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SUPREME COURT NO. _____

COA NO. 57293-8-I

SUPREME COURT
OF THE STATE OF WASHINGTON

RONALD LUNSFORD and ESTER LUNSFORD,

Respondents,

v.

SABERHAGEN HOLDINGS, INC.,

Petitioner.

PETITION FOR REVIEW

Timothy K. Thorson, WSBA No. 12860
Jason W. Anderson, WSBA No. 30512
Attorneys for Petitioner
Saberhagen Holdings, Inc.

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-5017
(206) 622-8020

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I. IDENTITY OF PETITIONER

Petitioner Saberhagen Holdings, Inc. (“Saberhagen”) asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. COURT OF APPEALS DECISION

Saberhagen seeks review of the Court of Appeals decision in *Lunsford v. Saberhagen Holdings, Inc.*, ___ Wn. App. ___, 160 P.3d 1089 (2007), filed on June 25, 2007. *See* Appendix at 1-8. A timely motion for reconsideration was denied on August 27, 2007. *See* Appendix at 9.

III. ISSUE PRESENTED FOR REVIEW

Is selective prospectivity of civil judicial decisions governed by the factors set forth in *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), as this Court has repeatedly and recently ruled, or, as Division One now holds—in defiance of the supremacy of this Court—were those rulings “erroneous” because they supposedly ignored the “abolishment” of selective prospectivity and the *Chevron Oil* factors in *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992)?

IV. STATEMENT OF THE CASE

A. Factual Background

This is a personal injury case in which Ronald Lunsford claims that he developed an asbestos-related disease, mesothelioma, as a result of

decades of exposure to asbestos. CP 8, 37-38. The claims against Saberhagen concern only Mr. Lunsford's alleged household exposure for a few weeks in 1958, when he was seven years old. He claims that during that period, his father worked as an insulator for a Saberhagen predecessor, the Brower Company ("Brower"), installing asbestos-containing insulation. CP 37, 84. He claims that dust from that insulation was carried home on his father's clothes and that this exposure caused him to develop the mesothelioma with which he was diagnosed 42 years later. CP 38, 138-39.

B. Procedural Posture

Following a prior asbestos lawsuit in California against 37 other companies, the Lunsfords filed the present lawsuit against Saberhagen in 2002. CP 3, 70, 88-94. They asserted claims for negligence and strict liability, among others. CP 6, 9.

Saberhagen filed a motion for partial summary judgment, arguing that no strict products liability cause of action existed in 1958 when Mr. Lunsford's alleged exposure to Brower products occurred.¹ CP 51. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (hereinafter "Section

¹Saberhagen has twice challenged the Lunsfords' strict liability claims. Saberhagen first argued that Mr. Lunsford was not a "user or consumer" of a defective product under RESTATEMENT (SECOND) OF TORTS § 402A (1965). See Appendix at 10. The trial court agreed and entered partial summary judgment. On appeal, Division One reversed on policy considerations, finding no clear authority on the question. *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 792, 106 P.3d 808 (2005) ("*Lunsford P*").

402A”), which created a strict liability cause of action, had not been adopted in Washington in 1958 (it had not yet been published by the American Law Institute, nor even conceived of by its eventual drafter, William Prosser). In 1958, the only available claims against product manufacturers and sellers were those that sounded either in *negligence* or *warranty*. CP 54-61, 248-51. Mr. Lunsford thus had no basis under the applicable law for his “strict liability” claim. Moreover, Saberhagen argued that it would be unfair to afford to plaintiffs injured by *asbestos* products in 1958 special and greater remedies than those that were available to persons injured by *other* products that year, or to single out the *sellers* of such products in 1958—from among the sellers of *all other* products that year—for the imposition of entirely unforeseeable theories of liability developed and adopted more than a decade later. CP 252-53.

In opposition, the Lunsfords argued that Saberhagen must be wrong since various Washington appellate decisions² discussed strict liability claims in asbestos cases without noting any issue as to whether strict liability existed prior to the adoption of Section 402A—although admittedly the issue had not been raised. CP 141-44, 251-2; RP 22-24.

²*Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 853 P.2d 908 (1993); *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); *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 915 P.2d 581, *rev. denied* 130 Wn.2d 1009 (1996); *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 865 P.2d 527 (1993).

The trial court granted Saberhagen's motion, dismissing the strict liability claim. RP 28-29; CP 273-75. The Lunsfords appealed. CP 277-90.

Division One reversed, holding that this Court's decisions in *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969), and *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975), adopting Section 402A strict liability as to manufacturers and product sellers, respectively, and its subsequent decisions applying Section 402A in asbestos cases, all applied *retroactively* to the Lunsfords' claims arising in 1958.³ 160 P.3d at 1095-96 ("*Lunsford II*"). Division One held that under *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992), if an appellate decision applies a new rule to the parties in that case, that new rule must be applied retroactively to *all* litigants not otherwise barred. *Lunsford II*, 160 P.3d at 1094-95. Division One refused to apply this Court's equitable retroactivity analysis drawn from *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), which this Court has applied in numerous and recent decisions, holding instead that *Robinson* had abolished the *Chevron Oil* analysis in retroactivity determinations. *Id.* at 1093-94. As for the post-*Robinson* Washington Supreme Court retroactivity cases that have ignored *Robinson* and have instead continued

³Division One reached the retroactivity issues even though they had never been raised below. *Lunsford II*, 160 P.3d at 1091. See Respondent Saberhagen's Motion for Reconsideration at 2-8.

to employ a *Chevron Oil* analysis, Division One characterized them as “erroneous,” declined to follow them, and concluded that *Robinson* “is still good law.” *Id.* at 1094-95.

V. **ARGUMENT WHY REVIEW SHOULD BE GRANTED**

Review is necessary because Division One’s published decision and reliance upon the 1992 *Robinson* case directly conflicts with at least *three* of this Court’s more recent decisions concerning retroactivity of judicial decisions and the applicability of *Chevron Oil* factors: *In re Detention of Audett*, 158 Wn.2d 712, 719-20, 147 P.3d 982 (2006); *State v. Atsbeha*, 142 Wn.2d 904, 916-17, 16 P.3d 626 (2001); and *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 691-92, 926 P.2d 923 (1996). Indeed, Division One specifically characterized *Atsbeha* and *Audett* as “erroneous” in their use of a *Chevron Oil* analysis, and it refused to follow them. 160 P.3d at 1094-95. Division One’s decision also conflicts with Division Two’s decision in *In re Marriage of Anderson*, 134 Wn. App. 506, 141 P.3d 80 (2006). The need for review could not be clearer. *See* RAP 13.4(b)(1), (2).

A. **Division One’s Decision Conflicts with Supreme Court and Court of Appeals Cases Establishing *Chevron Oil* As the Appropriate Analysis for Determining Retroactivity of Judicial Decisions.**

The *Ulmer* (1969) and *Tabert* (1975) decisions established a new, strict liability cause of action against product manufacturers and sellers under

Section 402A. In the parlance of retroactivity analysis, those decisions may theoretically be applied in three ways:

1. *prospectively only*, i.e., *only* to litigants with claims arising *after* the decision, but *not before* (not even to the litigants in the case giving rise to the decision);
2. *prospectively and retroactively*, i.e., to *all* litigants and claims, regardless of whether they arose before or after the decision; or
3. with *selective prospectivity*, i.e., *only* to the litigants *in that case* and prospectively to all *future* litigants whose cases arise thereafter, but *not* to litigants whose cases arose *before* the decision.

See Lunsford II, 160 P.3d at 1093; *Lau v. Nelson*, 92 Wn.2d 823, 827, 601 P.2d 527 (1979). The first alternative, “prospective only” application, is not pertinent to *Ulmer* and *Tabert*, since the new rules in those cases *were* applied to the parties themselves (the plaintiffs were allowed to assert the new Section 402A cause of action. Accordingly, the question raised in the Court of Appeals—one of first impression—was whether those decisions apply *prospectively and retroactively* (to persons like the Lunsfords whose claims arose long before), or only with *selective prospectivity* (to the plaintiffs in *Ulmer* and *Tabert* and those with claims arising thereafter, but not to the Lunsfords or others with claims arising before).

1. **The *Chevron Oil* analysis is the current and well-established test in Washington for determining the retroactive effect of appellate court decisions.**

As long ago as 1976 and as recently as 2006, this Court has stated that it will look to the equitable factors identified in *Chevron Oil* when deciding whether to apply a newly-announced rule retroactively or with selective prospectivity in civil cases. Under this analysis, the court must:

1. determine whether the decision established 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;
2. 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; and
3. weigh the inequity imposed by retroactive application.

See Taskett v. KING Broad. Co., 86 Wn.2d 439, 448, 546 P.2d 81 (1976) citing *Chevron Oil*, 404 U.S. at 106-07; *Audett*, 158 Wn.2d at 720-21, citing *Chevron Oil* and *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 756-66, 966 P.2d 1232 (1998) (Sanders, J., dissenting).⁴ Based on these factors, a court may decide to give a prior decision purely prospective, retroactive and prospective, or selectively prospective effect. *See Lau*, 92 Wn.2d 823 at 827.

⁴*Taskett* was by no means this Court's first recognition of its authority to limit retroactivity of its decisions for equitable reasons. *See State ex rel. Washington State Fin. Comm. v. Martin*, 62 Wn.2d 645, 670, 384 P.2d 833 (1963) (limiting retroactivity of a decision to "avoid working an unjust hardship" upon parties who relied on prior rule).

2. ***Robinson* represents a short-lived departure by this Court from *Chevron Oil* that has long since been overruled *sub silentio* and superseded by later cases.**

Despite this Court's reaffirmation of the *Chevron Oil* analysis as recently as last year in *Audett*, Division One nonetheless refused to apply it in this case, holding that the Court's abolishment of selective prospectivity 15 years ago in *Robinson* "is still good law." 160 P.3d at 1093-95. Characterizing this Court's continued use of *Chevron Oil* in post-*Robinson* cases as "erroneous," Division One refused to follow them. *Id.* at 1094.

a. ***Robinson's* abandonment of *Chevron Oil* in the wake of *Beam Distilling*.**

Robinson was decided shortly after the U.S. Supreme Court's abolishment of selective prospectivity and the *Chevron Oil* analysis as to civil, *federal-law* decisions. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2349, 114 L. Ed. 2d 481 (1991). In *Beam Distilling*, a majority of justices separately agreed that when a rule of federal law is applied to the parties before the court in a civil case, that rule must be given full retroactive effect regardless of whether a cause of action arose before the rule was adopted. *Id.* See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). In a complicated case,⁵ interpreting a very recent and equally complicated *Beam Distilling* decision,

⁵ The *Robinson* Court likened its task to "handling fly paper": "Evaluation of one subject in this case impacts another issue that in turn raises another for evaluation and decision." 119 Wn.2d at 48.

the *Robinson* Court elected to adopt *Beam Distilling's* limitations on *Chevron Oil* and its abolishment of selective prospectivity. 119 Wn.2d at 76-77. As shown below, that abolishment was short-lived.

b. More recent Washington cases have reverted to a *Chevron Oil* analysis, overruling *Robinson sub silentio*.

One year after *Robinson*, the U.S. Supreme Court revisited the retroactivity of federal decisions, adhering to the holding of *Beam Distilling* but making clear that state courts *are free to adopt their own rules* regarding retroactivity of state-law decisions. *Harper*, 509 U.S. at 100, citing *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-66, 53 S. Ct. 145, 77 L. Ed. 360 (1932). A review of post-*Robinson* retroactivity cases in Washington shows that this Court (like other jurisdictions) has done just that, abandoning *Robinson* (and the rationale of *Beam Distilling* and *Harper*) and instead employing *Chevron Oil* factors to determine when to give selective prospectivity to a prior decision announcing a new rule. In fact, *Robinson* has *no* progeny in its abolition of selective prospectivity; it has *never* (before *Lunsford II*) been relied upon by a Washington appellate court for the proposition that selective prospectivity and the *Chevron Oil* analysis have been abolished.⁶

⁶ Cf. *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 614, 94 P.3d 961 (2004) (declining to address “whether the prospectivity rule set forth in *Chevron Oil* has been weakened or reversed,” citing *Robinson, inter alia*).

(1). *Digital Equipment* (S. Ct. 1996)

This Court's first post-*Robinson* civil retroactivity case was *Digital Equipment Corp. v. State*, 129 Wn.2d 177, 916 P.2d 933 (1996). There, the Court gave retroactive effect to a decision of *federal* law, i.e., the U.S. Supreme Court's decision that Washington's B&O tax scheme was unconstitutional. 129 Wn.2d at 188. Because the case involved federal law, the Court was bound to follow *Beam Distilling*. Citing *Beam Distilling*, the lead opinion of three justices stated: "The normal rule, then, is retroactive application of a new pronouncement of *federal* law unless the Court declares otherwise. *Chevron Oil* no longer controls in *this area*." *Id.* (emphasis added). Although *Digital Equipment* did not necessarily represent a step away from *Robinson*, the Court limited its holding to federal law.

(2). *Jain* (S. Ct. 1996)

Six months later, this Court considered whether to give selective prospectivity to a civil, state-law decision in *Jain*. Although the Court did not cite *Robinson* or *Chevron Oil*, the Court did consider at least one *Chevron Oil* factor, i.e., whether a party had *reasonably relied* on pre-decisional law. The Court held that a judicial decision announced after the settlement of a first-party insurance claim would be given selectively-prospective effect if the insurer "reasonably and justifiably relied on the state of the pre-decisional law." *Id.* at 692, citing *Bradbury v. Aetna Cas. & Sur.*

Co., 91 Wn.2d 504, 509, 589 P.2d 785 (1979).⁷ *Jain* thus represented a clear break with *Robinson*, at least insofar as *Robinson* had “abolished” selective prospectivity and the consideration of *Chevron Oil* factors.

(3). *Franks* (S. Ct. 1998)

Further evidence of this Court’s rejection of *Robinson* and its continued acceptance of the *Chevron Oil* analysis is seen in Justice Sanders’ dissent in *Franks*, 136 Wn.2d at 765-66, in which he cited and applied the *Chevron Oil* factors. Although not itself precedent, Justice Sanders’ dissent shows that six years after *Robinson*, he considered selective prospectivity and the *Chevron Oil* analysis to be of continuing vitality, notwithstanding *Robinson*.⁸

(4). *Atsbeha* (S. Ct. 2001)

In *Atsbeha*, this Court applied the *Chevron Oil* analysis in deciding whether to give selectively-prospective effect to a prior state law decision.⁹ As in *Jain* and *Franks*, the Court did not mention *Robinson* or otherwise hint that Washington law had “abolished” the *Chevron Oil* analysis or

⁷ For this proposition, the *Bradbury* Court relied [91 Wn.2d at 508] upon *Haines v. Anaconda Aluminum Co.*, 87 Wn.2d 28, 549 P.2d 13 (1976), which in turn relied [87 Wn.2d at 34] upon *Taskett*, which in turn relied [86 Wn.2d at 448] upon *Chevron Oil*. *Jain* thus reflects the continuing lineage of *Chevron Oil* in Washington retroactivity law.

⁸ Nor is this likely to have been a mere researching “oversight” by Justice Sanders or the parties in *Frank*. Compare *Lunsford II*, 160 P.3d at 1094, 1095 (disregarding *Atsbeha* and *Audett* on the grounds that no one had cited *Robinson* to those courts). Perhaps more than any justice, Justice Sanders would most likely have been aware of the holding in *Robinson*: he had represented the Robinsons in that case. *Robinson*, 119 Wn.2d at 41.

⁹ *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998).

selective prospectivity. Rather, the Court stated: “This court considers three factors outlined in *Chevron Oil v. Huson* in determining whether an appellate decision applies prospectively or retroactively[.]”¹⁰ *Atsbeha*, 142 Wn.2d at 916. As Division One noted in *Lunsford II*, not only did *Atsbeha* break with *Robinson* by considering *Chevron Oil* factors, it did so in the context of a *criminal* case. Although *Atsbeha* may no longer control retroactivity issues in criminal cases,¹¹ it nonetheless tends to confirm this Court’s continuing affinity for *Chevron Oil*’s equitable considerations notwithstanding *Robinson*’s abandonment of them nine years earlier.

(5). *Anderson* (Ct. App. Div. 2, Aug. 2006)

In *In re Marriage of Anderson*, Division Two not only considered one of the *Chevron Oil* factors, it held that this Court’s decision in *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005), *would* be applied with selective prospectivity. In *C.A.M.A.*, a grandparent petitioned under a state statute for the right to visit her grandchild. This Court held that the statute was unconstitutional and applied that new rule to the parties, denying visitation. *C.A.M.A.*, 154 Wn.2d at 66. In *Anderson*, a mother argued that *C.A.M.A.* applied retroactively to invalidate an order that gave her ex-husband the right to visit his ex-stepdaughter. Division

¹⁰ Significantly, the Court cited *Digital Equipment* for this proposition, in which case the Court had held that *Chevron Oil* no longer controls the retroactivity of a new pronouncement of *federal* law. *Id.* at 916 n.33.

¹¹ See *In re Restraint of Markel*, 154 Wn.2d 262, 268, 111 P.3d 249 (2005). See also *Lunsford II*, 160 P.3d at 1095.

Two disagreed, holding that *C.A.M.A.* had only *selectively-prospective* effect: although the new rule applied retroactively to the parties in *C.A.M.A.*, it would *not* apply retroactively to other cases arising before that rule was announced. 134 Wn. App. at 511. Consistent with *Chevron Oil* (and contrary to *Robinson*), Division Two reasoned that a judicial decision may be given prospective (or selectively-prospective) effect “when retroactive application causes hardships and inequities.” *Id.* at 512.

(6). *Audett* (S. Ct., Nov. 2006)

In *Audett*, this Court unequivocally rejected the *Robinson* holding by applying a *Chevron Oil* analysis in deciding whether to give selectively-prospective effect to a prior civil, state-law decision.¹² The Court did not cite *Robinson*. Instead, the Court began its retroactivity analysis by declaring Washington’s right *to choose for itself* in defining the limits of adherence to precedent. 158 Wn.2d at 720, citing *Sunburst Oil*, 287 U.S. at 364. The Court then applied the *Chevron Oil* analysis, notably citing with approval Justice Sanders’ dissenting opinion in *Franks*.

The *Audett* Court also cited with approval the New Mexico Supreme Court’s decision in *Beavers v. Johnson Controls World Services, Inc.*, 118 N.M. 391, 881 P.2d 1376 (1994), explaining parenthetically that *Beavers* allowed the “presumption” of retroactivity for a new rule to be

¹² *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002).

overcome “by a sufficiently weighty combination of one or more of the *Chevron Oil* factors.” *Audett*, 158 Wn.2d at 722. The Court’s reliance upon *Beavers* is significant because that decision reflects a flat rejection of the very principles from *Beam Distilling* and *Harper* that the *Robinson* Court had accepted in 1992. *See Beavers*, 881 P.2d 1383. The *Beavers* court quoted Justice O’Connor’s concurring opinion in *Harper* and her dissent in *Beam Distilling* embracing the *Chevron Oil* analysis:

[W]hen 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 [a] 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.

881 P.2d at 1381, quoting *Harper*, 509 U.S. at 115 (O’Connor, J., concurring), quoting *Beam Distilling*, 501 U.S. at 550 (O’Connor, J., dissenting).

As shown, this Court has consistently (if tacitly) rejected *Robinson* in favor of *Chevron Oil*. In so doing, it has joined the courts of New Mexico and many other states¹³ in rejecting the rigid and harsh approach

¹³ *See, e.g., Bendorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 414 (Minn. 2007); *Findley v. Findley*, 280 Ga. 454, 629 S.E.2d 222 (2006); *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 104 P.2d 483 (2004); *Wenke v. Gehl Co.*, 274 Wis.2d 220, 682 N.W.2d 405, 429 (2004); *Justice v. RMH Aero Logging, Inc.*, 42 P.3d 549, 554 (Alaska 2002); *Citicorp N. Am., Inc. v. Franchise Tax Bd.*, 83 Cal. App. 4th 1403, 100 Cal. Rptr. 2d 509, 525 (2000); *Aleckson v. Village of Round Lake Park*, 176 Ill.2d 82, 679 N.E.2d 1224 (1997); *Fischer v. Canario*, 143 N.J. 235, 243-45, 670 A.2d 516 (1996); *Beavers*, 881 P.2d 1376; *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992).

of *Beam Distilling* and *Harper* (and *Robinson*), in favor of a *presumption* of retroactivity that can be “overcome by a sufficiently weighty combination of one or more of the *Chevron Oil* factors.” *Audett*, 158 Wn.2d at 722. As the Montana Supreme Court has recently explained:

Some states have welcomed *Harper* as being consistent with the court’s own approach to retroactivity. The more common approach, however, has been to decline *Harper*’s invitation to rethink *Chevron*, and merely to note that *Harper* is only applicable to federal law. Many states are uncomfortable with the harsh results that might follow if they abandon *Chevron* and completely disallow prospective decisions.

Dempsey v. Allstate Ins. Co., 325 Mont. 207, 104 P.2d 483, 488 (2004)

(citations omitted).

B. Division One’s Ruling That This Court Does Not Overrule Prior Decisions *Sub Silentio* Conflicts with Supreme Court and Court of Appeals Cases Recognizing *Sub Silentio* Overruling.

Attempting to remove the obvious conflict between *Robinson*’s stated abolishment of selective prospectivity and the *Chevron Oil* analysis, on the one hand, and this Court’s more recent, contrary rulings in *Audett* and *Atsbeha* on the other, Division One stated, “[t]he Washington Supreme Court ‘will not overrule such binding precedent sub silentio.’” *Lunsford II*, 160 P.3d at 1094, quoting *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Division One noted that “no party cited either *Chevron Oil* or *Robinson* to the court” in *Audett* or *Atsbeha*, implying that this Court had overlooked those cases. *Lunsford II*, 160 P.3d at 1094.

Contrary to Division One's ruling and its interpretation of *Studd*,¹⁴ this Court and Division One *have* recognized instances in which this Court has overruled itself *sub silentio*. For example, in *Safeco Insurance Co. v. Butler*, 118 Wn.2d 383, 403, 823 P.2d 499 (1992), this Court stated:

The Butlers also rely on the holding in [*Federated Am. Ins. Co. v. Strong*, 102 Wn.2d 665, 689 P.2d 68 (1984),] that whether an event is an accident is determined from the point of view of the insured. That holding was overruled *sub silentio* in *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990).

See also State v. Tamalini, 134 Wn.2d 725, 735 n.5, 953 P.2d 450 (1998) (“In light of our recent holdings that there are no lesser included offenses of felony murder, [*State v. Berry*], 52 Wn.2d 748, 328 P.2d 891 (1958),] has been overruled *sub silentio*.”). Even Division One has previously recognized *sub silentio* rulings by the Supreme Court. *See, e.g., In re Restraint of Davis*, 67 Wn. App. 1, 7, 834 P.2d 92 (1992); *Pannell v. Food Servs. of Am.*, 61 Wn. App. 418, 447, 810 P.2d 952 (1991).

Moreover, despite the absence of any citation to *Robinson* in *Audett* and *Atsbeha*, there can be no doubt that this Court *now* holds a

¹⁴ Division One's reliance on *Studd* for the proposition that this Court does not overrule precedent *sub silentio* ignores the context in that case. *Studd* concerned the situation in which a later decision appears only *implicitly* to be in conflict with an earlier decision, i.e., where the legal theory in the earlier decision was simply not considered in the later decision. Compare *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) (“In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised). Such is not the case here, where the legal theory for determining retroactivity was *expressly* considered, with conflicting results, in *Robinson* on the one hand, and in *Jain*, *Atsbeha*, and *Audett* on the other.

fundamentally different view of retroactivity than it did 15 years ago in *Robinson*. Indeed, this Court's reiteration in *Audett* of Washington's right *to choose for itself* what if any retroactivity limitations will apply to state decisional law, and its citation to the *Beavers* decision—a decision that flatly rejects the very basis of the *Robinson*—and to Justice Sanders' reliance on *Chevron Oil* in his *Franks* dissent, plainly reflect a careful, independent and reasoned formulation of state law and an intentional, if *sub silentio*, abandonment of the holding of *Robinson*. Ironically, Division One's contrary decision lays more importance upon what was *not* cited in those cases (i.e., *Robinson*) than upon what *was* cited and what the Court there had to say about retroactivity. This was error.

The validity and precedential value of this Court's decisions cannot depend upon whether *every* arguably pertinent case was cited in those decisions or the briefing. Indeed, *every* decision could be called into question if lower courts and litigants were free to ignore them whenever they could find some arguably pertinent case that was not cited in the briefing or decision. One could only speculate as to whether the Court was *aware of* but found it unnecessary to cite the case, or had *overlooked* it. If it had been overlooked, one would have to speculate further as to how the Court *would have ruled if* it had considered the case. All such speculation undercuts the supremacy of this Court and the rule of *stare*

decisis.¹⁵ The *sub silentio* doctrine is thus not only well-established in Washington jurisprudence; it is a necessary corollary of *stare decisis*.

B. Division One’s Refusal to Follow This Court’s Post-Robinson Retroactivity Decisions Because They Are Supposedly “Erroneous” or Ill-informed As to Prior Case Law Represents a Conflict with This Court’s Decisions and Supremacy.

Division One refused to follow *Audett* and *Atsbeha* because it believed this Court’s “interjection of *Chevron Oil* [in those cases] was erroneous.” *Lunsford II*, 160 P.3d at 1094. Even if that were true, Division One’s refusal to follow those cases is a violation of this Court’s supremacy.

It is not the prerogative of Division One to decline to follow a Supreme Court decision that it believes is “erroneous.” Any supposed “error” is for *this* Court, not Division One, to correct.¹⁶ *See 1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (“A decision by this court is binding on all lower courts in the state. . . .

¹⁵Division One itself has elsewhere declined to speculate as to whether this Court will overturn precedent. *See, e.g., Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 129 Wn. App. 832, 867, 120 P.3d 616 (2005), *review granted*, 158 Wn.2d 1024 (2007) (“The principle of *stare decisis*—‘to stand by the thing decided’—binds this court as well as the trial court *to follow Supreme Court decisions, not to speculate that they will be overruled.*” (Emphasis added)).

¹⁶ Division One should have applied the more recent authority, i.e., *Audett* and *Atsbeha*, noting its concerns and leaving any necessary “correction” for this Court. That is precisely how it handled a similar conflict of authority in *Pannell*. Division One properly addressed the conflict by following the *more recent* case, stating that “[w]hile the failure of the *Blair [v. Wash. State Univ.]*, 108 Wn.2d 558, 740 P.2d 1379 (1987)] court to mention the *Shannon [v. Pay ‘N Save Corp.]*, 104 Wn.2d 722, 709 P.2d 799 (1985)] case is puzzling, it is implicit in the reasoning of the *Blair* court that *Shannon* has been overruled *sub silentio.*” 61 Wn. App. at 447.

When the Court of Appeals fails to follow directly controlling authority by this court, it errs.”); *Hamilton v. Dep’t of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988) (Supreme Court’s decision of state law “is binding until *we* overrule it”) (emphasis added). *See also State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (noting that Seventh Circuit had correctly applied U.S. Supreme Court precedent with which it disagreed, since “it is *this* Court’s prerogative alone to overrule one of its precedents”). *Cf. Brown v. Allen*, 344 U.S. 443, 540, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final”).

C. **Division One’s Holding that *Chevron Oil* Applies Only in a Case in Which a New Rule Is Announced Conflicts with *Chevron Oil* Itself and with This Court’s Prior Decisions.**

In further support both of its refusal to follow *Audett* and *Atsbeha* and of its characterization of those decisions as “erroneous,” Division One ruled that “the *Chevron Oil* test by its own terms only applies in a case in which a new rule is being adopted.” *Lunsford II*, 160 P.3d at 1094. Because no new rules were being adopted in the *Audett* and *Atsbeha* cases themselves, Division One concluded that the use of the *Chevron Oil* test in those cases was erroneous. *Id.* at 1095. Obviously, this conclusion is in direct conflict with *Audett* and *Atsbeha*. If this Court ruled that a *Chevron Oil* analysis *was* appropriate in those cases (even though no “new rule”

was being adopted therein), Division One was obliged to abide by those rulings and to adjust its own view of the applicability of *Chevron Oil*.

Furthermore, Division One's conclusion is contrary to *Chevron Oil* itself. No "new rule" was being adopted in *Chevron Oil*. Rather, the Court in *Chevron Oil* was considering retroactivity of a *prior* decision¹⁷ that had announced a new rule. *Chevron*, 404 U.S. at 99-100.¹⁸

VI. CONCLUSION

Saberhagen asks this Court to accept review, to reverse Division One's decision, and to either affirm the trial court's dismissal of plaintiffs' strict liability claim or remand to the trial court for consideration of the selective prospectivity of the *Ulmer* and *Tabert* decisions' adoption of Section 402A, according to the factors set forth in *Chevron Oil*.

Respectfully submitted this 26th day of September, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By 
Timothy K. Thorson, WSBA No. 12860
Jason W. Anderson, WSBA No. 30512
Attorneys for Petitioner Saberhagen Holdings, Inc.

¹⁷*Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969) (applying a shorter statute of limitations than had previously applied).

¹⁸Even in *Robinson*, this Court was not considering whether to apply a *Chevron Oil* test to any new rule announced in *Robinson itself*; rather, it was considering whether to apply that test to *prior* cases that *did* announce a new rule. See *Robinson*, 119 Wn.2d at 71 (considering the selective prospectivity of *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987), and *R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 70 P.2d 838 (1989)).

APPENDIX

H

Lunsford v. Saberhagen Holdings, Inc.
Wash.App. Div. 1,2007.

Court of Appeals of Washington, Division 1.
Ronald LUNSFORD and Esther Lunsford,
Appellants,

v.

SABERHAGEN HOLDINGS, INC., First Doe
through One Hundredth Doe, Respondents.
No. 57293-8-I.

June 25, 2007.

Reconsideration Denied Aug. 9, 2007.

Background: Son of refinery worker brought action against manufacturer whose predecessor supplied asbestos-containing materials, alleging that manufacturer was strictly liable for injuries caused by childhood exposure to asbestos dust brought home by father. The trial court granted manufacturer's motion for summary judgment. Plaintiff appealed. The Court of Appeals, 125 Wash.App. 784, 106 P.3d 808, reversed and remanded. On remand, the Superior Court, King County, No. 02-2-32133.0, Sharon Armstrong, J., granted manufacturer's motion for summary judgment. Plaintiff appealed.

Holdings: The Court of Appeals, Appelwick, C.J., held that:

(1) strict liability applied retroactively, and

(2) American Law Institute (ALI) documents that were more than 20 years old were admissible as an exception to hearsay rule.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⇔ 179(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k179 Sufficiency of Presentation of Questions

30k179(1) k. In General. Most Cited Cases

Asbestos plaintiff raised the issue of retroactive

application of strict liability before the trial court, as was required for the issue to be properly before the Court of Appeals, where plaintiff stated that "the courts of this State have frequently, without caveat, applied strict liability to asbestos actions" in which exposure occurred prior to adoption of Restatement, and "the court of appeals has consistently applied strict liability to those exposures that have occurred prior" to the cases adopting the strict liability provision of the Restatement of Torts. Restatement (Second) of Torts § 402A.

[2] Appeal and Error 30 ⇔ 169

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k169 k. Necessity of Presentation in General. Most Cited Cases

Appeal and Error 30 ⇔ 171(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k171 Nature and Theory of Cause

30k171(1) k. In General; Adhering to Theory Pursued Below. Most Cited Cases

Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal, but if an issue raised for the first time on appeal is arguably related to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. RAP 2.5.

[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

When a Washington appellate decision applies a rule announced in that decision retroactively to the

parties in that case, the rule will also be applied to all litigants not barred by a procedural rule.

[4] 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

To apply an appellate decision retroactively means to apply its holding to causes of action which arose prior to the announcement of the decision; there is no balancing the equities to determine whether the court should now apply rules which were applied retroactively in the previous decisions.

[5] 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

Litigants are not 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.

[6] 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

Strict liability applied retroactively to asbestos case in which plaintiff's exposure to asbestos occurred

prior to the Supreme Court's adoption of the strict liability rule of the Restatement of Torts. Restatement (Second) of Torts § 402A.

[7] Courts 106 ⇌ 89

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k89 k. In General. Most Cited Cases

The Washington Supreme Court will not overrule binding precedent sub silentio.

[8] Evidence 157 ⇌ 372(1)

157 Evidence

157X Documentary Evidence

157X(D) Production, Authentication, and Effect

157k369 Preliminary Evidence for Authentication

157k372 Ancient Documents

157k372(1) k. In General. Most Cited Cases

American Law Institute (ALI) documents describing the proceedings of the ALI were admissible in asbestos claim involving strict liability under the Restatement of Torts, as an exception to hearsay for "statements in a document in existence 20 years or more whose authenticity is established." ER 803(a)(16), 901(b)(8), 902(e); Restatement (Second) of Torts § 402A.

*1090 Zachary B. Herschensohn, James E. Shaddock, Attorney at Law, Portland, OR, for Appellants.

Timothy Kost Thorson, Neal J. Philip, Carney Badley Smith & Spellman, Seattle, WA, for Respondents.

William Joel Rutzick, Schroeter Goldmark & Bender, Janet L. Rice, Attorney at Law, Seattle, WA, for Amicus Curiae on behalf of Goldmark & Bender Schroeter.

APPELWICK, C.J.

¶ 1 At issue is whether strict product liability retroactively applies to claims arising from injuries caused by exposure to asbestos that occurred before Washington's adoption of strict product liability.

We conclude because strict product liability was retroactively applied to litigants in previous asbestos exposure cases, it retroactively applies to all subsequent litigants. It cannot be selectively prospectively applied. The trial court erred when it held as a matter of law that Saberhagen cannot be held liable to **Lunsford** under a strict liability theory. We reverse and remand.

¶ 2 Ronald **Lunsford** suffers from mesothelioma. He and his wife, Esther **Lunsford** (together, **Lunsford**) contend that this was caused in part by respirable asbestos released from insulation supplied by the Brower Company/Saberhagen Holdings, Inc. The claims in this appeal concern only household exposure to asbestos in 1958, carried in **Lunsford's** father's clothing from his employment at the Texaco refinery in Anacortes, Washington.

¶ 3 In its first appearance in the court below, Saberhagen moved for summary judgment, arguing that because **Lunsford** himself was not a "user or consumer" of a defective product, he was not entitled to strict liability coverage. The trial court agreed and entered partial summary judgment. **Lunsford** appealed. On appeal, Saberhagen argued that the trial court correctly dismissed **Lunsford's** strict product liability claims because he failed to show that he was a "user" or "consumer" of Brower-supplied asbestos products within the meaning of Restatement (Second) of Torts § 402A. This court reversed, holding that, "policy rationales support application of strict liability to a household family member of a user of an asbestos-containing product, if it is reasonably foreseeable that household members would be exposed in this manner." *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wash.App. 784, 793, 106 P.3d 808 (2005) (*Lunsford I*). Whether **Lunsford** fit into that category was for the jury to decide-it was incorrect for the trial court to conclude as a matter of law that Saberhagen could not reasonably foresee that **Lunsford** would come into contact with its asbestos.

¶ 4 In that same appeal, Saberhagen, for the first time, also raised the argument that when two Washington appellate cases, *Ulmer* and *Tabert*, adopted § 402A strict product liability, it was a new rule that should not be applied retroactively under a three-part test from *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); see also *Seattle-First Nat'l Bank v. Tabert*, 86 Wash.2d

145, 148-50, 542 P.2d 774 (1975); *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 531-32, 452 P.2d 729 (1969). Because Saberhagen had not presented its retroactivity argument to the trial court below, this court declined to address that issue, leaving it to Saberhagen to raise on remand.

¶ 5 On remand, Saberhagen brought this argument before the court in its second motion for summary judgment. There, Saberhagen contended that "[b]ecause § 402A was not the law of Washington in 1958, 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 *1091 under a strict liability theory." On October 21, 2005, the trial court granted Saberhagen's motion for partial summary judgment. **Lunsford** appeals.

I. Summary Judgment Standard

¶ 6 On review of summary judgment courts engage in the same inquiry as the trial court. *Highline Sch. Dist. v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is appropriate if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. *Police Guild v. City of Seattle*, 151 Wash.2d 823, 830, 92 P.3d 243 (2004). The moving party bears this burden of proof. *Young v. Key Pharm.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989). Based on this standard, Saberhagen bears the burden of proof that it was entitled to judgment as a matter of law.

II. Review on Appeal

[1][2] ¶ 7 Saberhagen contends that **Lunsford** is attempting to raise the retroactivity argument, and should be precluded from doing so because he did not raise this argument below. Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5. But if an issue raised for the first time on appeal is "arguably related" to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. See *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wash.App. 869, 751 P.2d 329 (1988).

¶ 8 As noted above, Saberhagen first raised the issue

of retroactive application of § 402A in the appeal of *Lunsford I*. There, Saberhagen argued that [w]hile § 402A was eventually adopted and applied to manufacturers ... in the 1969 *Ulmer* decision, and was applied to product sellers ... in the 1975 *Tabert* decision, it would be fundamentally unfair to Saberhagen to retroactively impose upon its business activities and conduct in 1958 duties and liabilities that did not exist yet and would not come into existence for another 17 years.

¶ 9 On remand, Saberhagen argued that "[b]ecause § 402A was not the law of Washington in 1958, 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." *Lunsford*, characterizing Saberhagen's argument as a "retroactivity" argument, countered that "[i]n recognition of these long-standing rules, the courts of this State have frequently, without caveat, applied strict liability to asbestos actions in which the plaintiff's exposure occurred prior to the publication of Restatement § 402A." *Lunsford* goes on to list five cases in which plaintiffs recovered on theories of strict product liability for asbestos exposure occurring at least in part before 1958. Finally, in the summary judgment hearing, *Lunsford's* counsel argued "[b]ut the fact is those exposures occurred prior to the adoption of either one [*Ulmer* or *Tabert*] in '68 or in '75. And by implication, the court of appeals has consistently applied strict liability to those exposures that have occurred prior."

¶ 10 Saberhagen's objection is not well taken. Saberhagen asserts that strict liability should not be applied to exposures occurring before the adoption of § 402A in *Ulmer* and *Tabert*. This is a question of prospective versus retroactive application. *Lunsford* recognized Saberhagen's argument for what it was and responded. The issue of retroactive application of § 402A is properly before us.

III. Adoption of Strict Liability for Product Defects

¶ 11 The Washington Product Liability Act (WPLA) does not govern *Lunsford's* claim because he was exposed to asbestos before its adoption. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wash.App. 22, 33-34, 935 P.2d 684 (1997) (a cause of action "arises" when the plaintiff was exposed to asbestos, not when he discovered his injury); *Koker v. Armstrong*

Cork, Inc., 60 Wash.App. 466, 472, 804 P.2d 659 (1991) (applying the law in effect prior to the WPLA because the plaintiff's claim arose prior to that act).

*1092 ¶ 12 The parties disagree as to whether Restatement (Second) of Torts § 402A (1965) retroactively applies to *Lunsford's* claim. Section 402A reads:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(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, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(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.

¶ 13 In 1969, the Washington Supreme Court, after extensive review of product liability cases beginning in 1913, adopted the strict liability contained in § 402A as the law of this jurisdiction. *Ulmer*, 75 Wash.2d 522, 531-32, 452 P.2d 729. That decision applied only to the liability of manufacturers.

¶ 14 In 1975, the Washington Supreme Court after further review of product liability cases, extended § 402A strict liability to those in the business of selling or distributing a product. *Tabert*, 86 Wash.2d 145, 148-49, 542 P.2d 774. Both *Ulmer* and *Tabert* were remanded for trial with instructions to apply the strict liability rules announced in the appellate decision. *Ulmer*, 75 Wash.2d at 532, 452 P.2d 729; *Tabert*, 86 Wash.2d at 155-56, 542 P.2d 774.

¶ 15 Numerous appellate decisions have applied strict liability to claims arising from exposures to asbestos that occurred before the adoption of § 402A. See e.g. *Mavroudis*, 86 Wash.App. at 22, 935

P.2d 684 (upholding a jury verdict finding strict liability under pre-WPLA law based on inadequate warnings of exposure occurring between 1957 and 1963); *Van Hout v. Celotex Corp.*, 121 Wash.2d 697, 853 P.2d 908 (1993) (holding that under pre-WPLA law, strict liability should have been applied for exposure occurring between 1946 and 1980); *Krivanek v. Fibreboard Corp.*, 72 Wash.App. 632-33, 865 P.2d 527 (1993) (upholding a jury verdict based on pre-WPLA strict liability standards for exposure occurring between 1953 and 1986); *Falk v. Keene Corp.*, 113 Wash.2d 645, 782 P.2d 974 (1989) (holding that the WPLA did not change the standard to negligence-it remained strict liability as explained in § 402A and as adopted by *Ulmer* and *Tabert*-and remanding for application of strict liability to claims arising from exposure between 1947 and 1953); *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 744 P.2d 605 (1987) (upholding a jury verdict finding AC & S strictly liable for exposure to asbestos occurring between 1942 and 1972). In none of these cases did the court limit the application to the specific facts of each situation.

IV. Retroactive Application

¶ 16 Saberhagen argues that the adoption of § 402A by *Ulmer* and *Tabert* was a new rule and is therefore subject to a three-part analysis under *Chevron Oil* to determine whether it should apply retroactively. Since none of the Washington cases previously applied the *Chevron Oil* test and squarely addressed the issue, Saberhagen argues the test should be applied here. Under Saberhagen's analysis, the adoption of § 402A should not apply retroactively to **Lunsford's** exposure.

¶ 17 The United States Supreme Court in 1971 announced a three-prong test to determine whether a new federal rule of law in a civil case would be applied purely prospectively, selectively prospectively, or retroactively: 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, it has been stressed that we must ... weigh the merits and demerits in each *1093 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 have weighed the inequity imposed by retroactive application, for where 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.

Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) (internal citations and quotation omitted). This is the test Saberhagen invokes. However, the United States Supreme Court has long ago limited the use of the *Chevron Oil* analysis by rejecting selectively prospective application of new decisional law. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (holding that it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so, "principles of equality and stare decisis here prevailing over any claim based on a *Chevron Oil* analysis"). *Beam Distilling*, 501 U.S. at 540, 111 S.Ct. 2439. Prior to *Beam Distilling*, courts had three choices in civil matters: pure prospectivity, selective prospectivity, and pure retroactivity. The "purely prospective method of overruling" occurs when "a new rule is [not] applied ... to the parties in the law-making decision ... [t]he 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." *Beam Distilling Co.*, 501 U.S. at 536, 111 S.Ct. 2439. Selective prospectivity allowed retroactive application of a newly decided rule to some litigants but not others, based on the equities of the case. *Beam Distilling*, 501 U.S. at 540-43, 111 S.Ct. 2439. Pure retroactive application requires that once a rule is applied to the parties before the court it is applied to all: *Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application.* The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules.

Beam Distilling, 501 U.S. at 543, 111 S.Ct. 2439. Once rung, the bell is not unring.

¶ 18 To the extent this court finds strict liability applicable to asbestos claims, Saberhagen seeks purely prospective application of any new rule, or selective prospective application of any existing rule. But after *Beam Distilling*, courts are left with only two choices: purely prospective application of a new principle or rule of law overruling past precedent or deciding an issue of first impression, or purely retroactive application of such a principle or rule of law.

¶ 19 The Washington Supreme Court first applied *Chevron Oil* in *Taskett v. KING Broad. Co.*, 86 Wash.2d 439, 448, 546 P.2d 81 (1976). This was to determine whether a new state rule, *announced in that case*, should be applied retroactively. But in 1992 in *Robinson v. City of Seattle*, the court rejected the *Chevron Oil* test. 119 Wash.2d 34, 830 P.2d 318 (1992). Finding that "[t]he practice of retroactive application is 'overwhelmingly the norm'" the *Robinson* court adopted *Beam Distilling's* rejection of selective prospectivity.FN1 *Id.*, at 79, 830 P.2d 318.

FN1. In explaining its choice to abolish selective prospectivity of state appellate decisions, the *Robinson* court relied heavily on the reasoning in *Beam Distilling*:

"The plurality in *Beam Distilling* holds that selective prospectivity is not available in the civil context. The opinion concludes that *once the Supreme 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*.[.]

"*Robinson*, 119 Wash.2d at 75, 830 P.2d 318 (citing *Beam Distilling*, 501 U.S. at 543-44, 111 S.Ct. 2439) (other citations omitted).

"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...."

Robinson, 119 Wash.2d at 76, 830 P.2d 318, (quoting *Beam Distilling*, 501 U.S. at 543, 111 S.Ct. 2439) (other citations omitted).

*1094 [3][4][5] ¶ 20 When a Washington appellate

decision applies a rule announced in that decision retroactively to the parties in that case, the rule will also be applied to all litigants not barred by a procedural rule. *Id.*, at 80, 830 P.2d 318. "To apply an appellate decision 'retroactively' means to apply its holding to causes of action which *arose* prior to the announcement of the decision." *Id.*, at 71, 830 P.2d 318 (emphasis added). "[T]here is no balancing the equities to determine whether we should now apply rules which were applied retroactively" in the previous decisions. *Id.*, at 80, 830 P.2d 318. Litigants are not 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.

Id., at 80, 830 P.2d 318.(quoting *Beam Distilling*, 501 U.S. at 543, 111 S.Ct. 2439). Consequently, the *Robinson* court upheld retroactivity as sound and abolished the selective prospectivity analysis in the application of state appellate decisions. *Id.* Two options are available to a court when adopting a new rule: pure prospective application and retroactive application. Applying the new rule in the case before it necessarily invokes retroactivity.

V. Strict Product Liability Applies to Lunsford

[6] ¶ 21 Because *Ulmer* and *Tabert* adopted § 402A strict product liability, and *Mavroudis*, *Van Hout*, *Krivanek*, *Falk* and *Lockwood* all applied the theory to claims regarding exposure to asbestos to the parties before the court, *Robinson* requires that strict product liability apply to **Lunsford**. It does not matter that none of those courts applied the *Chevron Oil* test; the issue of retroactivity is already resolved with respect to asbestos exposure claims.

¶ 22 Even if it applied, the *Chevron Oil* test required the announcement of a new rule in those cases, not application of an existing rule. In this case the question is whether the rule of strict liability for asbestos exposure applied in *Mavroudis*, *Van Hout*, *Krivanek*, *Falk* and *Lockwood* may be applied to **Lunsford**. This is a question of application of an existing rule to a new fact pattern,

rather than an announcement of a new rule. Neither selective prospective application nor purely prospective application of strict liability is available to Saberhagen.

VI. *Robinson is Not Overruled Sub Silentio*

¶ 23 Saberhagen argues that the *Robinson* retroactivity rule has been overruled *sub silentio* by two recent cases from the Washington Supreme Court: *In re the Det. of Audett*, 158 Wash.2d 712, 147 P.3d 982, 986-87 (2006) and *State v. Atsbeha*, 142 Wash.2d 904, 916-17, 16 P.3d 626 (2001). In these cases, the Supreme Court used the analysis from *Chevron Oil* to determine whether previously announced "new" rules were appropriately applied to the defendants in *Audett* and *Atsbeha*. Saberhagen contends that because the Washington Supreme Court used the *Chevron Oil* analysis, *Robinson's* retroactivity rule has been overruled *sub silentio*.

[7] ¶ 24 We do not agree. The Washington Supreme Court "will not overrule such binding precedent *sub silentio*." *State v. Studd*, 137 Wash.2d 533, 548, 973 P.2d 1049 (1999). While use of *Chevron Oil* is contrary to *Robinson*, we note no one asked the court to overrule *Robinson* in either case. In fact, no party cited either *Chevron Oil* or *Robinson* to the court. A close look at the cases shows that the interjection of *Chevron Oil* was erroneous.

¶ 25 *Atsbeha*, a criminal case, involved the application of a change in the law of evidence *1095 announced in *State v. Ellis*, 136 Wash.2d 498, 963 P.2d 843 (1998). The *Chevron Oil* test by its own terms only applies in a case in which a new rule is being adopted, not when a relatively new rule from another decision is being applied. Further, while the Washington Supreme Court cited to its earlier decision in *Digital Equip. Corp. v. Dept. of Revenue* for the elements of the *Chevron Oil* test, the next paragraph of that decision cites *Robinson* for the proposition that the precedential weight of *Chevron Oil* had been called into question by recent United States Supreme Court decisions. 129 Wash.2d 177, 184, 916 P.2d 933 (1996). The *Digital* court concluded, "*Chevron Oil* no longer controls in this area." *Id.*, at 188, 916 P.2d 933. Moreover, *Chevron Oil* was a test for application of a new rule adopted in a federal civil case, and has

not been applied to application of a new rule adopted in a state criminal case. There was no precedent for use of *Chevron Oil* in this context.

¶ 26 However, under binding state precedent, the same result would have been reached. The United States Supreme Court has held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Washington courts have cited *Griffith* with approval: "A new rule announced by the state or federal Supreme Court applies to all cases pending direct review at the time the rule is announced." *State v. Gamble*, 118 Wash.App. 332, 335-36, 72 P.3d 1139 (2003) *reversed in part on other grounds* by 154 Wash.2d 457, 114 P.3d 646 (2005); *see also In re Pers. Restraint of St. Pierre*, 118 Wash.2d 321, 325-26, 823 P.2d 492 (1992). The rule announced in *Ellis* was applied to *Ellis*; under *Griffith* and *St. Pierre*, the rule should have retroactively applied to *Atsbeha* without reference to a *Chevron Oil* analysis.

¶ 27 While *Griffith* and *St. Pierre* should have been controlling precedent, neither case was cited in the briefing to *Atsbeha*. And, the parties did not ask that these cases be overruled in name or theory; nor did they cite *Chevron Oil* to the court as the test. Further, to the extent that the Rules of Evidence were at issue and could also apply in a civil context, *Robinson* would have been the controlling authority. However, it also was not cited by either party. This reinforces the conclusion that the court did not intend to overrule binding precedent *sub silentio*.

¶ 28 In *Audett* the Washington Supreme Court referred to the *Chevron Oil* analysis as instructive to determine whether to apply new civil commitment procedures from *In re the Detention of Williams*, 147 Wash.2d 476, 55 P.3d 597 (2002) *overruled on other grounds* by 117 Wash.App. 611, 72 P.3d 186 (2003). But, the *Audett* opinion was not purporting to adopt a new rule, which is the first requirement of the *Chevron Oil* test. *Digital Equip.*, 129 Wash.2d at 184, 916 P.2d 933. Under *Robinson*, "once this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by

procedural requirements." *Robinson*, 119 Wash.2d at 77, 830 P.2d 318. The new rule had been announced and applied in *Williams*, therefore it applied to all subsequent litigants including, Audett. While the *Audett* court reached the result required by *Robinson*, the reference to *Chevron Oil* is at odds with *Robinson* and *Digital Equip*. The parties did not ask the court to overrule *Robinson* or *Digital*; they did not even cite *Robinson*, *Digital* or *Chevron Oil* to the court. Further, the *Audett* opinion does not mention *Beam*, *Robinson* or *Digital* all of which disavow *Chevron Oil*. We conclude that the court was not asked to and did not intend to overrule *Robinson sub silentio*.

WE CONCUR: DWYER, J., and SCHINDLER,
A.C.J.
Wash.App. Div. 1,2007.
Lunsford v. Saberhagen Holdings, Inc.
160 P.3d 1089

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¶ 29 In sum, a *Chevron Oil* analysis is not appropriate in this case. *Robinson* is a clear and binding statement of the rule of retroactivity in civil cases. We conclude that it is still good law. Because the rule of strict product liability adopted in *Ulmer* and *Tabert* was applied to the litigants in subsequent*1096 asbestos exposure cases, it applies retroactively to all subsequent litigants not barred by procedural requirements. This includes litigants, like **Lunsford**, exposed to asbestos prior to Washington's adoption of § 402A of the Restatement of Torts.

VII. *Admissibility of American Law Institute (ALI)
Documents*

[8] ¶ 30 We find that the trial court was correct when it denied **Lunsford's** motion to strike documents describing the proceedings of the ALI as inadmissible hearsay. Evidence Rule (ER) 803(a)(16) provides a hearsay exception for "[s]tatements in a document in existence 20 years or more whose authenticity is established." ER 901(b)(8) and 902(e) provide for authentication of ancient documents. The reasons for this exception were explained in *Bowers v. Fibreboard Corp.*, 66 Wash.App. 454, 461-63, 832 P.2d 523 (1992), *rev. denied*, 120 Wash.2d 1017, 844 P.2d 436 (1992). They do not bear repeating. The ALI documents recorded proceedings from 1958, 1961 and 1964. They have been in existence for more than 20 years. They are authenticated as official publications under 902(e). The documents meet the hearsay exception under ER 803(a)(16).

¶ 31 We reverse and remand.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

RONALD LUNSFORD and ESTHER LUNSFORD,)	No. 57293-8-I
)	
Appellants,)	CORRECTED ORDER
)	DENYING
v.)	RESPONDENT'S MOTION
)	FOR RECONSIDERATION
SABERHAGEN HOLDINGS, INC.,)	
FIRST DOE through ONE)	
HUNDRETH DOE,)	
)	
Respondents.)	
)	

Respondent, Saberhagen Holdings having filed its motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 27th day of August, 2007.

FOR THE COURT:

Appelwick, CJ
Judge

TOPIC 5. STRICT LIABILITY

§ 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(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, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(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.