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STATE OF WASHINGTON

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BY RONALD IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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RONALD LUNSFORD and ESTHER LUNSFORD,

Plaintiffs/Respondents,

vs.

SABERHAGEN HOLDINGS, INC.,

Defendant/Petitioner,

and

FIRST DOE THROUGH ONE HUNDREDTH DOE,

Defendants.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2008 OCT -6 P 4:09  
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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION  
FOUNDATION

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of persons seeking legal redress, including the rights of persons to recover under the common law of torts. WSTLA Foundation has an interest in the law governing when an appellate court opinion in a civil case is deemed to apply retroactively.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves issues surrounding the very nature of appellate decision-making. The Court must address when a pronouncement of a new rule of law is retroactive, and the circumstances under which that pronouncement may be revisited at a later time. At issue are fundamental conceptual questions about the precedent-setting function of a court of last resort, and the doctrine of stare decisis.

The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Lunsford v. Saberhagen Holdings, Inc., 139 Wn.App. 334, 160 P.3d 1089 (2007), *review granted*, 163 Wn.2d 1039 (2008); Lunsford Br. at 2-5; Saberhagen Br. at 2-7; Saberhagen Pet.

for Rev. at 1-5; Lunsford Ans. to Pet. for Rev. at 3; Saberhagen Supp. Br. at 1-2; Lunsford Supp. Br. at 1-3.<sup>1</sup>

For purposes of this amicus curiae brief, the following facts are relevant: The plaintiffs-respondents are Ronald and Esther Lunsford. They brought this action against Saberhagen Holdings, Inc. (Saberhagen) for common law strict product liability (strict liability). Ronald Lunsford (Lunsford) alleges he suffers from mesothelioma as a result of exposure to asbestos supplied by Saberhagen's predecessor-in-interest, Brower Company. The alleged exposure occurred in 1958, and this action was commenced in 2002, after Lunsford developed mesothelioma.

The superior court granted partial summary judgment for Saberhagen on the basis that Lunsford could not pursue a claim for strict liability because his exposure to asbestos predated this Court's adoption in 1969 of strict liability in Ulmer v. Ford Motor Co., 75 Wn.2d 522, 452 P.2d 729 (1969) (adopting strict liability for manufacturers), and Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 542 P.2d 774 (1975) (extending strict liability to those in the chain of distribution of the product, such as sellers or suppliers).

Lunsford appealed to the Court of Appeals, Division I. Saberhagen defended the superior court's determination on the basis that the issue of retroactivity of Ulmer and Tabert to persons exposed to asbestos before this Court adopted strict liability was an open question that

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<sup>1</sup> There was a prior appeal in this case. See Lunsford v. Saberhagen Holdings, Inc., 125 Wn.App 784, 106 P.3d 808 (2005).

had not been previously addressed or resolved by Washington appellate courts. While Saberhagen acknowledged that the application of strict liability had been upheld in a number of Washington appellate decisions involving asbestos products, it noted that in none of these cases had the court expressly considered the retroactivity issue. See Saberhagen Br. at 13-15 & accompanying notes.<sup>2</sup>

The Court of Appeals, Division I, reversed, concluding that Ulmer and Tabert applied retroactively, and that Lunsford is entitled to pursue his strict liability claim. See Lunsford, 139 Wn.App. at 336, 347. In so doing, the court began by recognizing that both the holdings in Ulmer and Tabert were applied to the litigants in those cases. Id. at 340. It was then necessary for the court to grapple with two discordant lines of authority from this Court regarding how it is determined whether a precedent-setting opinion is applied retroactively, prospectively, or selectively prospectively.<sup>3</sup>

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<sup>2</sup> The Court of Appeals below identified a number of appellate cases applying strict liability to asbestos exposure, including cases from this Court. See Lunsford, 139 Wn.App. at 340-41 (collecting strict liability cases involving asbestos products); see also Lockwood v. ACS, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987) (applying strict liability to asbestos exposure occurring between 1942 and 1972).

<sup>3</sup> As explained by the Court of Appeals, if an opinion is purely “retroactive” it applies to the parties before the court and all others with claims arising before *or* after the particular decision. Lunsford, 139 Wn.2d at 342. An opinion is purely “prospective” when it only applies to future conduct, and does not apply to the parties before the court in the law-making decision. Id. Lastly, “selective prospectivity” may take several forms, but generally applies the newly-decided rule to some litigants, but not others. Id.

The above definitions are in accord with the general understanding of these terms. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534-37 (1991) (plurality); Bradley Scott Shannon, The Retroactive and Prospective Application of Judicial Decisions, 26 Harv. J. of L. & Pub. Pol’y, 811, 812 & n.2, 813-14 & accompanying notes (2003). Regarding retroactivity, it is generally also understood that retroactivity is limited by the doctrine of *res judicata* and procedural barriers, such as the statute of limitations. See Beam Distilling at 535 (plurality).

The argument in this brief is framed with these general definitions in mind.

On the one hand, is this Court's opinion in Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992). Under Robinson, which adopted the United States Supreme Court's approach in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534-45 (1991), when a prior opinion establishing the new rule of law was applied retroactively, that determination is not revisited in subsequent cases.<sup>4</sup>

On the other hand, there is a separate line of cases by this Court, mainly decided after Robinson, represented by In re Detention of Audett, 158 Wn.2d 712, 147 P.3d 982 (2006), and State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001). These cases employ the approach outlined in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), decided 20 years prior to Beam Distilling, which established a three-part test resolving when the pronouncement of a new rule of law is retroactive, prospective or selectively prospective.

In Audett and Atsbeha, this Court considered the Chevron Oil criteria notwithstanding the fact that in each instance the case previously announcing the new principle of law applied it retroactively. See Audett, 158 Wn.2d at 718-23 (applying Chevron Oil factors and affirming retroactively of new rule); Atsbeha, 142 Wn.2d at 914-17 (same).<sup>5</sup>

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<sup>4</sup> The holding in Beam Distilling was clarified and reaffirmed by the U.S. Supreme Court in Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97-99 (1993).

<sup>5</sup> The Chevron Oil Co. v. Huson factors (Chevron Oil analysis) bearing on prospectivity or retroactivity are:

(1) Whether the decision establishes a new rule of law by overruling clear past precedent or deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive application would further or retard the purposes of the rule; and (3) whether retroactive application would be inequitable. Atsbeha, 142 Wn.2d at 916 (footnote omitted; quoting Chevron Oil, 404 U.S. at 106-07).

Neither of these cases reference Robinson. See Lunsford, 139 Wn.App. at 345-47. Under Robinson (and in the federal realm under Beam Distilling), the *Chevron Oil* analysis would not apply in such circumstances because of the prior determination of retroactivity. See Robinson, 119 Wn.2d at 75; Beam Distilling, 501 U.S. at 540; Harper, 509 U.S. at 97-98 (explicating how Chevron Oil is limited by Beam Distilling).

After examining this discordant Washington precedent, the Court of Appeals determined that Robinson remained binding precedent and that, as a consequence, the issue of retroactivity was settled with regard to strict liability claims against suppliers of asbestos products, such as Saberhagen:

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

Lunsford at 347. The Court of Appeals concluded that under Robinson the *Chevron Oil* analysis is only appropriate when this Court is *first determining* whether the new rule it announces should apply retroactively, but is not undertaken in subsequent cases involving application of the same rule. See *id.* at 344-45, 347.

This Court granted Saberhagen's petition for review.

### III. ISSUES PRESENTED

1. Whether the adoption of common law strict liability 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), applies retroactively to strict liability claims based upon exposure to asbestos that predates these cases?
2. More generally, what is the proper analysis in Washington for determining whether a Supreme Court opinion announcing a new principle of law in a civil case applies retroactively?

### IV. SUMMARY OF ARGUMENT

The Court should hold that Ulmer and Tabert were applied retroactively when decided, and that under the reasoning in Robinson v. Seattle, the retroactivity issue is settled. This result is consistent with the general rule of retroactivity, and the more particularized rule of retroactivity applied when the Court recognizes a new civil remedy for tort victims. Lastly, this approach avoids the potential for destabilizing decisional law and undermining the stare decisis effect of precedent-setting opinions by allowing re-evaluation of retroactivity in subsequent cases. Bench and bar should rightfully assume, absent a pronouncement to the contrary, that the retroactivity of a new rule of law was fully considered by the Court under a *Chevron Oil*-type analysis when the rule was adopted, whether or not discussed in the opinion.

### V. ARGUMENT

#### *Introduction*

The Court of Appeals determined Robinson v. Seattle remains precedential, and Lunsford and amicus curiae Schroeter Goldmark &

Bender both support this conclusion in their briefing. See Lunsford, 139 Wn.App. at 341-47; Lunsford Supp. Br. at 3-13; Br. of Am. Curiae Schroeter Goldmark & Bender at 3-8. This brief focuses on why the reasoning of Robinson is compelling, and why the Court should reaffirm that once it applies a new rule of law to the litigants in a precedent-setting case it applies to all litigants, unless otherwise barred by res judicata or a procedural barrier.

Preliminarily, Saberhagen, without citation, urges examination of retroactivity of strict liability claims in this case - almost 40 years after this doctrine was first announced - based upon the following rationale:

The failure of prior Washington appellate decisions in asbestos cases to comment upon the question of whether strict liability is available in a case arising in 1958 demonstrates only that this is an issue of first impression. That issue simply never arose in those cases, very likely because (as the Lunsfords' counsel conceded at oral argument), the parties simply didn't think of it.

Saberhagen Br. at 13-14 (footnote omitted). This assertion arguably has some superficial appeal because under the doctrine of stare decisis a prior holding of a court is not determinative of an issue not addressed in that holding. See State ex rel. Gallwey v. Grimm, 146 Wn.2d 445, 459, 48 P.3d 274 (2002). However, under Robinson, the issue of retroactivity is deemed to have been resolved, whether the Court saw fit to comment on it in particular or not. See 119 Wn.2d at 77. Moreover, the issue of retroactivity is a jurisprudential consideration that transcends the above-referenced stare decisis principle governing case-specific issues. Instead,

the issue of retroactivity involves the very nature of appellate decision-making.

**A.) Brief Overview Regarding Adoption Of Strict Liability In Washington.**

In 1969, in Ulmer, this Court adopted strict liability against manufacturers for unreasonably dangerous products. See 75 Wn.2d at 532. In 1975, in Tabert, the Court extended strict liability for unreasonably dangerous products to those in the chain of distribution, including sellers or suppliers such as Saberhagen's predecessor-in-interest, Brower Company. See 86 Wn.2d at 147-49.<sup>6</sup>

In 1981 the Legislature adopted the Tort Reform Act of 1981, codified in Ch. 7.72 RCW. See Ch. 27, Laws of 1981. This act has no application here.

**B.) Under *Robinson*, The Retroactivity of *Ulmer* And *Tabert* Should Not Be Reexamined; This Result Is Consistent With Both General Rules Regarding Retroactivity And Relevant Policy Considerations.**

In Ulmer, this Court applied the holding on strict liability to the parties, and remanded for a new trial against the manufacturer on this new theory. See 75 Wn.2d at 532. In Tabert, the Court extended strict liability to those in the chain of distribution, including the party defendant, and reversed and remanded the case for trial. See 86 Wn.2d at 149, 156.

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<sup>6</sup> In addition to the numerous appellate decisions noted that applied strict liability in asbestos cases involving exposure pre-dating Ulmer and Tabert, see n.2 supra, this Court has also applied the "discovery rule" to strict liability claims involving unreasonably dangerous products involving belated discovery of an element of the cause of action. See Ohler v. Tacoma Gen. Hosp., 92 Wn.2d 507, 598 P.2d 1358 (1979); see also Sahlie v. Johns-Manville Corp., 99 Wn.2d 550, 552-54, 663 P.2d 473 (1983) (declining to reconsider Ohler, and applying Ohler in a case involving asbestos products).

Under Robinson v. Seattle, the retroactivity determinations in Ulmer and Tabert are dispositive. In Robinson, the Court determined that a *Chevron Oil* analysis is inappropriate as “unmindful of stare decisis.” See 119 Wn.2d at 77. Robinson held:

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.

Id. (emphasis removed). The Court based this holding on the rationale in Beam Distilling, 501 U.S. at 544, which limited the application of the *Chevron Oil* analysis, and was later reaffirmed in Harper, 509 U.S. at 94-99. In the lead opinion in Beam Distilling, Justice Souter explained the holding as follows:

We might, of course, limit retroactive application to those who at least try to fight their own battles by litigating before victory was certain. To this possibility, it is enough to say that distinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review.

Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: Whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis.

Beam Distilling at 542-43 (lead opinion by Souter, J.).

Robinson is, to some extent, premised on the general rule that appellate opinions are by their very nature retroactive. See Robinson at 79 (recognizing “[t]he practice of retroactive application is

‘overwhelmingly the norm,’” quoting Beam Distilling at 535); State ex rel. Finance Comm. v. Martin, 62 Wn.2d 645, 671, 384 P.2d 833 (1962); see also Harper at 94; Shannon Article, 26 Harv. J. L. & Pub. Pol’y at 812, 867 n. 256. Six years before Ulmer was decided this Court in Martin referenced, but did not apply, this general rule of retroactivity:

“Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only . . . .”

62 Wn.2d at 671 (quoting Florida Forest & Park Serv. v. Strickland, 18 So.2d 251, 253 (Fla. 1944)).<sup>7</sup>

The rule in Robinson is also consistent with this Court’s general policy of applying new common law tort remedies retroactively:

[A]bsent unique circumstances, we have consistently applied our decisions retroactively whenever the intended purpose was to provide a remedy for an individual who has been tortiously injured and now seeks redress before the court.

Taskett v. King Broadcasting Co., 86 Wn.2d 439, 449, 546 P.2d 81 (1976) (citations omitted).

The Court is well aware of the general rule of retroactivity, and has departed from this rule when it deemed it necessary. See e.g. Martin, 62 Wn.2d at 668-73 (applying new rule prospectively); Ueland v. Pengo Hydra-Pull Corp., 103 Wn.2d 131, 140-41, 691 P.2d 190 (1984) (applying new rule to litigants, but otherwise only to cases arising after date of

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<sup>7</sup> Unquestionably, the Court has not always followed this general rule, with varying consequences. See e.g. Lau v. Nelson, 92 Wn.2d 823, 925-28, 601 P.2d 527 (1979) (denying full retroactive effect of prior precedent-setting opinion); Audett, 158 Wn.2d 718-23 (re-examining retroactivity but affirming retroactive effect).

opinion). In the absence of any such indication in Ulmer and Tabert, these opinions should be viewed as retroactive, and, under Robinson, not subject to re-examination.<sup>8</sup>

The Court should re-examine the approach employed in Audett and Atsbeha, supra, where retroactivity was re-evaluated after a precedent-setting opinion was issued that applied the new rule of law retroactively. This approach risks destabilizing decisional law and undermining the stare decisis effect of precedent-setting opinions, by encouraging future litigants to pursue re-evaluation of retroactivity determinations.

Further, a re-evaluation of retroactivity, where the prior precedent-setting opinion did not explicitly reserve the question, suggests that the Court overlooked the issue of retroactivity in announcing the new rule in the first place. The premise should be exactly the opposite. Bench and bar should assume that in announcing a new common law rule, the Court gave careful consideration to the issue of retroactivity, under a *Chevron Oil*-type analysis. This analytical step inheres naturally in the precedent-setting function of a court of last resort. See Shannon at 854, 862. As noted by Professor Shannon, in describing what ought to be involved in court consideration of a significant change in the law, and in the course of criticizing prospective application of a new rule of law:

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<sup>8</sup> WSTLA Foundation disagrees with the Court of Appeals to the extent that it found the issue of retroactivity here was only settled by those cases subsequent to Ulmer and Tabert that applied strict liability in an asbestos product context. See Lunsford, 139 Wn.App. at 347. Ulmer and Tabert adopted strict liability generally, and they are binding precedent regarding *all* unreasonably dangerous products.

[P]roper adherence to the doctrine of stare decisis requires that factors such as reliance, to the extent considered at all, must be factors in the law-changing decision *itself*. They cannot be deferred to a later “law-applying” portion of the precedent-setting court’s opinion, nor to a later case similarly involving pre-decision conduct or events. In other words, a proposed rule of law that is dramatically new and would seriously upset the reasonable reliance interests of one or more of the parties should not be regarded as a rule that should not be applied retroactively; rather, such a rule of law should simply be rejected as bad law, or a rule that cannot, as yet, be the law.

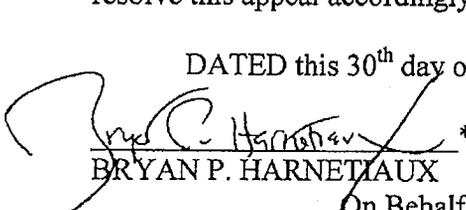
Id. at 856-57 (footnotes omitted).<sup>9</sup> It should be presumed the Court undertook this type of analysis in deciding Ulmer and Tabert and applying them retroactively.

This Court’s well-reasoned opinion in Robinson should control here. Robinson is grounded in the principle of retroactivity that is the norm in appellate decision-making. It also best assures the stability of precedent and respect for the rule of law. Ulmer and Tabert are retroactive, and the Court should decline to re-examine these holdings.

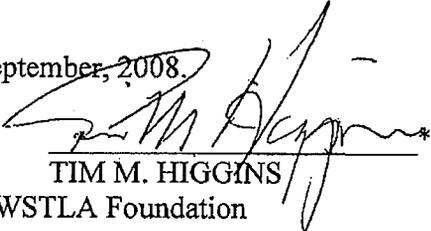
## VI. CONCLUSION

The Court should adopt the reasoning advanced in this brief and resolve this appeal accordingly.

DATED this 30<sup>th</sup> day of September, 2008.

  
BRYAN P. HARNETAUX \*

On Behalf of WSTLA Foundation

  
TIM M. HIGGINS

\*Brief transmitted for filing by e-mail; signed original retained by counsel.

<sup>9</sup> Professor Shannon argues that prospective decision-making falls outside of the doctrine of stare decisis. Shannon at 861-65, 873-76. While this Court may not share Professor Shannon’s view on this point, see Martin, 62 Wn.2d at 666, 670, this does not foreclose a common understanding about the retroactive effect of a precedent-setting opinion applied to the litigants involved.