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NO. 80728-1

BY RONALD R. CARPENTER

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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.

LUNSFORDS' SUPPLEMENTAL BRIEF

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## A. INTRODUCTION

Petitioner Saberhagen Holdings, Inc. (“Saberhagen”) has insisted on pursuing legal avenues to forestall compensation to Ronald Lunsford for the cancer he contracted, mesothelioma, due to his inhalation as a child of asbestos insulation that his father brought home on his clothing, tools, and car from his work at the Texaco refinery in Anacortes. CP 138-39. Brower Co., Saberhagen’s predecessor, employed Lunsford’s father at the refinery, and provided asbestos-containing insulation there. In *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 106 P.3d 808 (2005) (*Lunsford I*), the Court of Appeals held that Lunsford had a cause of action for both negligence *and* product liability arising out of his 1958 exposure to the asbestos insulation. Saberhagen did not seek review by this Court of that decision.

Now, Saberhagen asserts that the principle of *Lunsford I* that a family member exposed to asbestos has a cause of action against its manufacturer or supplier in strict liability as a product user should not be applied “retroactively.” More precisely, Saberhagen argues that this Court’s adoption of the *Restatement (Second) of Torts* § 402A in 1969 should not be applied retroactively to asbestos exposure pre-dating 1969.

The Court of Appeals correctly applied *Lunsford I* in this second appeal. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 160

P.3d 1089 (2007) (*Lunsford II*). Under this Court's decision in *Robinson v. City of Seattle*, 119 Wn.2d 34, 71-80, 830 P.2d 318 (1992), applying the United States Supreme Court analysis in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L.Ed.2d 481 (1991), or even under the analysis of the United States Supreme Court selective prospectivity rule in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), § 402A applies retroactively to Lunsford's 1958 exposure to Saberhagen's asbestos products.

Retroactivity is the just outcome in toxic exposure cases like this one where the harm of exposure to asbestos products – asbestosis and mesothelioma – have such a long latency period.

#### B. ISSUE PRESENTED FOR REVIEW

Where this Court has clearly rejected the principle of selective prospectivity for a common law rule in civil cases in *Robinson*, and that decision has never been overruled by this Court, did the Court of Appeals correctly determine that strict liability in a products case involving asbestos exposure must apply retroactively to product users' exposure to asbestos predating 1969?

#### C. STATEMENT OF THE CASE

The facts and procedure in this long-running case are well chronicled in the Court of Appeals opinions in *Lunsford I* and *Lunsford II*, and do not require repetition here.

D. ARGUMENT

(1) *Robinson Is Controlling Precedent and Does Not Merit Reversal*

Federal decisional law since *Beam* is well-settled that retroactivity is the principle for all new common law rules. “The general principle that statutes operate prospectively and judicial decisions apply retroactively had been followed by the common law and the Supreme Court’s decisions ‘for near a thousand years.’” *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S. Ct. 140, 54 L.Ed. 228 (1910) (Holmes, J. dissenting).

In *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L.Ed.2d 74 (1993), the Supreme Court reaffirmed *Beam*’s holding, expressly adopting the rule articulated by a majority of justices in *Beam*:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith*’s ban against “selective application of new rules.” Mindful of the “basic norms of constitutional adjudication” that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the

application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit “the substantive law [to] shift and spring” according to the “particular equities of [individual parties’] claims” of actual reliance on an old rule and of harm from a retroactive application of the new rule. Our approach to retroactivity heeds the admonition that “[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.”

*Id.* at 97 (internal citations omitted). *See also, Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L.Ed.2d 820 (1995) (applying decision invalidating Ohio tolling statute retroactively). As the Rhode Island Supreme Court in *Dart Industries, Inc. v. Clark*, 657 A.2d 1062, 1065 (R.I. 1995) observed, *Harper* “virtually eviscerated *Chevron Oil’s* equitable analysis in the civil context” and put an end to any questions about whether *Beam’s* holding controlled on the retroactive application of new common law principles.

As the Court of Appeals here noted, 139 Wn. App. at 343, this Court adopted the United States Supreme Court analysis for retroactive application of a common law rule from *Beam* in *Robinson v. City of Seattle*, 119 Wn.2d 34, 79, 830 P.2d 318 (1992). *Robinson* has never been overruled by this Court.

In *Robinson*, this Court explicitly rejected the rule *Saberhagen* now argues must apply. *Robinson* rejected “selective prospectivity,” where a

new common law rule applies to the parties in the case, but applies to any other cases prospectively only. *Id.* at 74-75.<sup>1</sup> This Court held that if a new rule is “applied retroactively to the parties in the case, then it applies to all parties in subsequent cases.” This Court asserted that the practice of retroactive application of common law principles is “overwhelmingly the norm.” *Id.* at 79. As the *Robinson* court stated:

To state it another way, under *Beam Distilling*, retroactive application of a principle in a case announcing a new rule precludes prospective application of the rule in any subsequently raised suit based upon the new rule. Such selective, or “modified,” prospectivity would be unequal and unmindful of stare decisis as it treats similarly situated litigants unequally. *Beam Distilling*, 501 U.S. at \_\_\_, 111 S. Ct. at 2447-48, 115 L.Ed.2d at 493. We are persuaded that the *Beam Distilling* holding is sound. While our decision in *National Can* relied in part on the *Chevron Oil* analysis, we now modify our rule from *National Can* in a manner consistent with the limitations on the *Chevron Oil* rule effected in *Beam Distilling*. We expressly limit our holding in this case to the abolishment of selective prospectivity in the application of our state appellate decision.

*Id.* at 77 (Court’s emphasis). Moreover, this Court again explicitly recognized that *Robinson* adopted the *Beam* rule on retroactive application of common law rules in civil cases in *Digital Equipment Corp. v. Dep’t of Revenue*, 129 Wn.2d 177, 188, 916 P.2d 933 (1996) (“*Chevron Oil* no longer controls in this area.”). In fact, in *Digital Equipment*, this Court

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<sup>1</sup> Saberhagen argues total prospectivity, a rule that would not apply the Court of Appeals decision in *Lunsford I* to Mr. Lunsford himself.

overruled *National Can Corp. v. Dep't of Revenue*, 109 Wn.2d 878, 749 P.2d 1286, *cert. denied*, 486 U.S. 1040 (1988), a case that had applied a new rule *prospectively*. *Id.* at 195.

The only civil cases Saberhagen has cited to support its argument that *Robinson* is no longer a controlling precedent are *Jain v. State Farm Mutual Auto Ins. Co.*, 130 Wn.2d 688, 926 P.2d 923 (1996) and *Frank & Sons, Inc. v. State*, 136 Wn.2d 737, 966 P.2d 1232 (1998). These cases do not support the view that *Robinson* has been overruled. The majority opinion in *Jain* does not even mention *Robinson* or *Chevron Oil*! Moreover, *Jain* applied a new common law principle in a civil case retroactively, just as *Robinson* commands.

The *majority* in *Frank & Sons* did not address retroactivity. The dissent, signed by two justices, suggests that the remedy for the perceived *constitutional violation* should be applied retroactively, citing *Chevron Oil*. A dissent is not precedent. Moreover, the result of the majority decision -- retroactive application of a new constitutional principle -- is consistent with *Robinson*.

Saberhagen cannot cite a single decision of this Court overruling or otherwise calling into question the holding in *Robinson* that new common law rules in civil cases should be applied retroactively.

No matter how much Saberhagen protests, it is seeking to *overrule* *Robinson*, as that case is controlling precedent. Controlling common law principles should not be lightly abandoned. Stare decisis directs that a party seeking to overturn a common law rule make “a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). The rule in *Robinson* is neither incorrect nor harmful, and, in fact, is a salutary rule. Saberhagen has not shown anything to the contrary.

Saberhagen has also contended that this Court overruled *Robinson* *sub silentio*, but this contention fails for two key reasons. First, as this Court observed in *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999), this Court should “not overrule such binding precedent *sub silentio*.” Second, the Court of Appeals below analyzed the very cases cited by Saberhagen in support of its assertion that *Robinson* was somehow silently overruled by this Court, and found Saberhagen’s analysis wanting. As previously noted, this Court explicitly recognized the *Robinson* analysis in *Digital Equipment*. The Court of Appeals correctly observed that this Court’s decisions in *State v. Aisbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001) and *In re the Detention of Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006), while applying the *Chevron Oil* analysis, hardly dictate that *Robinson* is overruled as to civil cases.

*Atsbeha*, a criminal case, does not even mention *Robinson*. The Court of Appeals determined that controlling precedent on the evidentiary issue before the Court, as well as *Robinson*, were never even cited to this Court. 139 Wn. App. at 345. Similarly, *Audett* is a sexual predator civil commitment case. Again, *Robinson* was not even cited to the Court. *Id.* This Court applied the new rule in *Audett* retroactively, consistent with *Robinson*, noting “a new rule of law announced in a civil case is usually applied retroactively ...” 158 Wn.2d at 721.<sup>2</sup>

Apart from the general principles of retroactivity stated above, this Court has, in fact, retroactively applied § 402A. In *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969), this Court stated:

On a new trial, however, an instruction stating the rule according to Restatement (Second) of Torts § 402A (1965) should be given, rather than instruction No. 6, which does not make it clear that the manufacturer is liable only for defects which create an unreasonable risk of harm.

*Id.* at 532. Similarly, in *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975), this Court not only held that a distributor was subject to strict liability because it was in the chain of distribution (*id.* at 148-49) but, based on that holding, reversed the grant of summary

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<sup>2</sup> At best, *Saberhagen* might contend that *Chevron Oil* applies as to criminal cases or civil commitment cases where the burden of proof is higher, but it has little basis for contending *Robinson* is no longer the rule for civil cases. New common law rules in civil cases should apply retroactively.

judgment for the distributor and remanded the matter for trial. *Id.* at 155-56.

Further, numerous Washington appellate courts have applied strict liability law to asbestos cases where the exposure pre-dated 1969. *See, e.g., Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 704-06, 853 P.2d 908 (1993) (exposure to asbestos from 1946 to 1980); *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989) (asbestos exposure 1947 to 1953); *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987) (exposure to asbestos insulation in shipyards in 1940s and 1950s). *See also, Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997) (asbestos exposure “1957 to 1963”); *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 915 P.2d 581, *review denied*, 130 Wn.2d 1009 (1996) (asbestos exposure is in the 1950s); *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 635, 865 P.2d 527 (1993), *review denied*, 124 Wn.2d 1005 (1994) (asbestos exposure in “1950’s and 1960’s”). In *Coulter v. Asten Group, Inc.*, 135 Wn. App. 613, 146 P.3d 444 (2006), *review denied*, 161 Wn.2d 1011 (2007), the Court of Appeals applied principles of joint and several liability retroactively to the plaintiff’s exposure from 1951 to 1992 to asbestos that resulted in his asbestosis and applied this Court’s interpretation of the comparative negligence statute retroactively as well.

If anything, Washington law is consistent with *Robinson*, applying § 402A strict liability retroactively, particularly in asbestos cases.

The retroactive application of the judicial adoption of § 402A is the norm in other jurisdictions as well. *See, e.g., Hulin v. Fibreboard Corp.*, 178 F.3d 316 (5<sup>th</sup> Cir. 1999) (applying Louisiana law on strict liability retroactively in asbestos case); *Trimble v. Bramco Prods., Inc.*, 351 So.2d 1357, 1361 (Ala. 1977) (strict liability applied retroactively).

Finally, *Robinson's* retroactive rule is a beneficial one, particularly in asbestos cases; the rule of *Lunsford I* should apply retroactively given the long latency period for mesothelioma. In many asbestos cases, workers in particular industries such as shipbuilding and repairs, constructions, and automotive work in the 1940s, 1950s, or 1960s were exposed to asbestos products. Asbestos-related cancers generally did not manifest themselves years after the date of first exposure. The average time period between first exposure and the development of mesothelioma often was decades. Thus, most cases of mesothelioma now being diagnosed may relate to exposures to asbestos *prior* to 1969. The rule *Saberhagen* urges on this Court could eliminate strict liability for most

mesothelioma cases, although strict liability offers greater certainty to those afflicted by asbestos exposure.<sup>3</sup>

Additionally, the rationale for retroactivity of new common law principles is far more compelling than the policy basis for the rule of selective prospectivity advocated by Saberhagen.<sup>4</sup> First, as previously noted, the overwhelming majority rule in America is retroactivity of new common law principles. Second, it is the height of unfairness for Lunsford to be deprived of the very rule he sought and obtained in *Lunsford I*. Even in selective prospectivity situations, as the United States Supreme Court recognized in *Beam* (501 U.S. at 537-38), the party

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<sup>3</sup> The elements of strict liability differ materially from the elements of negligence, as this Court recognized in *Lockwood*, 109 Wn.2d at 254-55. Strict liability looks not to the manufacturer's or seller's fault, but the danger of the product and the consumer's expectations. *Id.* at 254.

<sup>4</sup> This policy argument for pure retroactivity in the tort context is well-articulated in Note, *The Retroactivity of Minnesota Supreme Court Personal Injury Decisions*, 6 Wm. Mitchell L. Rev. 179, 196-97:

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

seeking the new rule should have the benefit of it in order to continue the incentive for parties to seek review to obtain the announcement of the correct common law rule by courts. See, e.g., *Leland v. J. T. Baker Chemical Co.*, 423 A.2d 393, 396 (Pa. Super. 1980) (intervening change in law adopting 402A must be applied to “cases which are in the throes of direct appeal when the change occurred”). Finally, selective prospectivity defeats the rule of law in the judicial branch. Courts must announce the correct common law rule. When they do so, that rule is the law, subject to principles of finality like the statute of limitations or res judicata. *Beam*, 501 U.S. at 541-42 (“ . . . a new rule cannot open the door already closed.”). Selective prospectivity allows courts to pick and choose from among similarly situated parties to decide who merits the benefits of the correct common law rule. *Beam*, 501 U.S. at 537-38. In effect, the rule of law comes into question when this Court sanctions the application of the *wrong* common law to classes of parties.

A prospective application of the rule in *Lunsford I* would deprive too many individuals exposed to asbestos products of the benefit of a strict liability cause of action for exposure to asbestos when mesothelioma does not manifest itself for an extraordinarily long period of time.

Under *Robinson*, and the long tradition of the common law as discussed in federal decisions like *Beam* and *Harper*, this Court’s

decisions in *Ulmer* and *Tabert* adopting § 402A strict liability for manufacturers and sellers, as well as *Lunsford I* as to users, should apply to asbestos exposure predating 1969.

(2) Even if *Chevron Oil* Applied, *Lunsford I* Applies Retroactively

The Court of Appeals did not analyze the factors relevant to retroactive application of a common law rule set forth in *Chevron Oil*, although it cited them. 139 Wn. App. at 341-42. Had it done so, it is clear *Chevron Oil* also compels retroactive application of *Ulmer*, *Tabert*, and *Lunsford I*.

In *Chevron Oil*, the United States Supreme Court indicated that federal courts must consider first whether the new common law principle was a clear departure from past precedent or clearly foreshadowed. Courts must also weigh the merits in each case by assessing the history of the rule, its purpose and effect, and whether retrospective application would advance or damage its operation. Courts must finally assess the potential for inequity by retroactive application. *Chevron Oil*, 404 U.S. at 106-07. *Chevron Oil* permitted pure retroactivity, selective prospectivity, and pure

prospectivity. Saberhagen argues here for a rule of *pure prospectivity*, denying Lunsford the fruits of his victory in *Lunsford I*.<sup>5</sup>

Pure prospectivity should not apply here under *Chevron Oil*. First, strict liability in product liability cases was not a new rule in 1969 when this Court formally adopted it for manufacturers in *Ulmer*, and in 1975 for product sellers in *Tabert*, or in asbestos user cases generally. *Lunsford*, 139 Wn. App. at 344-45.

Even if strict liability in product liability were somehow a “new rule,” it was plainly foreshadowed in Washington law. In *Ulmer*, this Court stated that the plaintiff “chose to rest her case on a theory of strict liability, *which is supported by our decisions* (although admittedly not expressed as such therein). . .” 75 Wn.2d at 532 (emphasis added). The *Ulmer* court cited earlier decisions holding a manufacturer strictly liable, although the cause of action was based on implied warranty. *Id.* at 525-27. *See, e.g., Brewer v. Oriard Powder Co.*, 66 Wn.2d 187, 193, 401 P.2d 844 (1965) (dynamite); *Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 355, 378 P.2d 298 (1963) (hair product); *Baxter v. Ford Motor Co.*, 168 Wash.

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<sup>5</sup> Pure retroactivity is the better rule here, as previously noted, but at a minimum, this Court should apply the principle of *Lunsford I* to Lunsford.

456, 462, 12 P.2d 409 (1932) (glass in window of car); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913) (meat products).<sup>6</sup>

The *Ulmer* court did not address the liability of sellers, but noted that sellers had been held liable on implied warranty theories, as had manufacturers. 75 Wn.2d at 532 n.5. See, e.g., *Pulley v. Pacific Coca-Cola Bottling Co.*, 68 Wn.2d 778, 783, 415 P.2d 636 (1966) (seller held liable for cigarette in Coca-Cola); *Ringstad v. I. Magnin & Co.*, 39 Wn.2d 923, 931, 239 P.2d 848 (1952) (seller liable for burns to plaintiff from wearing highly flammable dress); *Nelson v. West Coast Dairy Co.*, 5 Wn.2d 284, 289-90, 105 P.2d 76 (1940) (seller liable for infected milk which sickened plaintiff). These cases demonstrate that *Ulmer* and *Tabert* did not constitute a “clear break with the past.”

Moreover, the advent of strict liability in the products context was clearly foreshadowed in case law and in academic discussions long before *Ulmer* or *Tabert*. See *McKisson*, 416 S.W.2d at 789 n.2. Professor Prosser spoke of “the citadel” being under attack in 1960. Prosser, *The Attack Upon the Citadel*, 69 Yale L.J. 1099 (1960). By 1966, it had fallen. Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. 791 (1966).

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<sup>6</sup> The Texas Supreme Court in *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967) cogently noted that for purposes of strict liability “no sound distinction can be drawn between the use of an eyewash solution that impairs or destroys vision and a foodstuff which causes illness.” The *Mazetti* court’s adoption of strict

The second *Chevron Oil* factor relates to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. The substitution of “strict liability” for the legal fiction of “implied warranty” ended the tortured efforts to use warranty and contract language in product liability decisions. William Prosser, *Torts* (4<sup>th</sup> ed. 1971) at 653-55. It also made plain that courts would hold manufacturers and sellers liable for unsafe products. As this Court noted, the purpose of imposing strict liability on a seller was “giving the consumer the maximum of protection, and requiring the dealer to argue out with the manufacturer any questions as to their respective liability.” *Tabert*, 86 Wn.2d at 149, quoting Prosser, *supra* at 665. This purpose was advanced in *Lunsford I* by imposing strict liability in cases brought by consumers, users, and others directly affected by the product.

The *Lunsford I* court articulated the general justification for § 402A strict liability: “The doctrine of strict liability is premised on a policy decision that manufacturers of products are better able to bear the costs associated with injuries from their products.” 125 Wn. App. at 789.

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liability for meat in 1913 foreshadowed adoption of the doctrine for exposure to other toxic substances.

That court also gave voice to the rationale for applying strict liability to product “users” like Lunsford. “The reason for extending the strict liability doctrine to innocent bystanders is the desire to minimize risk of personal injury and/or property damage.” *Id.* at 791. These policy judgments are plainly consistent with *Chevron Oil’s* second factor.

The third *Chevron Oil* factor relates to whether there are inequities resulting from retroactive application of § 402A strict liability. Here, Lunsford suffers far more if strict liability is not applied retroactively than Saberhagen will if it is. Lunsford will have a far more difficult time in proving a negligence case than a strict liability cause of action. Lunsford was exposed to an extraordinarily hazardous product supplied by Saberhagen’s predecessor and should have the benefit of a remedy. By contrast, Saberhagen can readily defend either theory, and will have the benefit both of comparative fault and the ability to seek contribution from other responsible parties.

This Court expressed the rationale for retroactivity in *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 450, 546 P.2d 81 (1976):

Who better deserves the benefits of an equitable result; the individual whose reputation has been utterly destroyed, or the media who has abused its power and breached its ethical duty to present the general public with the truth in an unbiased and impartial manner? A realistic view of the rights and power of the respective parties surely favors the former.

This argument is no less compelling if the affected person is one exposed to asbestos' toxicity than one exposed to defamation, as the *Lunsford I* court readily observed:

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

125 Wn. App. at 792-93.

Even under the *Chevron Oil* analysis, application of § 402A strict liability to asbestos exposure pre-dating 1969 is required.

#### E. CONCLUSION

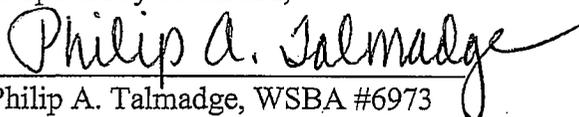
This Court should reaffirm the general principle it adopted in *Robinson* that new common law principles apply retroactively. § 402A strict liability should apply to asbestos exposures pre-dating 1969. However, even if *Chevron Oil* somehow applied, as Saberhagen contends,

the result would be the same: § 402A should apply retroactively to pre-1969 asbestos exposures, particularly in Lunsford's case.

This Court should affirm the Court of Appeal's decision and award costs on appeal to the Lunsfords.

DATED this 3d day of July, 2008.

Respectfully submitted,



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DECLARATION OF SERVICE

BY ~~RONALD R. CARPENTER~~  
On said day below, I deposited in the U. S. Mail a true and accurate copy of the following documents: Lunsfords' Supplemental Brief, Supreme Court Cause No. 80728-1, to the following:  
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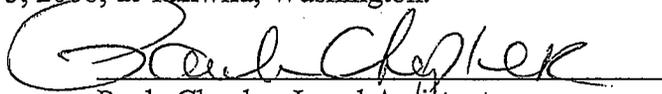
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 3, 2008, at Tukwila, Washington.

A handwritten signature in cursive script, appearing to read "Paula Chapler", written over a horizontal line.

Paula Chapler, Legal Assistant

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