the master cylinder. Failure of the piston to uncover the bypass port led to a closed system and a partial application of the brakes, which in turn led to heating that expanded the brake fluid until the brakes applied themselves with such force that Vandermark lost control of the car. The expert also testified that the failure of the piston to retract sufficiently to uncover the bypass port could have been caused by dirt in the master cylinder, a defective or wrong-sized part, distortion of the firewall, or improper assembly or adjustment. (1) The trial court struck the testimony of the possible causes of the failure of the piston to retract, on the ground that there was no direct evidence that any one or more of the causes existed, and it rejected plaintiffs offer to prove that all of the possible causes were attributable to defendants. These rulings were erroneous, for plaintiffs were entitled to establish the existence of a defect and defendants' responsibility therefor by circumstantial evidence, particularly when, as in this case, the damage to the car in the collision precluded determining whether or not the master cylinder assembly had been properly installed and adjusted before the accident.

Accordingly, for the purposes of reviewing the nonsuit in favor of Ford and the directed verdict in favor of Maywood Bell on the warranty causes of action, it must be taken as established that when the car was delivered to Vandermark, the master cylinder assembly had a defect that caused the accident. Moreover, since it could reasonably be inferred from the description of the braking system in evidence and the offer of proof of all possible causes of defects that the defect was owing to negligence in design, manufacture, assembly, or adjustment, it must be taken as established that the defect was caused by some such negligence.

Ford contends, however, that it may not be held liable for negligence in manufacturing the car or strictly liable in tort for placing it on the market without proof that the car was defective when Ford relinquished control over it. Ford points out that in this case the car passed through two other authorized Ford dealers before it was sold to Maywood Bell and that Maywood Bell removed the power steering unit before selling the car to Vandermark.

(2) In Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 62 [27 Cal.Rptr. 697, 377 P.2d 897], we held that "A *261 manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." Since the liability is strict it encompasses defects regardless of their source, and therefore a manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another. (Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 437 [240 N.Y.S.2d 592, 191 N.E.2d 81]). Moreover, even before such strict liability was recognized, the manufacturer of a completed product was subject to vicarious liability for the negligence of his suppliers or subcontractors that resulted in defects in the completed product. (Dow v. Holly Manufacturing Co., 49 Cal.2d 720, 726-727 [321 P.2d 736]; Ford Motor Co. v. Mathis, 322 F.2d 267, 273; Boeing Airplane Co. v. Brown, 291 F.2d 310, 313; see Rest., Torts, § 400.) (3) These rules focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product, and they apply regardless of what part of the manufacturing process the manufacturer chooses to delegate to third parties. (4) It appears in the present case that Ford delegates the final steps in that process to its authorized dealers. It does not deliver cars to its dealers that are ready to be driven away by the ultimate purchasers but relies on its dealers to make the final inspections, corrections, and adjustments necessary to make the cars ready for use. Since Ford, as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do.

(5) Since plaintiffs introduced or offered substantial evidence that they were injured as a result of a defect that was present in the car when Ford's authorized dealer delivered it to Vandermark, the trial court erred in granting a nonsuit on the causes of action by which plaintiffs sought to establish that Ford was strictly liable to them. (6) Since plaintiffs also introduced or offered substantial evidence that the defect was caused by some

negligent conduct for which Ford was responsible, the trial court also erred in granting a nonsuit on the causes of action by which plaintiffs sought to establish that Ford was liable for negligence.

Plaintiffs contend that Maywood Bell is also strictly liable *262 in tort for the injuries caused by the defect in the car and that therefore the trial court erred in directing a verdict for Maywood Bell on the warranty causes of action. Maywood Bell contends that the rule of strict liability in the Greenman case applies only to actions against manufacturers brought by injured parties with whom the manufacturers did not deal. It contends that it validly disclaimed warranty liability for personal injuries in its contract with Vandermark [FN1] (see Civ. Code, § 1791; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 693 [268 P.2d 1041]), and that in any event neither plaintiff gave it timely notice of breach of warranty. (Civ. Code, § 1769.)

FN1 The warranty clause of the contract provided: "Dealer warrants to Purchaser (except as hereinafter provided) each part of each Ford Motor Company product sold by Dealer to Purchaser to be free under normal use and service from defects in material and workmanship for a period of ninety (90) days from the date of delivery of such product to Purchaser, or until such product has been driven, used or operated for a distance of four thousand (4,000) miles, whichever event first shall occur. Dealer makes no warranty whatsoever with respect to tires or tubes. Dealer's obligation under this warranty is limited to replacement, without charge to Purchaser, of such parts as shall be returned to Dealer and as shall be acknowledged by Dealer to be defective. This warranty shall not apply to any Ford Motor Company product that has been subject to misuse, negligence, or accident, or in which parts not made or supplied by Ford Motor Company shall have been used if, in the determination of Dealer, such use shall have affected its performance, stability, or reliability, or which shall have been altered or repaired outside of Dealer's place of business in a manner which, in the

determination of Dealer, shall have affected its performance, stability, or reliability. This warranty is expressly in lieu of all other warranties, express or implied, and of all other obligations on the part of Dealer."

(7) 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. (See Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 63 [27 Cal.Rptr. 697, 377 P.2d 897].) In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to *263 the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship. (8) Accordingly, as a retailer engaged in the business of distributing goods to the public, Maywood Bell is strictly liable in tort for personal injuries caused by defects in cars sold by it. (See Greenberg v. Lorenz, 9 N.Y.2d 195, 200 [213 N.Y.S.2d 39, 173 N.E.2d 773]; McBurnette v. Playground Equipment Corp. (Fla.) 137 So.2d 563, 566-567; Graham v. Butterfield's Inc., 176 Kan. 68 [269 P.2d 413, 418]; Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 406 [161 A.2d 69, 75 A.L.R.2d 1]; State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289 [110 N.W.2d 449, 455-456]; Rest.2d Torts (Tent. Draft No. 7) § 402A, com. f.)

(9) Since Maywood Bell is strictly liable in tort, the fact that it restricted its contractual liability to Vandermark is immaterial. Regardless of the obligations it assumed by contract, it is subject to strict liability in tort because it is in the business of selling automobiles, one of which proved to be defective and caused injury to human beings. (10) The requirement of timely notice of breach of warranty (Civ. Code, § 1769) is not applicable to such tort liability just as it is not

applicable to tort liability based on negligence (Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 60-62 [27 Cal.Rptr. 697, 377 P.2d 897]; see Rest.2d Torts (Tent. Draft No. 7) § 402A, com. m); Whitfield v. Jessup, 31 Cal.2d 826 [193 P.2d 1], and Vogel v. Thrift Drug Co., 43 Cal.2d 184 [272 P.2d 1], on which Maywood Bell relies, dealt only with warranties arising under the uniform sales act (Civ. Code, §§ 1721-1800); neither of them considered the question whether the defendant might be subject to strict tort liability not arising under that act.

(11) Although plaintiffs sought to impose strict liability on Maywood Bell on the theory of sales-act warranties, they pleaded and introduced substantial evidence of all of the facts necessary to establish strict liability in tort. Accordingly, the trial court erred in directing a verdict for Maywood Bell on the so-called warranty causes of action.

Plaintiffs contend finally that various prejudicial errors were committed in presenting the negligence causes of action to the jury and that therefore the judgment in favor of Maywood Bell on those causes of action should be reversed. The issue of Maywood Bell's liability for negligence was fully litigated. Although the evidence was in sharp conflict, we are convinced from an examination of the record that no prejudicial *264 error occurred in presenting the negligence causes of action to the jury.

The judgment of nonsuit in favor of Ford Motor Company is reversed. The judgment in favor of Maywood Bell Ford on the negligence causes of action is affirmed and in all other respects the judgment in favor of Maywood Bell Ford is reversed.

Gibson, C. J., Schauer, J., McComb, J., Peters, J., Tobriner, J., and Peek, J., concurred.

Cal., 1964.

Vandermark v. Ford Motor Co.

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