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NO. 57293-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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RONALD LUNSFORD and ESTHER LUNSFORD,

Plaintiffs-Appellants,,

vs.

SABERHAGEN HOLDINGS, INC.

Defendant-Respondent.

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COURT OF APPEALS DIV. #1  
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BRIEF OF AMICUS CURIAE OF  
SCHROETER GOLDMARK & BENDER

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## I. INTRODUCTION

Schroeter, Goldmark & Bender (SGB) has represented more than 2,000 Washington residents who have contracted asbestos-related diseases and have filed complaints relating to those diseases, and currently represents several hundred such residents. The great majority of those people were only exposed to asbestos prior to 1975. These plaintiffs' complaints always include a claim based on strict product liability. SGB recently defended a motion for summary judgment in King County Superior Court in which a defendant argued that strict product liability was not applicable to a distributor of asbestos-containing products when such distribution pre-dated Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 542 P.2d 774 (1975). Depending on this Court's decision in the above-entitled appeal, SGB expects there may be many more such motions. As such, SGB, on behalf of itself and its clients, has an interest in the outcome of this appeal, and believes that this amicus brief will be useful to the Court.<sup>1</sup>

## II. STATEMENT OF THE CASE

In a typical asbestos-related case, the individual worked beginning in the 1940's, 1950's, or 1960's, and was exposed to asbestos-containing insulation products which were used in shipbuilding and repairs as well as in construction. It is well-recognized that asbestos-related cancers generally do not appear any earlier than 10 to 15 years from the date of first exposure, and can appear as late as 70 years from the date of first exposure. The average

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<sup>1</sup> SGB has previously filed an amicus curiae brief in an analogous situation. Green v. A.P.C. Co., 136 Wn.2d 87, 960 P.2d 912 (1998).

time period between first exposure and the development of an asbestos-related cancer is 35 to 40 years. Thus, most asbestos related cancers being diagnosed at the present time relate to exposures to asbestos prior to 1975. The rule adopted by the Superior Court at respondent's urging would thus eliminate strict product liability for most asbestos cancer cases.

The elements of strict product liability differ materially from the elements of negligence. See, generally, Lockwood v. A C & S, Inc., 109 Wn. 2d 235, 254-55, 744 P.2d 605 (1987). Juries in asbestos cases sometimes base liability on strict product liability rather than negligence. See, e.g., Viereck v. Fibreboard Corp., 81 Wn. App. 579, 581, 915 P.2d 581 (1996) ("In February 1993, Viereck and his wife commenced this action against OCF and others. They sought damages based on products liability and negligence theories. A jury returned a verdict in their favor solely on the products liability claim"). On other occasions, the presence of the two separate claims serves as an important "failsafe." For example, in Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 935 P.2d 684 (1997), the jury found liability based on both negligence and strict liability. While this Court found instructional error relating to a negligence instruction, this Court held:

Here, the error was harmless because the jury rendered a single monetary verdict on both the strict liability product-warning claim and the negligent failure-to-warn claim. Because we affirm the judgment with respect to the strict liability product-warning claim, a reversal of the negligent failure-to-warn claim would not affect the judgment. [Footnote omitted].

Id. at 36.

### III. ARGUMENT

#### A. Under The Holding In Robinson v. Seattle, Strict Liability Applies In This Case Because Tabert And Ulmer Were Applied Retroactively To The Parties In Those Cases.

The Supreme Court declared in 1969 that manufacturers and, in 1975, product sellers were strictly liable under §402A of Restatement of Torts (Second) for product defects. Ulmer v. Ford Motor Co., 75 Wn.2d 522, 532, 452 P.2d 729 (1969); Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 542 P.2d 774 (1975). The holdings in both Ulmer and Tabert were applied retroactively to the parties in those cases. In Ulmer, the court held:

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. In Tabert, the court not only held that a distributor was subject to strict liability because it was in the chain of distribution (86 Wn.2d at 148-49), but, based on that holding, reversed the grant of summary judgment for the distributor and remanded the matter for trial. (Id. at 155-156.)

The Washington Supreme Court in Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992), held that when a Washington appellate decision applies a rule announced in that decision retroactively to the parties in that

case, the rule will also be applied to all litigants not barred by a procedural rule such as a statute of limitations. See also Carrillo v. City of Ocean Shores, 122 Wn. App. 592, 971-972, 94 P.3d 961 (2004); Digital Equipment Corporation v. Dept. of Revenue, 129 Wn.2d 177, 186-189, 916 P.2d 933 (1996). As Robinson explained “to apply an appellate decision ‘retroactively’ means to apply its holding to causes of action which arose prior to the announcement of the decision.” 119 Wn.2d at 71.

Put differently, Robinson rejected “Selective prospectivity” which it defined as applying a new rule in a decision to the parties in the case, but otherwise applying the new rule prospectively. 119 Wn.2d at 74-75. The Robinson 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.” Id. at 77:

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*, 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 decisions.

C. *Applying Beam Distilling to This Case.*

In accordance with *Beam Distilling*, as we have noted, once this court has applied a rule retroactively to the parties in the cases announcing a new rule, we will apply the new rule to all others not barred by procedural requirements such as the statute of limitation or res judicata....

119 Wn.2d at 77 (italics emphasis in original, emphasis added, footnotes omitted).

In Ulmer and Tabert, the Supreme Court applied its rulings regarding strict liability retroactively to the parties in those cases. Thus, under the holding in Robinson, the holdings in Ulmer and Tabert must be applied to all other cases filed subsequently to Ulmer and Tabert, including this one, even if the cause of action arose “prior to the announcement of the decision” in Tabert or Ulmer.

Respondent Saberhagen Holdings, Inc. cites Robinson, but attempts to distinguish it by characterizing it as a decision only on constitutional questions, and arguing that the present case does not involve a question of federal or constitutional law:

*See also, Robinson v. City of Seattle*, 119 Wn.2d 345, 830 P.2d 318 (1992) (holding that decision on constitutional questions would be given retroactive effect pursuant to *Beam Distilling*). Of course, this case does not involve a question of federal or constitutional law and *Beam Distilling* and the line of cases flowing from it are therefore inapplicable.

Resp. Bf., p. 18, n. 20. This attempted distinction fails because the Robinson holding dealing with retroactivity was not based on a constitutional question and was not limited to constitutional questions.

The retroactively issue in Robinson came up in the Supreme Court's discussion of the City's alternative argument:

... on cross-appeal that the trial court erred in refunding any moneys paid to the Robinsons prior to this court's decision in *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987) and *R/L Assocs, Inc. v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989).

Id. at 71. The Robinson court in its section entitled "Facts Background" explained that the "*San Telmo* [*v. Seattle*, 108 Wn.2d 20, 735 P.2d 673 (1987)] decision did not reach any constitutional claims or federal salutatory claims . . ." Id. at 44. At page 45 of the opinion, the Robinson court also explained that the decision in *R/L Assocs., Inc. v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989) was based on violation by the city of "RCW 82.02.020," and that:

This court declined to reach the taking issue raised by the plaintiffs in *R/L Assocs.*, and reversed the trial court's ruling that enforcement of HPO-2 violated substantive due process, as the plaintiffs had made 'no allegation of irrational, or arbitrary or capacious conduct on the part of the City in its denial of [the] demolition license.' *R/L Assocs.*, at 412."

According to the Robinson court, therefore, neither San Telmo nor R/L Assocs. was decided on constitutional issues. While portions of the Robinson opinion were decided on constitutional issues, see, e.g., 119

Wn.2d at 55, the retroactivity discussion in Robinson (which begins at page 71) and the holding regarding retroactivity quoted above did not decide a constitutional issue and was not based on a constitutional analysis.<sup>2</sup> For example, the Court distinguishes between class members who paid fees pursuant to ordinance provisions before the invalidation of those provisions by the Superior Court who may be entitled simply to refund relief and those who were assessed fees after the trial court decision who may pursue §1983 relief.<sup>3</sup> This demonstrates that the retroactivity discussion for those who paid prior to invalidation was not predicated on the existence of a constitutional violation. A second reason that respondent's attempted distinction is incorrect is that the holding in Robinson dealing with retroactivity was not limited to constitutional rules, but more generally involved "the abolishment of selective prospectively in

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<sup>2</sup> The constitutional analysis in the early portions of the opinion related to the City's continued efforts to enforce housing replacement fees after they had been ruled invalidated by the King County Superior Court. See 119 Wn. 2d at 60-63.

<sup>3</sup> The relevant portion of the opinion states:

As to any property owners who may be present in the class who paid HPO fees pursuant to ordinance provisions prior to the invalidation of those provisions, such plaintiffs' remedies lie solely in refund relief, since there will be no initial showing of arbitrary and capricious conduct necessary for a section 1983 action. The right to refund relief is subject to the statute of limitation for refund actions, discussed below. By contrast, property owners who were assessed fees after trial court invalidation of applicable ordinance provisions may pursue damages remedies under section 1983, subject to the applicable limitations period for such actions in Washington.

Robinson, 119 Wn.2d at 80.

the application of our state appellate decisions.” Id. at 77 (emphasis added).

Robinson also addresses another issue raised in this appeal having to do with whether this Court should consider a retroactivity analysis to the extent that it was not raised in the lower court. That was also true in Robinson where both parties relied on National Can Corp. v. Department of Rev., 109 Wn.2d 878, 749 P.2d 1286 (1988), but the Supreme Court nevertheless limited the National Can analysis based on a case neither party cited. The Supreme Court explained that it was relying on the James Beam case which limited Chevron, but which neither party had cited:

Both parties to this action agree that the *Chevron Oil Co. v. Huson, supra*, analysis relied upon in National Can is relevant to our determination of whether the rules of our *San Telmo* and *R/L Assocs.* decisions should be applied retroactively. However, the United States Supreme Court has recently limited the *Chevron Oil Co. v. Huson, supra*, rule regarding retroactive application in the case of *James B. Beam Distilling Co. v. Georgia*, -- U.S. --, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991).

Robinson, supra, 119 Wn.2d at 73. Robinson thus supports this Court relying on Robinson even though it was not cited in the lower court.

**B. Numerous Washington Appellate Court Decisions Have Applied Tabert And Ulmer In Situations Where The Exposure To The Injurious Substance Occurred Prior To The Date Those Decisions Were Issued.**

Washington appellate courts have routinely applied strict liability law to post-Ulmer and Tabert cases involving exposure to asbestos in the 1950s and 1960s. Van Hout v. Celotex Corp., 121 Wn.2d 697, 704-706

(1993) (Supreme Court applies strict liability to manufacturer in case involving exposure to asbestos from 1946 to 1980); Mavroudis, supra, at 86 Wn. App at 26-27 (Court of Appeals applies strict liability to manufacturer in case involving exposure “1957 to 1963”); Viereck, supra, 81 Wn. App. at 580 (Court of Appeals applies strict liability to manufacturer when the exposure is in the 1950s because “[t]he trial court correctly applied to this case the products liability law in effect prior to enactment of the Washington products liability act of 1981”); Krivanek v. Fibreboard Corp., 72 Wn. App. 632, 635, 865 P.2d 527 (1993) (Court of Appeals applies strict liability to manufacturer despite exposure to asbestos in “1950's and 1960's”); also see, Little v. PPG Industries, 92 Wn.2d 118, 122, 594 P.2d 911 (1979) (Supreme Court applies Tabert's design defect precedent to product manufactured in 1970 (19 Wn. App. at 813, sets forth the facts of the case)). In Martin v. Abbott Labs, 102 Wn.2d 581, 584, 607-608, 689 P.2d 368 (1984), the Supreme Court held that a distributor of DES in the early 1960s was potentially liable under strict liability law, as well as negligence.

**C. Even Assuming That Robinson Does Not Apply Under The Facts Here, Ulmer And Tabert Should Apply To This Case.**

The Supreme Court's abrogation of selective prospectivity in Robinson determines the issue in this case. However, in State v. Atsbeha, 142 Wn.2d 904, 916-917, 16 P.3d 626 (2001), the Supreme Court decided

a retroactivity issue in a criminal case using the criteria set forth in Chevron Oil v. Huson, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971), without citing Robinson, *supra*. A review of the briefs in the Court of Appeals and Supreme Court in State v. Atsbeha, shows that neither party cited Robinson v. Seattle to the courts. Thus, its failure to cite Robinson does not imply that the Supreme Court is backing away from its holding in Robinson. Amicus, however, will discuss the Chevron criteria in an excess of caution.

Even if the Chevron Oil criteria were applied in this case, the result would be that Ulmer and Tabert should be applied here. See, State v. Atsbeha, *supra* at 142 Wn. App. at 917; Taskett v. King Broadcasting Company, 86 Wn.2d 439, 448-450, 546 P.2d 81 (1976) (Supreme Court relied on Chevron Oil, holding its decision on libel case would be applied retroactively); Bulla v. Fife, 50 Wn. App. 602, 608-609, 749 P.2d 749 (1988) (Court of Appeals relied on Chevron Oil, to apply Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 84 L. Ed.2d 494, 105 S.Ct. 1487 (1985) retroactively).

The Chevron Oil criteria are set forth in Taskett, *supra*, as follow:

In Chevron Oil Co. v. Huson, 404 U.S. 97, 106, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971), the United States Supreme Court set forth the following three factors to serve as the proper test for determining retroactivity in civil suits:

First, the decision to be applied nonretroactively must establish 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 . . . Second, it

has been stressed that "we must . . . 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." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Taskett, 86 Wn.2d at 448.

Each of these criteria applied to Ulmer and Tabert, results in a determination that these decisions should be applied retroactively, which is what this Court has previously done in cases such as Mavroudis, Viereck, and Krivanek, and what the Supreme Court did in Lockwood and Van Hout. First, Ulmer and Tabert did not address "an issue of first impression whose resolution was not clearly foreshadowed." 86 Wn.2d at 448. In Ulmer, the Supreme Court pointed out that the plaintiff in that case "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 Supreme Court, in Ulmer, also cited several prior decisions that held a manufacturer strictly liable although the cause of action was based on an "implied warranty" theory. 75 Wn.2d at 525-527, citing the following cases: Esborg v. Bailey Drug Co., 61 Wn.2d 347, 355, 378 P.2d 298 (1963) (hair product injured plaintiff); Brewer v. Oriard Powder Co., 66 Wn.2d 187, 193, 401 P.2d 844

(1965) (dynamite injured employee of purchaser); Baxter v. Ford Motor Co., 168 Wash. 456, 462, 12 P.2d 409 (1932) (glass in window of car injures plaintiff).

In Ulmer, the Supreme Court did not address the liability of sellers but noted that sellers had been held liable on implied warranty theories as well. 75 Wn.2d at 532, fn. 5, citing 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, 289-290, 105 P.2d 76 (1940) (seller liable for infected milk which sickened plaintiff); 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). The presence of these cases going back decades demonstrates that Ulmer and Tabert did not constitute a “clear break with the past”. See, Bulla, 50 Wn. App. at 608 (the principle that some kind of hearing was needed had been settled for some time according to the court in Loudermill).

The second criteria Chevron Oil looked to is “the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” Taskett, 86 Wn.2d at 448. The substitution of “strict liability” for the legal fiction of “implied warranty” ended the tortured efforts to use warranty and contract language in decisions crafted to compensate consumers. Prosser, Torts (4<sup>th</sup> ed.

1971), p. 653-5. It also made plain what was there all along – the intent to hold manufacturers and sellers liable for unsafe products. According to the Washington Supreme Court, 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 §100. This purpose is furthered by imposing strict liability in cases brought by consumers or users of the product. See, also, Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 106 P.3d 808 (2005).

The third Chevron Oil criteria is whether there are sufficient inequities resulting from retroactive application to limit the decision prospectively only. Weighing the inequities, the plaintiff in this case will suffer far more from not applying strict liability retroactively than the respondent will. The respondent also has the option of seeking contribution from other responsible parties. See, Taskett, 86 Wn.2d at 449-450 (in a libel case, the Court determined that its decision should be applied to the appellant stating:

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.”

Id. at 450.)

#### IV. CONCLUSION

For the foregoing reasons, Amicus believes that the decision of the Superior Court should be reversed and the case remanded.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of December, 2006.



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