

NO. 80728-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

RONALD LUNSFORD and ESTHER LUNSFORD,

Respondents,

v.

SABERHAGEN HOLDINGS, INC.,

Petitioners,

and

FIRST DOE through ONE HUNDREDTH DOE,

Defendants.

RESPONSE OF RESPONDENTS LUNSFORD TO AMICI CURIAE  
MEMORANDUM OF COALITION FOR LITIGATION JUSTICE, INC.,  
CHAMBER OF COMMERCE OF THE UNITED STATES OF  
AMERICA, NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF  
WHOLESALE-DISTRIBUTORS, NATIONAL ASSOCIATION OF  
MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY  
INSURERS ASSOCIATION OF AMERICA, AND AMERICAN  
INSURANCE ASSOCIATION

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## A. INTRODUCTION

A veritable “who’s who” of business and insurance special interests have filed a brief in support of the petitioner Saberhagen Holdings, Inc.’s (“Saberhagen”) petition for review pursuant to RAP 13.4(b). The amici curiae memorandum is nothing more than a re-hash of Saberhagen’s arguments in this matter. Nothing in the memorandum of the amici curiae should dissuade this Court from denying Saberhagen’s petition for review.

### (1) The Interest of the Amici Curiae

As previously indicated, the various amici curiae filing the brief in this case are special interest business and insurance organizations. Despite the high-sounding title of the Coalition for Litigation Justice, for example, that coalition is nothing more than a group of insurance companies affected by asbestos litigation. *See*, Motion for Leave to Submit Amici Curiae Brief at 4, n.1. The remainder of the amici curiae are more direct in articulating their interest—they are large national business and insurance organizations seeking to restrict the rights of asbestos litigants for the harm occasioned by that toxic substance.

By contrast, Ronald Lunsford is an individual who was exposed to asbestos when his father brought asbestos into the family home on his clothing from work. He now suffers from mesothelioma, a particularly

virulent form of cancer of the lining of the lung that is ordinarily fatal. See *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 516 n.10, 901 P.2d 297 (1995).

The amici curiae have a direct interest in insuring that Mr. Lunsford and individuals similarly situated may not recover for their exposure to asbestos despite the toxic nature of asbestos.

(2) The Court of Appeals Decision Is Consistent with *Robinson*

The amici curiae assert in their brief at 2-3 that the decision of the Court of Appeals, Division I, was somehow inconsistent with this Court's prior precedents. In fact, Division I's decision is plainly consistent with this Court's decision in *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992), a fact that the amici curiae hope this Court will overlook. The Court of Appeals correctly distinguished all of the other Washington authorities cited by the amici curiae in their brief. Op. at 12-15.

Moreover, the Court of Appeals' decision is consistent with this Court's sense of justice in asbestos litigation. In numerous decisions, this Court has permitted asbestos litigants to recover for asbestosis or mesothelioma, conditions that specifically result from asbestos exposure, long prior to this Court's adoption of the *Restatement (Second) of Torts* § 402A for manufacturers and sellers 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), respectively. See, Lunsford Answer to Petition for Review at 8-9.

This Court has clearly recognized that asbestos litigation is special.<sup>1</sup> Given the very long latency period for asbestos exposure that occurs before the deadly diseases of asbestosis or mesothelioma manifest themselves, this Court has permitted recovery. Saberhagen, whose distribution of a deadly product resulted in the exposure of individuals like Ronald Lunsford and other to asbestos, now seeks to craft an argument for limiting its liability when it and other asbestos manufacturers have not done so over decades of asbestos-related litigation.

This Court should deny review pursuant to RAP 13.4(b)(1). The Court of Appeals decision is entirely consistent with this Court's retroactivity analysis in *Robinson*. Moreover, the Court of Appeals decision is also clearly consistent with this Court's long-standing jurisprudence permitting asbestos litigants to recover for asbestos exposure that predated *Ulmer* and *Tabert*.

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<sup>1</sup> The 1986 Legislature, for example, largely decided to abandon joint and several liability for tortfeasors in Washington. An exception to such an effort was asbestos litigation. RCW 4.22.070(3)(a); *Coulter v. Asten Group, Inc.*, 135 Wn. App. 613, 146 P.3d 444 (2006), *review denied*, 161 Wn.2d 1011 (2007). The *Coulter* court not only held the statutory exception preserved joint and several liability in asbestos litigation, it also applied Washington's 1973 comparative negligence retroactively to asbestos exposure that took place in the 1950's and 1960's.

(3) Application of *Chevron Oil*

The amici curiae argue in their brief at 3-7 that were this Court to apply the principles of *Chevron Oil v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971) to the present facts, that retroactive application of product liability law under the *Restatement (Second) of Torts* § 402A to pre-1965 conduct would not take place. This argument, too, is nothing more than a regurgitation of the argument already advanced in Saberhagen's improper reply.

The amici curiae add little to the *Chevron Oil* argument. They *admit* that this Court adopted strict liability for warranties made by product manufacturers and for food, clothing, and cosmetics long before the Court expressly adopted 402A in *Ulmer* and *Tabert*. Br. of Amici at 4.

Additionally, their discussion of the foreshadowing of the adoption of strict product liability is incomplete. Clearly, the adoption of strict product liability was foreshadowed by discussions of the issue of law journals, e.g., William L. Prosser, *The Assault Upon the Citadel, (Strict Liability to the Consumer)*, 69 Yale L. J. 1099 (1960), and certainly when a major state supreme court adopted the concept. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 377 P.2d 897 (1963). Prosser suggests that the "citadel" of privity was falling long before his 1960 article, and he cites numerous earlier articles and government reports indicating strict

product liability was appropriate. 69 Yale L.J. at 1099, n.4. The *Greenman* court cited to a wide variety of pre-1963 cases in California that applied strict product liability beyond the unsafe food setting. 59 Cal.2d at 62-63. Plainly, strict product liability, as contemplated in 402A of the *Restatement (Second) of Torts*, did not suddenly arrive on the legal scene in 1965. It was plainly foreshadowed in the 1950's and even earlier.

The amici also assert that retroactivity does not advance the purpose of strict liability and would be inequitable to asbestos defendants and their insurers. Br. of Amici at 6-7. This argument plainly ignores the impact of prospective application of strict liability on *the victims* of asbestos exposure including, but certainly not limited to, shipyard workers exposed to asbestos during World War II. See, e.g., *Lockwood v. A, C&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987) (worker exposed to shipyard asbestos in Second World War); *Berry v. Crown Corke & Seal Co., Inc.*, 103 Wn. App. 312, 14 P.3d 789 (2000), *review denied*, 143 Wn.2d 1015 (2001).

The Lunsfords have already addressed this issue in detail in their answer to the petition for review at 3-9, and do not feel the need to again address an issue that is already been presented to the Court in prior pleadings. However, the Lunsfords note that this Court need not reach the issue of the application of the *Chevron Oil* factors for retroactive

application of the *Restatement (Second) of Torts* §402A in asbestos litigation in light of this Court's retroactivity analysis in *Robinson*.

(4) This Case Does Not Present an Issue of Substantial Public Importance

The amici curiae assert in their brief at 7-10 that the decision of the Court of Appeals would subject Washington businesses to "devastating liability" in asbestos and other latent injury cases. This argument is odd insofar as virtually all of the amici curiae are national organizations. It does not appear that their Washington counterparts, to the extent that such Washington counterparts actually exist, were so moved by the decision of the Court of Appeals, Division I.

Moreover, the argument of the amici curiae, based on a variety of newspaper stories in such "dispassionate," "unbiased" business-friendly journals as the *Wall Street Journal*, and other sources, entirely ignores the fact that this Court has historically approved of the ability of plaintiffs in asbestos cases to recover for consequences of that exposure where the exposure pre-dated *Ulmer and Tabert*. Br. of Amici at 8-9. Such recovery, far from having a devastating effect on businesses in Washington, has had the salutary effect of telling such businesses to stop producing products with a toxic component like asbestos, a fact completely ignored by amici.

The amici are also silent on the truly devastating impacts of asbestos exposure, that is, the disability and death of those individuals who have experienced asbestosis and mesothelioma as a result of asbestos exposure. In Mr. Lunsford's case, an innocent child was affected by asbestos exposure occasioned by his father's exposure to asbestos on the job. Family members have contracted a deadly disease because of something that a family member was exposed to on the job. The amici curiae appear to be tone deaf to such truly devastating impacts to individuals exposed to this deadly substance.<sup>2</sup> Asbestos litigation forced manufacturers and distributors of asbestos to exercise real care; this has limited asbestos exposure and will prevent future incidents of asbestosis and mesothelioma, a socially useful outcome.

#### B. CONCLUSION

The amici curiae have done nothing more than rehash a variety of arguments already raised by petitioner Saberhagen Holdings, Inc. Far from being "friends of the Court," these business and insurance organizations are plainly interested in the outcome of this case from the standpoint of

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<sup>2</sup> The amici curiae also invite this Court to engage in a referendum on other decisions of the Court of Appeals, Division I, on asbestos liability. Had the amici curiae been so concerned about those decisions, the amici curiae had every opportunity to submit pleadings to the Court of Appeals, or to persuade the defendants in those cases to pursue further appellate review before this Court. *See*, Amici Curiae Brief at 8, n.4. It is entirely inappropriate for the amici curiae to urge such a referendum on a decision of a sister court.

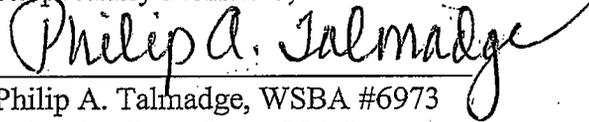
curtailing any responsibility on the part of their members or their insurers for the public's exposure to a toxic substance like asbestos that resulted in so many individuals contracting the deadly diseases of asbestosis and mesothelioma.

The amici curiae have presented nothing new here. Nothing in the brief of amici curiae should persuade this Court that review is appropriate under RAP 13.4(b). The respondents Lunsford respectfully request that the Court deny review.

DATED this 7<sup>th</sup> day of January, 2008.

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Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I deposited in the U. S. Mail a true and accurate copy of the following documents: Response of Respondents Lundsford to Amici Curiae Memorandum of Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Federation of Independent Business Legal Foundation, National Association of Wholesaler-Distributors, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and American Insurance Association, Supreme Court Cause No. 80728-1, to the following:

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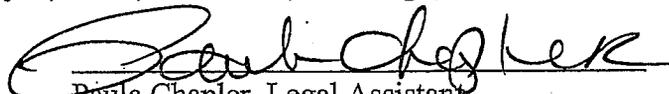
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 7, 2008, at Tukwila, Washington.



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