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SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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RONALD LUNSFORD and ESTER LUNSFORD,

*Respondents,*

v.

SABERHAGEN HOLDINGS, INC.,

*Petitioner.*

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REPLY IN SUPPORT OF PETITION FOR REVIEW

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FILED AS ATTACHMENT  
TO E-MAIL

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## I. INTRODUCTION

Petitioner Saberhagen Holdings, Inc., submits this Reply in Support of its Petition for Review pursuant to RAP 13.4(d), which permits a reply “if the answering party seeks review of issues not raised in the petition for review.” Saberhagen’s Petition raised a single issue: whether the court of appeals erred in holding that selective prospectivity of civil judicial decisions in the State of Washington is no longer 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), contrary to this Court’s holdings as recently as one year ago. *See In re Audett*, 158 Wn.2d 712, 719-20, 147 P.3d 982 (2006).

In their Answer, however, Respondents Lunsford raise an additional issue: if the *Chevron Oil* factors *do* control, what should be the outcome? Would those factors *support* or *defeat* retroactive application of Restatement (Second) § 402A strict liability, adopted by this Court as to product manufacturers in 1969, *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729, and as to product sellers in 1975, *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774, to an alleged injury in 1958 from a product sold by Saberhagen’s alleged predecessor, The Brower Company? Neither the trial court nor the court of appeals engaged in such

an analysis,<sup>1</sup> and it was not raised in Saberhagen's Petition.

The Lunsfords argue that review should be denied because, even if the court of appeals was wrong in holding that the *Chevron Oil* factors no longer control, the result would have been the same, i.e., *Ulmer's* and *Tabert's* adoption of 402A strict liability would have been retroactively applied. As demonstrated below, the Lunsfords are mistaken. Even on the limited record that currently exists, the *Chevron Oil* analysis plainly favors the *non-retroactive* application of 402A, *Ulmer*, and *Tabert* to the parties and events of 1958 that are pertinent herein.<sup>2</sup>

## II. ARGUMENT

As discussed in Saberhagen's Petition for Review, this Court applies 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:

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<sup>1</sup> The Lunsfords did not argue for "retroactivity" in the trial court but contended that application of section 402A to exposures predating its adoption was "implicitly ratified" by appellate decisions in the 1990s that were silent on the issue. (CP 142-45.) The trial court granted summary judgment to Saberhagen, but the court of appeals reversed based a retroactivity argument the Lunsfords made for the first time on appeal and held that all judicial decisions are fully retroactive.

<sup>2</sup> Nonetheless, Saberhagen believes that the proper scope of this Court's review should be limited to deciding whether the Court of Appeals was correct or in error when it ruled that the *Chevron Oil* test is no longer applicable in Washington retroactivity determinations. If this Court decides that the *Chevron Oil* is applicable, then the proper course would be to remand so that the parties can develop a full record on the facts pertinent to that test and the trial court can rule based upon that full record.

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.

*In re Audett*, 158 Wn.2d at 720-21.

A. **First Chevron Oil Factor: Strict Liability for Product Manufacturers and Sellers Was a “New Rule” that Was Not “Clearly Foreshadowed” in 1958.**

Section 402A was first published by the American Law Institute (ALI) in 1965. This Court adopted section 402A in 1969 as to manufacturers only. *Ulmer*, 75 Wn.2d at 530. It was extended to product sellers (such as Brower) in 1975. *Tabert*, 86 Wn.2d at 150. Those decisions dramatically changed prior law concerning the liability of product manufacturers and sellers.<sup>3</sup>

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<sup>3</sup> The *Tabert* and *Ulmer* decisions received considerable public attention when they were handed down. Each case reflected a substantial change in the law, and each was immediately reported in the local newspapers. See CP 101 (SEATTLE POST-INTELLIGENCER, Mar. 21, 1969: “In a far-reaching decision with consumer protection impact, the State Supreme Court yesterday held that an auto maker or other manufacturer, no matter how careful he is, is liable for damages to the user if the product fails.”); CP 98-100 (SEATTLE TIMES, Nov. 27, 1975: “*Supreme Court Says Sellers are Liable* . . . The State Supreme Court extended the boundaries of consumer protection yesterday by widening the liability for faulty products to include not just the maker, but the seller”).

In 1958, product sellers generally could *not* be held strictly liable for injuries caused by defective products. See *Larson v. Farmers' Warehouse Co.*, 161 Wash. 640, 644, 297 P. 753 (1931) (noting the general rule that product sellers are not subject to claims such as "implied warranty"). Claims against *manufacturers* sounded either in negligence or warranty. Although warranty did not require fault, it did require privity. See *La Hue v. Coca-Cola Bottling Co.*, 50 Wn.2d 645, 647, 314 P.2d 421 (1957). Notably, the Lunsfords do not contend that Mr. Lunsford was in privity with Brower -- or anyone else<sup>4</sup> -- in 1958 as to the products that supposedly injured him.

There were exceptions to the privity requirement. Courts in Washington and elsewhere had carved out narrow exceptions in *food product* cases, characterizing the claim as one of *implied warranty*. See *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913). Such exceptions were based on the special importance of food, such that the law should imply a warranty that purchased food is wholesome and fit for consumption. *Id.*; *Brewer v. Oriard Powder Co.*, 66 Wn. 2d 187, 191, 401

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<sup>4</sup> It is significant that Mr. Lunsford not only lacks privity with Brower; he lacks privity *with anyone*. Saberhagen is not aware of any pre-1958 Washington case allowing an implied warranty claim to a plaintiff who did not at least buy the defective product from *someone*. Prosser himself canvassed the case law in 1964 and told the ALI that he had found *no* such cases allowing bystanders to assert strict liability claims. See 41 ALI PROC. 352-53 (1964) [CP 124]; discussion *infra* at 5-7, see also *infra* at 9 n.11.

P.2d 844 (1965); RESTATEMENT (SECOND) OF TORTS § 402A at 74B-75 (Council Draft No. 8, 1960) [CP 107-08]. This and similar exceptions<sup>5</sup> notwithstanding, “the general rule” in 1958 was *non*-liability of the manufacturer absent privity.<sup>6</sup> See *La Hue*, 50 Wn.2d at 647.

A nationwide trend toward eliminating the privity requirement and adopting strict liability developed quickly, dramatically, *and after 1958*. In January 1958, the Advisory Committee of the ALI (led by William L. Prosser, Reporter) discussed a proposed new restatement section, 402A, that would reflect the recently-developed implied warranty exception to the privity requirement for actions against manufacturers of *food products only*.<sup>7</sup> See RESTATEMENT (SECOND) OF TORTS § 402A (Prelim. Draft No. 6, 1958) [CP 110-12]. Following consideration by the ALI Council, the Preliminary Draft was first presented to the ALI in 1961. However, Prosser told the Institute that in the few years that had elapsed since the Preliminary Draft, much had changed in the law of strict liability, and the pace of change was accelerating at a rate that shocked even Prosser:

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<sup>5</sup> Apparently based upon the same rationale as the food exception, i.e., that such items are intended to come into direct contact with the human body, several Washington decisions recognized exceptions for clothing, drugs, and cosmetics. See, e.g., *Ringstad v. I. Magnin & Co.*, 39 Wn.2d 923, 239 P.2d 848 (1952); *Brewer*, 66 Wn. 2d at 191.

<sup>6</sup> Indeed, the development of tort principles that ultimately led from this “general rule” of non-liability to the broad strict liability of 402A had hardly even *begun* in 1958, as shown by the proceedings of the ALI.

<sup>7</sup> Prosser identified Washington as one of 15 states following the food products rule in 1958. CP 111-12.

*So much for food.* Actually, beginning a very short time ago, a great many jurisdictions are now applying the rule of this section to products *other than food*. You will find . . . several cases applying it to articles for what might be called *intimate bodily use* which is external rather than internal -- things like hair dye, soap, permanent wave solutions, surgical pins for setting a bone fracture, polio vaccine in California, and then getting beyond what might be called bodily use in any sense of the word, you find very recently *a quite spectacular eruption of cases* which extended the rule of this section to other products not for external use at all. . . .

*This is perhaps the most spectacular development that I have witnessed in my lifetime in the American law of Torts.*

. . .

[Y]ou will notice how late most of the cases are -- the *great majority of them since 1958* -- this rather *spectacular* extension of the whole thing to things like automobiles. There is a great deal of contrary authority even in the states which accept the food liability. California, for instance, thus far has refused to extend to anything beyond food . . . . They won't apply it to pumps, insecticides -- anything like that -- so that here what appears . . . is a definite minority rule. It is a minority of the jurisdictions -- about 7 or 8 of them -- which have suddenly kicked over the traces in a *spectacular fashion since 1958*. There seems to be every indication that that is spreading and spreading rapidly, but it is still a small minority.

38 ALI PROC. 51-52, 71-72 (1961) (emphasis added) [CP 115-16, 118-19].

By the end of the 1961 conference, Prosser convinced the ALI that the "spectacular" development of the law *since 1958* warranted expanding the scope of 402A's strict liability from food products *only*, to products intended for "intimate bodily use." Prosser was directed to redraft the

section accordingly, expand the comments and resubmit them the following year. *Id.*; 41 ALI PROC. 349 (1964) [CP 122].

Remarkably, by the time the ALI reconvened in 1964 to discuss the revised draft, Prosser felt it necessary to propose yet *another* expansion -- this time to *all* products -- due to the continued, “explosive” expansion of the law since the prior revised draft. *Id.* at 349-50 [CP 122].

Prosser noted:

[I]t becomes apparent that if our Section of the Restatement which we have approved is to be published this summer in Volume 2 of the Restatement, it will be on the verge of becoming dated before it is published.

...

*[T]his is the speediest development in the law of torts that I have encountered in my lifetime, as well as being one of the most spectacular.*

*Id.* at 350-51 (emphasis added) [CP 123]. After lengthy discussion, the ALI approved the expansion to all products and the section was published in its current form in the 1965.

Clearly, in 1958 (when Mr. Lunsford claims exposure to dust from Brower products), *no one* -- not William Prosser, not the American Law Institute, *and certainly not Brower* -- could have foreseen the “spectacular” development of the law of strict liability that would ultimately lead to 402A in 1965, its adoption in *Ulmer* in 1969 as to manufacturers, and its adoption in *Tabert* in 1975 as to product sellers.

The historical record notwithstanding, the Lunsfords contend that *Ulmer's* adoption of 402A in 1969 was "clearly foreshadowed" by the implied warranty cases cited in *Ulmer*. They ignore that most of those cases were decided *after 1958*,<sup>8</sup> i.e., *after* Mr. Lunsford's alleged exposure to Brower products. Whatever those decisions may have foreshadowed *after* they were issued, they plainly foreshadowed nothing in *1958*.

As for the few implied warranty cases cited in *Ulmer* that were decided *before 1958*,<sup>9</sup> they were largely<sup>10</sup> confined to the narrow categories of *food, cosmetics, and clothing*, i.e., the categories that, according to Prosser's observation in 1961, defined the outer limits of implied warranty claims in which courts dispensed with a privity

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<sup>8</sup> *Pulley v. Pacific Coca-Cola Bottling Co.*, 68 Wn.2d 778, 415 P.2d 636 (1966); *Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 378 P.2d 298 (1963); *Brewer v. Oriard Powder Co.*, 66 Wn.2d 187, 401 P.2d 844 (1965); *Brown v. General Motors Corp.*, 67 Wn.2d 278, 407 P.2d 461 (1965); *Wise v. Hayes*, 58 Wn.2d 106, 361 P.2d 171 (1961); *Dipangrazio v. Salamonsen*, 64 Wn.2d 270, 393 P.2d 936 (1964).

<sup>9</sup> *La Hue v. Coca Cola Bottling Co.*, 50 Wn.2d 645, 314 P.2d 421 (1957); *Nelson v. West Coast Dairy Co.*, 5 Wn.2d 284, 105 P.2d 76 (1940); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

<sup>10</sup> *Ulmer* also cited a 1932 case involving a defective windshield, rather than food or items intended for close bodily contact, *Baxter v. Ford Motor Co.*, 168 Wn.2d 456, 12 P.2d 409 (1932). However, *Baxter* was decided on an *express* rather than implied warranty theory. In promotional materials given to the dealer, the manufacturer made express claims about the auto's shatter-proof windshield. Plaintiff purchased the auto from the dealer in reliance on those claims. Notwithstanding plaintiff's lack of privity with the manufacturer, *Baxter* ruled that in fairness the manufacturer should be held to the terms of the express representations it used to create consumer demand. *Id.* See *Fleenor v. Erickson*, 35 Wn.2d 891, 215 P.2d 885 (1950) (holding that, outside of narrow exceptions, "[t]he general rule is that if there is no privity there can be no warranty, either express or implied"; distinguishing *Baxter* on grounds that it involved violation of *express representations*). *Accord* *Murphy v. Plymouth Motor Corp.*, 3 Wn.2d 180, 182-83, 100 P.2d 30 (1940).

requirement. See Brief of Respondent at 20-21. Notably, just three years earlier in 1958 (the year of Mr. Lunsford's alleged exposure), Prosser considered the availability of such claims to be considerably narrower, being allowed *only* against the manufacturers of *food products*; and he characterized Washington as one of the states allowing only this narrow exception as of 1958. *Id.* at 19, n.21.

Notwithstanding the astonishing changes in the law that were to follow in the coming decade, the law *in 1958* was fairly settled in Washington: outside of narrow exceptions, privity was required for warranty claims.<sup>11</sup> Nothing in Washington's law as of 1958 "clearly foreshadowed" for Brower a development Prosser himself considered "the speediest development in the law of torts that I have encountered in my lifetime, as well as being one of the most spectacular."<sup>12</sup> 41 ALI PROC.

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<sup>11</sup> In 1962, the Washington Supreme Court stated that, regardless of the various exceptions under which implied warranty claims are permitted in the absence of privity, *all such claims require the plaintiff to be a product purchaser*: "[F]or there to be recovery on a breach of an implied warranty, the plaintiff must have bought something from somebody." *Kasey v. Suburban Gas Heat*, 60 Wn.2d 468, 475, 374 P.2d 549 (1962) (propane gas explosion case where the Court prohibited the implied warranty claim asserted by a neighbor against the gas supplier, as the neighbor was not in privity either with the gas supplier). The law would have prohibited an implied warranty claim by a bystander such as Mr. Lunsford who did not purchase the defective product.

<sup>12</sup> Any non-manufacturing product sellers such as Brower who happened to consult the Restatement of Torts as it existed *in 1958* would have learned that, so long as they had no reason to know that the product they sold was dangerous, they could not be held liable to third persons injured by the product, even if a pre-sale inspection would have discovered the dangerous condition. REST. OF TORTS § 402 (1948 Supp.). This provision would preclude any liability of Brower to Mr. Lunsford for asbestos-containing products that Brower sold, absent proof that Brower had reason to know the products were dangerous.

350-51 (1964) [CP 123]. The first prong of the *Chevron Oil* analysis militates against retroactive application of *Ulmer* and *Tabert* to events occurring in 1958.

**B. Second *Chevron Oil* Factor: The Purposes of 402A Strict Liability Are Not Furthered by Retroactive Application.**

**1. Retroactive application of *Ulmer* and *Tabert* would defeat the “risk spreading” purpose of 402A strict liability.**

The rationale underlying strict liability is to compensate injured parties through a mechanism that spreads the costs and risks associated with the product. Answer at 12. According to this rationale, liability without fault should be imposed upon product manufacturers and sellers because they can spread the risk or absorb the loss through obtaining insurance or raising the price of the product. *See* REST. (SECOND) OF TORTS § 402A, cmt. c (1965). *See generally* Cortese & Blaner, *The Anti-Competitive Impact of U.S. Prod. Liability Laws*, 9 J.L. & COMM. 167, 175, 181-82 (1989) (“[A]vailability of product liability insurance is critical to the validity of the cost-shifting theory underlying strict liability.”).

The risk-distributing goals of strict liability would not be served by retroactive application of *Ulmer* and *Tabert* to events occurring or products sold in 1958. Because strict products liability did not even exist and was utterly unforeseeable in 1958 (it would not exist for product

sellers like Brower until 1975), Brower and other product sellers would have had no reason whatsoever to procure insurance against such risks in 1958. Social and tort policy may reasonably expect product manufacturers and sellers to insure against *conceivable* risks, but it cannot reasonably expect them insure against the *inconceivable* risks that do not exist under current or foreseeable developments in the law. See Henderson & Twerski, *A Proposed Revision of Section 402A of the Rest. (Second) of Torts*, 77 CORNELL L. REV. 1512, 1517 (1992).

Similarly, just as Brower cannot reasonably have been expected in 1958 to obtain insurance against claims based on non-existent legal theories, it likewise had no reason to raise the price of its products incrementally and thereby spread the cost of a non-existent risk among its purchasers. Indeed, in the case of a non-existent risk, how would Brower know by what incremental margin the price should be increased? Sound social policy can require commercial prudence and foresight, but not clairvoyance.

In planning, conducting, and protecting their businesses in 1958, manufacturers and sellers like Brower were entitled to rely upon the liability limitations and theories Washington courts had announced before

then. Thus, retroactive application of *Ulmer* and *Tabert* would not serve or advance the risk-spreading policies underlying strict liability.<sup>13</sup>

**2. Retroactive application of *Ulmer* and *Tabert* would be inconsistent with current public policy as declared by the Washington State Legislature.**

In arguing that 402A strict liability should apply to their claim arising from exposure in 1958, the Lunsfords rely on a second public policy justification: to guarantee “the maximum of protection” to injured persons at the expense of the product seller, regardless of fault. Answer at 11, citing *Tabert*. Yet even if that was the policy of the Washington as of 1969 and 1975 (when *Ulmer* and *Tabert* were decided), it *ceased* being the

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<sup>13</sup>Indeed, in the context of this case, the extent of any supposed risk-spreading function associated with the Lunsfords’ strict liability claim is truly minimal. Here, the date of sale of the allegedly defective product (1958) and the date of the Lunsford’s resulting claim (2002) are separated by *more than 40 years*. The product in question, asbestos-containing thermal insulation, has long been off the market and in fact is currently banned. See 40 C.F.R. 763.163 *et seq.* (2005); S. Rep. No. 109-97, at 15 (2005), available at <http://thomas.loc.gov> (search “s.852” in bill text, then select hyperlink to S.852.RS, then select “Link to Senate Committee Report 97”). Most of the major insulation manufacturers have gone bankrupt due to the “elephantine mass” of asbestos litigation. *Id.* at 19; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999). Thus, the cost of Brower’s strict liability to the Lunsfords could not be spread through adjusting either Brower’s or the manufacturers’ price for the product, nor can Brower *now* spread the cost by obtaining insurance after the fact, if 402A is held to apply retroactively.

This same grim predicament faces more than 8,400 U.S. companies involved in asbestos litigation today, and the numbers are growing, as individual plaintiffs like the Lunsfords sue scores of defendants in multiple suits. S. Rep. 109-97, at 12; CP 93-94 (service list of 37 companies in Lunsfords’ California suit). Asbestos litigation has forced more than 70 companies into bankruptcy, with more bankruptcies between 2000 and 2004 than in the 1970’s, 1980’s and 1990’s combined. More than 60,000 jobs have been lost, and future bankruptcies are expected to rise exponentially. *Id.* at 14, 20. The plight of those who suffer from serious asbestos disease is tragic, indeed; but plainly the risk-spreading policy that the Lunsfords cite to support 402A strict liability has little merit or relevance in asbestos litigation.

policy of this State shortly thereafter, when the Legislature passed substantial reforms to the state tort system in 1981 -- reforms that were in substantial part *prompted by Ulmer, Tabert, and 402A*.

Momentum for legislative change began almost immediately after *Tabert* in 1975 and increased over the next four years as the product liability controversy continued. SENATE JOURNAL, 47th Leg., Reg. Sess., at 618 (Wash. 1981). Fueling this controversy was the perception (confirmed by the Senate Select Committee on Tort and Product Liability Reform) that products liability insurance costs were “skyrocketing” between 1974 and 1976, creating “a product liability crisis.” *Id.* at 622. Insurance rates for bodily injury and property damages jumped 75% in 1974-75. While products liability insurance remained available in the late 1970’s, *affordability* was problematic. *Id.* at 623.

Among the areas of greatest concern identified by the Senate Select Committee and seen as contributing to the insurance and product liability crisis were the 402A strict liability standards adopted in *Tabert*<sup>14</sup> and the joint and several liability exposure of non-manufacturing product

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<sup>14</sup>See SENATE JOURNAL, 47th Leg., Reg. Sess., at 624-25 (Wash. 1981) (“With its adoption of Section 402A . . . the Washington court has *purported* to extend strict liability to manufacturers of defective products, regardless of the nature of the defect” (emphasis added)).

sellers.<sup>15</sup> In enacting legislation to address such issues, the Legislature made no secret of its concern over existing products liability law and underlying policy, and the need for reform:

The purpose this amendatory act is to enact further reforms in the tort law to create *a fairer and more equitable* distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial motivation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

LAWS OF 1981, ch. 27, § 1 (emphasis added). Accordingly, reform legislation proceeded from a new, more balanced policy, in which the interests of *injured consumers*, while important, did not trump all others:

It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer *in a balanced fashion* in order to deal with these problems.

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<sup>15</sup>See SENATE JOURNAL, *supra*, at 632 (“One of the complaints most frequently expressed before the Legislature during the whole course of the product discussion over the past few years has been the alleged inequity of holding the non-manufacturing product seller liable for product defects over which it had no control . . .”); 1981 FINAL LEGISLATIVE REPORT, 47th Wash. Leg., at 126 (“Proponents of legislation point to the significant increase in product liability insurance premiums which occurred in the early 1970’s which they say resulted from judicial decisions increasing the exposure of product sellers to liability for defective products”); Philip Talmadge, *Washington’s Product Liability Act*, 5 U. PUGET SOUND L. REV. 1, 5-6, n.28 (1981) (Senate Select Committee Chairman attributes “extreme variations” in product liability insurance premiums from 1973-79 to uncertainty among insurers about the trend in Washington product liability law).

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be *unduly* impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.

*Id.* (emphasis added). To restore a more balanced products liability system, the 1981 WPLA contained important changes benefiting product manufacturers and sellers, including a substantial limitation of liability for product sellers (such as Brower), allowance of evidence of state of the art, provision of an absolute defense where a product is in compliance with government specifications, a 12-year statute of repose/useful safe life, and adoption of comparative fault. *See* RCW 7.72.030 *et seq.*

If the Lunsfords are correct that 402A, *Ulmer*, and *Tabert* embodied a monolithic policy of guaranteeing consumers “the maximum of protection,” then that fact today is of merely historical significance; it has *not* reflected Washington products liability policy *since 1981*. Applying 402A strict liability to an exposure *in 1958* would unnecessarily and unwisely perpetuate and expand the unsatisfactory products liability scheme that instigated legislative reform in 1981. The WPLA represents *current* public policy, which favors a *balanced* approach to protect the

interests of manufacturers, sellers and insurers, while not “*unduly* impairing” the recovery rights of injured consumers.

C. **Third Chevron Oil Factor: Retroactive Application Would Be Inequitable.**

The equities militate strongly against retroactive application of *Ulmer/Tabert* in this case. As discussed above, Brower could have had no inkling in 1958 that it might one day be held liable, regardless of fault, to persons other than its customers for injuries caused by its products. Because the risk of such liability was unforeseeable, there is no plausible means by which Brower could have acted to protect itself or to distribute the costs that might one day be imposed. It would be unjust to impose strict liability upon Brower retroactively under the circumstances.

In contrast to the inequity that would result for Saberhagen if the Lunsfords’ strict liability claims are allowed, no inequity will result for the Lunsfords if the strict liability claims are dismissed. They will retain precisely the same legal claims -- no more and no less -- as every other person who was injured by a product in Washington State in 1958.

The Lunsfords have never disputed the fact that, if Mr. Lunsford had become ill *in 1958* as a result of his exposure (instead of 42 years later) and had sued Brower that same year, he would have had no cause of action for strict liability and could only assert a negligence claim. Indeed,

the *only* reason that Mr. Lunsford can even advance the argument for strict liability is because his illness did not show up until 42 years after the exposure that supposedly caused it and because, in the interim, the law has developed in a way he considers more favorable. Certainly the nature of a product seller's liability should not turn upon how long it takes for the injury to manifest itself. Mr. Lunsford's remedies should be no greater than those of any other similarly-situated person injured by an allegedly defective product in Washington in 1958.<sup>16</sup>

Their suggestions to the contrary notwithstanding, there is *no* evidence suggesting that the Lunsfords -- who have previously sued and resolved their claims against 37 other companies in a California lawsuit (*see* CP 93-94) -- will suffer *any* harm if 402A is not retroactively applied to 1958.<sup>17</sup> But leaving aside their *actual* recoveries to date and the recoveries they may yet obtain on their *negligence* cause of action, the fact remains that the theoretical "harm" they contend will result if 402A is not

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<sup>16</sup>In any event, even if it were a hardship for the Lunsfords to pursue Saberhagen with only a negligence claim, Washington courts have repeatedly noted that non-retroactive application of certain judicial decisions is appropriate, even if "of necessity, hardships result." *Erdman v. Lower Yakima Valley B.P.O.E Lodge No. 2112*, 41 Wn. App. 197, 212, 704 P.2d 150 (1985). *See also Cunningham v. Lockard*, 48 Wn. App. 38, 42, 736 P.2d 305 (1987).

<sup>17</sup>Moreover, the Lunsfords' unsupported suggestion that denying retroactive application of *Ulmer* to pre-*Ulmer* exposures "could eliminate strict liability for most mesothelioma cases" (Answer at 14) completely ignores a basic fact: that many mesothelioma cases -- and even the Lunsfords' case itself (CP 89, alleging exposures in 1970-74) -- also allege *post-Ulmer* exposures. Those exposures could plainly support 402A strict liability claims against proper parties, since *Ulmer* would apply prospectively to such claims.

retroactively applied boils down to this: if 402A is not retroactively applied to Mr. Lunsford's injury from asbestos products in 1958, he will be left with "only" the rights and remedies that were available to every other person who was injured that year by defective products. This supposed "harm" hardly constitutes inequity under *Chevron Oil*.

By contrast, applying 402A retroactively *would* be inequitable for Brower and other manufacturers or sellers of asbestos-containing products. It would single them out among virtually all other product manufacturers and sellers in 1958 for the imposition of new, unforeseeable, and devastating forms of liability against which they could not have protected themselves, or evaluated their potential risks, or even made an informed decision as to whether to leave the business entirely.

The Lunsfords suggest that any resulting inequity for Brower is ameliorated by the option of seeking contribution from other responsible parties. Answer at 12. However, many of the largest and most significant "responsible parties" -- more than 70 to date -- are bankrupt as a result of asbestos litigation, and the pace of asbestos-related bankruptcies is accelerating exponentially. See Brief of Respondent at 25, n.22.

Finally, in balancing the equities it is important to avoid the confusion the Lunsfords invite in their quotation from *Taskett v. KING*

*Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), where this Court compared the equities as between an innocent person whose reputation was destroyed through libel and an unscrupulous television station that “breached its ethical duties” to the public and negligently libeled that person. Answer at 12-13, quoting *Taskett*, 86 Wn.2d at 450. *Taskett* addressed the desirability of retroactively imposing a *negligence* cause of action for libel, i.e., an action in which a party breached a duty through unreasonable and negligent conduct and is *at fault*. By contrast, retroactive application of 402A would impose *strict liability* upon parties *without fault*. Refusing to apply 402A retroactively will not affect Mr. Lunsford’s right to proceed in negligence against a party who, like the TV station in *Taskett*, caused his injury through unreasonable conduct falling below the standard of care; in short, someone who was *at fault*.

### III. CONCLUSION

This Court should grant review and reverse the court of appeals. Review (and reversal) cannot be denied on the ground that the result would be the same even if the court of appeals was wrong in holding that the *Chevron Oil* factors no longer control. In fact, this case demonstrates why the *Chevron Oil* factors have been retained as a basis for giving

selective prospectivity, as opposed to full retroactivity, to certain judicial decisions. Here, review of the *Chevron Oil* factors demonstrates that:

1. Brower could not possibly have foreseen in 1958 the development of 402A strict liability or its adoption in *Ulmer* and *Tabert* in 1969 and 1975;
2. The *Ulmer* and *Tabert* decisions fundamentally changed the liabilities of product manufacturers and sellers and overruled the law in effect in 1958, allowing claims that had previously been barred;
3. In assessing its insurance needs, product pricing, and product testing duties in 1958, Brower had a right to rely upon the state of the law and the claims and remedies then available;
4. Retroactive application of *Ulmer* and *Tabert* would not advance the risk-spreading policies that underlie 402A;
5. The Washington State Legislature has determined that implementation of the policies underlying 402A and the *Ulmer* and *Tabert* decisions has led to a product liability crisis, requiring fundamental and sweeping reforms and a more balanced state products liability policy; and
6. Retroactively applying *Ulmer* and *Tabert* would result in substantial prejudice to Saberhagen by imposing the burden of unforeseeable risks, while dismissing the Lunsfords' strict liability claims would leave them with the same rights as any other person injured by a product in 1958.

Respectfully submitted this 13th day of November, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By  30512

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Holdings, Inc.'s Reply in Support of Petition for Review, Supreme Court

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Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 13, 2007, at Seattle, Washington.



Catherine A. Norgaard, Legal Assistant  
Carney Badley Spellman P.S.

Declaration

IS ATTACHMENT  
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Attached please find Petitioner Saberhagen Holdings, Inc.'s Reply in Support of Petition for Review and Declaration of Service.

**Case Name:** Ronald Lunsford and Ester Lunsford v. Saberhagen Holdings, Inc.

**Supreme Court No.** 80728-1

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