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NO. 57293-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RONALD LUNSFORD and ESTER LUNSFORD,

Appellants,

v.

SABERHAGEN HOLDINGS, INC.,

Respondent.

RESPONDENT'S ANSWER TO BRIEF OF AMICUS CURIAE

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I. INTRODUCTION

Respondent Saberhagen Holdings, Inc. (“Saberhagen”) submits this brief in answer to the Brief of Amicus Curiae Schroeter Goldmark & Bender (“SGB”), an asbestos plaintiffs’ law firm.

II. ARGUMENT

A. SGB’s Brief Expands upon the Lunsfords’ Retroactivity Arguments that Were Never Advanced Below and Are Improperly Asserted on Appeal.

Saberhagen has argued previously that the Lunsfords should not be permitted to raise on appeal retroactivity arguments that they did not raise first in the trial court. Their entire summary judgment opposition brief in the trial court was barely 8 pages long and it contained no mention of the argument that has now become the centerpiece of their appeal, namely, that the Washington Supreme Court’s adoption of RESTATEMENT (SECOND) OF TORTS §402A (1965) (“402A”) was retroactive according to a general principle of retroactivity of judicial decisions. The brief of SGB continues down the same new path.

Saberhagen reiterates its objection to the consideration of these arguments and asks the Court to respond precisely as it did when, in the prior appeal in this case, *the Lunsfords* objected to Saberhagen’s new argument that no strict liability cause of action existed in 1958 when Mr. Lunsford’s exposure occurred: the Court declined to consider that

argument because it had not first been raised in the trial court.¹ *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 106 P.3d 808 (2005).

B. SGB's Reliance upon *Robinson* Overlooks More Recent, and Controlling, Supreme Court Precedent.

To determine the applicable law concerning retroactivity of judicial decisions, SGB looks to the 1992 case of *Robinson v. City of Seattle*² and concludes that the Washington Supreme Court has abandoned once and for all the *Chevron Oil v. Huson*³ test for determining whether an appellate decision should be applied prospectively only, or with limited prospectivity. SGB is plainly wrong, as demonstrated by Washington Supreme Court decisions since *Robinson*. Indeed, *less than two months ago*, the Washington Supreme Court *reaffirmed Chevron Oil* as setting forth the appropriate analysis for determining whether an appellate decision applies retroactively, prospectively only, or with selective prospectivity. *In re Audett*, __ Wn.2d __, 147 P.3d 982, 986-87 (November 30, 2006). *See also State v. Atsbeha*, 142 Wn.2d 904, 916-17, 16 P.3d 626 (2001).

¹ If the Court nonetheless decides to consider these new arguments, then *Saberhagen* believes that all factual issues that may be presented in connection with those new arguments should be resolved in *Saberhagen's* favor, since the failure to raise the arguments below obviously deprived *Saberhagen* of a fair opportunity to develop a factual record on those arguments in the trial court.

² 119 Wn.2d 34, 830 P.2d 318 (1992).

³ 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

1. **Washington courts have followed *Chevron Oil* since 1976.**

The Washington Supreme Court adopted the *Chevron Oil* test in *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 448, 546 P.2d 81 (1976). The court held that Washington law permits pure prospectivity and selective prospectivity of judicial decisions and that *Chevron Oil* sets forth the appropriate three-factor test. Under this test 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, 86 Wn.2d at 448, quoting *Chevron Oil*, 404 U.S. at 106-07.⁴

Thereafter, however, the U.S. Supreme Court announced that, in matters of *federal* law, it was abandoning *selective* prospectivity - - i.e., the application of an overruling decision retroactively only to the litigants

⁴ The Washington Supreme Court's adoption of the *Chevron Oil* factors in 1976 was by no means its first recognition of its authority to limit retroactivity of its decisions. *See State ex rel. Washington State Finance Committee 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 the prior rule).

in that case and prospectively to all future litigants whose cases arise thereafter. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2349, 115 L. Ed. 2d 481 (1991), and *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). The Supreme Court made clear that its abandonment of selective prospectivity was binding *only* as to decisions on federal law, and that state courts are free to adopt their own rules in this area. *Harper*, 509 U.S. at 100, citing *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-66, 53 S. Ct. 145, 77 L. Ed. 360 (1932) (“A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.”)

As contemplated by the U.S. Supreme Court, Washington appellate courts (and the majority of other jurisdictions, see discussion *infra* at 8-9) thereafter have continued to apply the *Chevron Oil* test to determine whether to give selectively prospective effect to state-law decisions. See *State v. Atsbeha*, 142 Wn.2d 904, 916-17, 16 P.3d 626 (2001); *In re Audett*, ___ Wn.2d ___, 147 P.3d 982, 986-87 (2006). Cf. *Digital Equip. Corp. v. State*, 129 Wn.2d 177, 188, 916 P.2d 933 (1996) (recognizing that *Chevron Oil* factors no longer control retroactivity of a federal-law decision).

2. In *Digital Equipment*, the Washington Supreme Court followed *Beam Distilling* and *Harper* to give retroactive effect to a federal-law decision.

In *Digital Equipment*, the Washington Supreme Court gave retroactive effect to a decision on an issue 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. The court limited its holding regarding retroactivity analysis to decisions on issues of *federal* law:

The normal rule, then, is retroactive application of a new pronouncement of *federal law* unless the Court declares otherwise. [Citing *Beam Distilling* and *Robinson*.] *Chevron Oil* no longer controls in *this area*.

...

Once the United States Supreme Court has applied a new pronouncement of *federal law* to the parties then before the Court, it does so with respect to all others not barred by res judicata or procedural rules.

129 Wn.2d at 188, 194 (footnotes omitted) (emphasis added).

The court in *Digital Equipment* said nothing to suggest that the *Chevron Oil* test would no longer determine retroactivity of *state court* decisions, nor has *Digital Equipment* been interpreted as so holding. To the contrary, in *Atsbeha*, the Washington Supreme Court cited *Digital Equipment* as authority for applying the *Chevron Oil* factors in determining whether to give selectively prospective effect to a decision on

an issue of state law.⁵ In applying the *Chevron Oil* test, the *Atsbeha* court declined to follow *Beam Distilling* and *Harper* as to state-law decisions.⁶ *Atsbeha*, 142 Wn.2d at 916-17, citing *Digital Equip.*, 129 Wn.2d at 184.

3. In *Atsbeha* and *Audett*, the Washington Supreme Court followed *Chevron Oil* in determining whether to give selectively prospective effect to prior decisions.

In *Audett*, decided in November 2006, the Washington Supreme Court again applied the *Chevron Oil* factors in determining whether to give selectively prospective effect to a decision on an issue of state law.⁷ *Audett*, 147 P.3d at 985-87. The *Audett* court relied in large part upon the New Mexico Supreme Court's decision in *Beavers v. Johnson Controls World Services, Inc.*, 118 N.M. 391, 881 P.2d 1376 (1994).

The *Audett* court's reliance upon *Beavers* is particularly instructive because *Beavers* was sharply critical of *Beam Distilling* and *Harper* (at least insofar as they might be applied to state-law decisions). *Beavers* held that selective prospectivity *would* be permitted and that the *Chevron*

⁵At issue in *Atsbeha* was the Washington Supreme Court's earlier decision in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), that the admissibility of expert testimony regarding the defense of diminished capacity is governed by ER 401, ER 402, and ER 702.

⁶ The court also declined to follow the U.S. Supreme Court decision in *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), that decisions on issues of criminal cases apply retroactively without exception.

⁷ At issue in *Audett* was the Washington Supreme Court's earlier decision in *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002), that, pursuant to state statute, the State is not entitled to conduct a CR 35 mental examination of an individual for whom the State seeks commitment as a sexually violent predator.

Oil factors would continue to determine retroactivity of state-law decisions. *Beavers*, 881 P.2d at 1383. The *Beavers* court was particularly critical of the majority opinion in *Harper*, agreeing instead with and quoting Justice O'Connor's concurring opinion approving *Chevron Oil*:

[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.

Beavers, 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). The *Beavers* court also quoted Justice Felix Frankfurter's criticism of the "declaratory theory" of law:

We should not indulge in the fiction that the law now announced has always been the law. . . . It is much more conducive to the law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.

Beavers, 881 P.2d 1381, quoting *Harper*, 509 U.S. at 116-17 (O'Connor, J., concurring), quoting *Griffin v. Illinois*, 351 U.S. 12, 26, 76 S.Ct. 505, 100 L. Ed.2d 891 (1956) (Frankfurter, J., concurring).

4. The Washington Supreme Court is in the majority of jurisdictions that use the *Chevron Oil* test to determine whether to give selectively prospective effect to state law decisions.

By its application of the *Chevron Oil* factors in *Atsbeha* and *Audett*, its citation of the *Beavers* decision in *Audett*, and its express recognition in *Digital Equipment* that *Beam Distilling* and *Harper* apply only to federal-law decisions, the Washington Supreme Court plainly holds that *Chevron Oil* remains the test in Washington State for determining whether a state-law decision is to be given retroactive, prospective, or selectively prospective effect.

In so holding, the Washington Supreme Court is among the majority of jurisdictions that have declined to follow *Beam Distilling* and *Harper* as to state-law decisions and have instead continued to apply the *Chevron Oil* test for retroactivity determinations. *See, e.g., Findley v. Findley*, 280 Ga. 454, 620 S.E.2d 222 (2006) (“[T]he juristic philosophy of this State is more consistent with that expressed in *Chevron Oil* than that of [*Beam Distilling*] or [*Harper*].”); *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 104 P.3d 483 (2004) (“The more common approach . . . has been to decline *Harper*’s invitation to rethink *Chevron*, and merely to note that *Harper* is only applicable to federal law.”); *Wenke v. Gehl Co.*, 274 Wis.2d 220, 682 N.W.2d 405, 428-30 (2004); *Citicorp 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, 1227 (1997) (*Harper* has no application to state-law decisions); *Beavers*, *supra*; *Montells v. Haynes*, 133 N.J. 282, 627 A.2d 654, 661 (1993); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 113 n.7 (Colo. 1992) (“[W]e continue to adhere to the *Chevron* analysis in resolving the issue of retroactive or prospective application of [a] state judicial decision.”).

5. To the extent *Robinson* is inconsistent with the subsequent *Digital Equipment*, *Atsbeha*, and *Audett* decisions, it has been impliedly overruled by them.

The sole contrary Washington authority cited by SGB, *Robinson v. City of Seattle*, precedes *Digital Equipment*, *Atsbeha* and *Audett* and the rejection in those cases (implicit or explicit) of *Beam Distilling* and *Harper*. In *Robinson*, the Washington Supreme Court, following *Beam Distilling*, declined to apply the *Chevron Oil* factors or to consider giving selective prospectivity to two of its state-law decisions. 119 Wn.2d 34, 73-77. To the extent that *Robinson* can be said to have held (as SGB contends) that state courts may no longer use a *Chevron Oil* analysis to determine whether to give selectively prospective effect to a state-law decision, that holding has obviously *not* been followed in subsequent cases and has been impliedly overruled by them. The supreme court must be presumed to be familiar with its prior holdings and, in any event, its most

recent decisions are binding even if inconsistent with prior decisions.⁸ See *Pannell v. Food Svcs. of Am.*, 61 Wn. App. 418, 447, 810 P.2d 952, 815 P.2d 812 (1991) (concluding that the latter of two inconsistent Washington Supreme Court decisions had overruled *sub silentio* the former decision).

C. **SGB's Repetition of the Lunsfords' "Implicit Ratification" Argument is Improper and, In Any Event, Lends It No Weight.**

SGB devotes a section of its brief to repeating the Lunsfords' "implicit ratification" argument and authorities, i.e., the argument that since certain Washington asbestos decisions involved strict liability claims of plaintiffs whose asbestos exposures, like Mr. Lunsford's, predated the Washington Supreme Court's adoption of 402A strict liability in *Ulmer* (1969, as to manufacturers) and *Tabert* (1975, as to sellers), those courts must have intended to apply 402A, or to "implicitly ratify" its application, to *pre-402A* exposures. Compare Brief of Amicus Curiae at 8-9 with Brief of Appellants at 4-5, 10-14. Such repetitious argument is improper in an amicus brief. RAP 10.3(e) ("Amicus must review all briefs on file and avoid repetition of matters in other briefs").

⁸ SGB seems to suggest that the *Atsbeha* decision should be regarded as a mistake because it does not cite *Robinson* and neither did the parties. However, the *Atsbeha* court was hardly ignorant of its prior decisions. In applying the *Chevron Oil* to determine the retroactivity of a state-law decision, the *Atsbeha* court cited *Digital Equipment*, which in turn cited *Robinson*, *Harper*, and *Beam Distilling* for the proposition that decisions on issues of federal law are retroactive. *Atsbeha*, 142 Wn.2d at 916 n.33. Moreover, SGB has overlooked the Washington Supreme Court's most recent statement on the subject, *Audett*, which can hardly be written off as a second "mistake."

In any event, Saberhagen has previously addressed the “implicit ratification” argument, pointing out that none of the cited cases addressed or considered the issue of whether 402A strict liability is available in a case arising before 402A became the law of Washington. See Brief of Respondent at 13-15. This issue was never presented in the cited cases and therefore was never decided. See *Berschauer/Phillips Const. Co. Seattle School Dist. No. 1*, 124 W.2d 816, 881 P.2d 986 (1994) (case in which legal theory is *not* discussed in opinion is not controlling on future case where legal theory *is* properly raised). So far as Saberhagen can determine, this issue is an important one of first impression - -which no doubt explains SGB’s keen interest in the outcome of this appeal.

Notably, however, while not addressing the narrow issue of whether 402A applies to claims arising before 402A was adopted in Washington (because the parties did not raise that issue), at least *one* of the cases cited by SGB leaves little doubt that 1958 tort law applies to a 1958 asbestos exposure:

[Appellant’s] argument misconstrues both *Koker [v. Armstrong Cork, Inc.]*, 60 Wn. App. 466, 804 P.2d 659, *rev. denied*, 117 Wn.2d 1006 (1991)] and *Krivanek [v. Fibreboard Corp.]*, 72 Wn. App. 632, 865 P.2d 527 (1993), *rev. denied*, 124 Wn.2d 1005 (1994)], both of which hold that ***the applicable law is that which is in effect at the time of the event that causes the actual harm (in this case exposure to asbestos)***, not at the time the disease manifests itself or is diagnosed.

Viereck v. Fibreboard Corp., 81 Wn. App. 579, 585, 915 P.2d 581, *rev. denied*, 130 Wn.2d 1009 (1996) (emphasis added).⁹

D. SGB's Repetition of the Lunsfords' Chevron Oil Analysis is Improper and Adds Little Original to Previously Submitted Briefing.

Having devoted the first half of its brief to arguing that the *Chevron Oil* factors have been clearly rejected in Washington, SGB devotes the last half to the application of those factors. In doing so, SGB adds little to the arguments previously advanced by the Lunsfords. *Compare Brief of Amicus Curiae at 10-14 with Reply Brief of Appellants at 5-18.* As with its other repetitious arguments and authorities, this instance is likewise improper under the rules of this Court. RAP 10.3(e).

In any event, SGB's *Chevron Oil* analysis, like the Lunsfords', is myopic at best. As to *Chevron Oil's* first prong, i.e., whether the new decision overrules clear past precedent on which litigants may have relied or decides an issue of first impression whose resolution was not clearly foreshadowed, SGB argues that *Ulmer's* adoption of 402A in 1969 was clearly foreshadowed by the implied warranty cases cited in the *Ulmer* decision. However, SGB ignores that most of the key implied warranty

⁹ The choice of law issue in *Viereck* was not what law applied *before* the adoption of 402A; rather the issue was whether the law that *succeeded* 402A, i.e., the 1981 Washington Products Liability Act ("WPLA"), governed an asbestos case in which the plaintiff was diagnosed with an asbestos disease after the effective date of the WPLA.

cases cited by *Ulmer*¹⁰ were decided *after 1958*, i.e., *after* Mr. Lunsford was allegedly exposed to an asbestos product supplied by Brower. Whatever “foreshadowing” value those decisions may arguably have had *after* they were issued, they plainly had none in 1958.

As for the few implied warranty cases cited in the *Ulmer* decision that were issued *before 1958*,¹¹ those cases were largely confined to the narrow categories of *food, cosmetics and clothing*, i.e., the categories that, according to Dean Prosser’s observation in 1961, defined the outer limits of implied warranty claims in which courts dispensed with a privity requirement.¹² See Brief of Respondent at 20-21. Notably, just three

¹⁰ *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. Salomonsen*, 64 Wn.2d 270, 393 P.2d 936 (1964).

¹¹ *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).

¹² *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).

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. Prosser characterized this abrupt expansion in the law of implied warranty between 1958 and 1961 and thereafter as "spectacular." *Id.* at 20. Even the Washington Supreme Court in *Tabert* described the period after 1961 as one of "rapidity of change in this area of the law." *Tabert*, 86 Wn.2d at 147-48.

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.¹³ Brower was entitled to rely upon the law in effect at that time. Certainly there was nothing in Washington's jurisprudence as of 1958 that could have "clearly foreshadowed" for Brower a future

¹³ Even in 1962, the Washington Supreme Court stated, bluntly and categorically, that regardless of the various exceptions under which implied warranty claims are permitted in the absence of privity, nonetheless *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, in which the Court prohibited the implied warranty claim asserted by a neighbor against the gas supplier, since the neighbor was not in privity either with the gas supplier or anyone else). The state of the law at that time would obviously have prohibited any implied warranty claim by persons such as Mr. Lunsford, who had not purchased the defective product from anyone and whose injuries were those of a bystander, as in *Kasey*.

development in the law that 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.”¹⁴ 41 A.L.I. PROC. 350-51 (1964) [CP 123]. The first prong of the *Chevron Oil* analysis plainly militates against retroactive application of *Ulmer* and *Tabert* to events occurring 1958. See Brief of Respondent at 18-22.

As to *Chevron Oil*'s second prong, i.e., considering the purpose and effect of the new rule and whether retroactive application would serve or retard its operation, SGB argues that the purpose of imposing strict liability upon sellers is to “give the consumer the maximum of protection and requiring the dealer to argue out with the manufacturer any questions as to their respective liability.” SGB contends that this purpose is served by applying 402A liability retroactively. In fact, however, SGB has overlooked a key assumption underlying the doctrine of strict liability: namely, that manufacturers and sellers will be able to *spread the risks and costs* of strict liability, and thus to protect themselves, by insuring against

¹⁴ 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. RESTATEMENT OF TORTS §402 (1948 Supp.). This provision would plainly preclude any liability of Brower to Mr. Lunsford for asbestos-containing products that Brower sold, absent proof that Brower had reason to know that the products were dangerous.

the risks and/or by adjusting the costs of the product accordingly. *See* Brief of Respondent at 23-26. That assumption is entirely absent, however, where as here strict liability is sought to be imposed for products manufactured or sold long before the strict liability was the law of Washington. As noted above, Brower cannot be expected to have foreseen in 1958 the development and adoption in Washington of strict products liability more than a decade later, much less to have foreseen the need to have obtained insurance against such future risks or to have adjusted its prices to reflect those risks. The risk of strict liability did not exist and was not foreseeable in 1958. Thus, the retroactive application of strict liability will defeat, not serve, the underlying policy of strict liability by simply punishing faultless manufacturers and sellers who did business prior to the adoption of strict products liability in Washington, without allowing them any meaningful opportunity to protect themselves and thereby spread the risks as contemplated by the doctrine.

Moreover, SGB ignores the fact that the policy of “giving the consumer the maximum of protection” (a policy that supposedly favors retroactive application of 402A), has not been the policy of Washington tort law since at least 1981, when the WPLA was enacted. *See* Brief of Respondent at 26-30. In doing so, the Legislature rejected this one-sided policy in favor of a more balanced and equitable approach that protects

Washington businesses “from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.” LAWS OF 1981, ch. 27, § 1. Certainly *Chevron Oil* does not contemplate or require a court to resurrect and perpetuate obsolete tort policies that the Legislature has discarded.

As to *Chevron Oil's* third prong, i.e., considering whether any inequities would result from retroactive application, SGB simply asserts, without explanation, that Mr. Lunsford “will suffer far more from not applying strict liability retroactively than the respondent will [*sic*].” To be clear, there is *no* evidence suggesting that Mr. Lunsford - - who has previously sued and resolved his asbestos exposure claims against 37 other companies in a California lawsuit¹⁵ - - will suffer *any* harm whatsoever if 402A is not retroactively applied to his alleged exposure in 1958.

But leaving aside his actual recoveries to date and the recoveries he may yet obtain on his *negligence* cause of action, the fact remains that the theoretical “harm” he and SGB say will result if 402A is not retroactively applied boils down to this: if 402A is not retroactively applied to his injury from asbestos products in 1958, he will be left with “only” the rights and remedies that were available to every other person

¹⁵ See CP 93-94.

who was injured that year by defective products. In other words, the “harm” complained of is that, absent retroactive application of 402A, Mr. Lunsford will not enjoy *preferential treatment* but rather will be treated the same as others who were injured by defective products in 1958. This supposed “harm” can hardly be said to constitute inequity within the meaning of *Chevron Oil*.

By contrast, applying 402A retroactively *would* be inequitable for Brower and other manufacturers or sellers of asbestos-containing products. It would essentially 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 inequity of so dramatically enlarging the scope of a company’s *civil* liability decades after the conduct has occurred may be every bit as objectionable as the inequity of enlarging the scope of an individual’s *criminal* liability *ex post facto*. As to the latter, the Washington Supreme Court has stated:

Several federal courts, including the United State Supreme Court, have held that where a court overrules a prior decision so as to enlarge the scope of criminal liability, the new rule must be applied prospectively only.

...

The fundamental principle that “the required criminal law must have existed when the conduct in issue occurred” must apply to bar retroactive criminal prohibitions emanating from courts as well as legislatures. If a judicial construction of a criminal statute is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect.

State v. Gore, 101 Wn.2d 481, 489, 681 P.2d 227 (1984) (citations omitted).

SGB suggests that any resulting inequity for Brower is ameliorated by the option of seeking contribution from other responsible parties. Brief of Amicus Curiae at 13. However, as SGB knows full well, many of the largest and most significant “responsible parties” - - more than 70 to date - - are now bankrupt as a result of asbestos litigation, and the pace of asbestos-related bankruptcies is accelerating exponentially. See authorities cited in Brief of Respondent at 25, n. 22.

Finally, in balancing the equities it is important to avoid the confusion that SGB invites through its closing quotation from *Taskett*, in which the supreme court compares the equities as between an innocent individual whose reputation is destroyed through libel, and an unscrupulous television station that has “breached its ethical duties” to the public and negligently libeled that individual. Brief of Amicus Curiae at 13, quoting *Taskett*, 86 Wn.2d at 450. *Taskett* was discussing the desirability of

retroactively imposing a *negligence* cause of action for libel, i.e., an action in which a party has breached a duty through unreasonable and negligent conduct and is *at fault*. By contrast, the retroactive application of 402A would impose *strict liability* upon parties who are *without fault*. Refusing to apply 402A retroactively will have no impact upon Mr. Lunsford's right so proceed in negligence against a party who, like the TV station in *Taskett*, had caused his injury through unreasonable conduct falling below the standard of care; in short, someone who was *at fault*. Under the third prong of the *Chevron Oil* test, the balancing of the equities militates strongly against the retroactive application of 402A strict liability.

III. CONCLUSION

For the foregoing reasons and those set forth in the Brief of Respondent, the Court should affirm the trial court.

DATED this 10th day of January, 2007.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RONALD LUNSFORD and ESTER
LUNSFORD,

Appellant,

v.

SABERHAGEN HOLDINGS, INC. et
al.,

Respondent.

NO. 57293-8-I

DECLARATION OF SERVICE

I, Daniel J. Naspinski, hereby declare that on the 10th day of January, 2007, I caused
to be served in the manner indicated below, a copy of the following pleadings:

1. Respondent's Answer to Brief of Amicus Curiae and
2. Declaration of Service

on counsel for the parties herein addressed as follows:

DECLARATION OF SERVICE - 1

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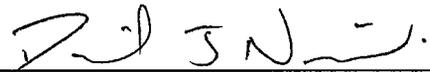
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