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STATE OF WASHINGTON

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.

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ANSWER TO PETITION FOR REVIEW

Zachary Herschensohn
WSBA #33568
Brayton Purcell LLP
111 SW Columbia Street
Suite 250
(503) 295-4931

Philip A. Talmadge
WSBA #6973
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-5551

Attorneys for Respondents Lunsford

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
A. INTRODUCTION	1
B. ISSUE PRESENTED FOR REVIEW	2
C. STATEMENT OF THE CASE.....	3
D. ARGUMENT WHY THIS COURT SHOULD DENY REVIEW.....	4
(1) <u>Robinson Is Controlling Precedent</u>	3
(2) <u>Even if Chevron Oil Applied, as Saberhagen Contends, Its Analysis Does Not Alter the Result Here</u>	9
(3) <u>This Case Does Not Present an Issue of Substantial Public Interest</u>	13
E. CONCLUSION.....	15
Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Baxter v. Ford Motor Co.</i> , 168 Wash. 456, 12 P.2d 409 (1932).....	10
<i>Brewer v. Oriard Powder Co.</i> , 66 Wn.2d 187, 401 P.2d 844 (1965).....	10
<i>Carrillo v. City of Ocean Shores</i> , 122 Wn. App. 592, 94 P.3d 961 (2004).....	5
<i>Digital Equip. Corp. v. Dep't of Revenue</i> , 129 Wn.2d 177, 916 P.2d 933 (1996).....	5, 7
<i>Esborg v. Bailey Drug Co.</i> , 61 Wn.2d 347, 78 P.2d 298 (1963).....	10
<i>Falk v. Keene Corp.</i> , 113 Wn.2d 645, 782 P.2d 974 (1989).....	8, 10
<i>Frank & Sons, Inc. v. State</i> , 136 Wn.2d 737, 966 P.2d 1232 (1998).....	5
<i>In re the Detention of Audett</i> , 158 Wn.2d 712, 47 P.3d 982 (2006).....	7
<i>Jain v. State Farm Mutual Auto Ins. Co.</i> , 130 Wn.2d 688, 926 P.2d 923 (1996).....	5
<i>Krivanek v. Fibreboard Corp.</i> , 72 Wn. App. 632, 865 P.2d 527 (1993), <i>review denied</i> , 124 Wn.2d 1005 (1994).....	8, 10
<i>Lockwood v. AC & S, Inc.</i> , 109 Wn.2d 235, 744 P.2d 605 (1987) ..	8, 10, 14
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 125 Wn. App. 784, 106 P.3d 808 (2005).....	<i>passim</i>
<i>Mavroudis v. Pittsburgh-Corning Corp.</i> , 86 Wn. App. 22, 935 P.2d 684 (1997).....	8, 10
<i>Nelson v. West Coast Dairy Co.</i> , 5 Wn.2d 284, 105 P.2d 76 (1940).....	11
<i>1000 Virginia Ltd. P'ship v. Vertecs Corp.</i> , 158 Wn.2d 566, 146 P.3d 423 (2006).....	6
<i>Pulley v. Pacific Coca-Cola Bottling Co.</i> , 68 Wn.2d 778, 415 P.2d 636 (1966).....	11
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	6

<i>Ringstad v. I. Magnin & Co.</i> , 39 Wn.2d 923, 239 P.2d 848 (1952).....	10
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992).....	<i>passim</i>
<i>Seattle-First National Bank v. Tabert</i> , 86 Wn.2d 145, 542 P.2d 774 (1975).....	8, 9, 11
<i>State v. Atsbeha</i> , 142 Wn.2d 904, 16 P.3d 626 (2001)	7
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	9
<i>Taskett v. KING Broadcasting Co.</i> , 86 Wn.2d 439, 546 P.2d 81 (1976).....	12
<i>Ulmer v. Ford Motor Co.</i> , 75 Wn.2d 522, 452 P.2d 729 (1969).....	<i>passim</i>
<i>Van Hout v. Celotex Corp.</i> , 121 Wn.2d 697, 853 P.2d 908 (1993)	8, 10
<i>Viereck v. Fibreboard Corp.</i> , 81 Wn. App. 579, 915 P.2d 581, <i>review denied</i> , 130 Wn.2d 1009 (1996).....	8

Federal Cases

<i>Chevron Oil Co. v. Huson</i> , 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971).....	<i>passim</i>
<i>James B. Beam Distilling Co. v. Georgia</i> , 501 U.S. 529, 111 S. Ct. 2439, 115 L.Ed.2d 481 (1991).....	2, 4

Statutes

<i>Restatement (Second) of Torts</i> § 402A	<i>passim</i>
---	---------------

Rules and Regulations

RAP 13.4(b)	2, 3, 15
RAP 13.4(b)(1)	3, 9
RAP 13.4(b)(2)	3, 9
RAP 13.4(b)(4)	3, 14, 15

Other Authorities

William Prosser, <i>Torts</i> (4 th ed. 1971).....	11
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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. was Saberhagen’s predecessor and it employed Lunsford’s father at the refinery. It provided asbestos-containing insulation there. In *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 106 P.3d 808 (2005) (*Lunsford I*), Lunsford established that he 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. It asserts aggressively that the Court of Appeals decision was contrary to this Court’s recent decisions on the retroactive application of new

common law rules in civil cases. Its assertion is belied by the careful analysis of the Court of Appeals below.

Nothing in Saberhagen's petition for review supports the proposition that the Court of Appeals incorrectly applied *Lunsford I* in this second appeal (*Lunsford II*). Under this Court's decision in *Robinson v. City of Seattle*, 119 Wn.2d 34, 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 in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), the Court of Appeals was correct in applying § 402A and its decision in *Lunsford I* retroactively to Lunsford's 1958 exposure to Saberhagen's asbestos products.

Retroactivity is also 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.

Saberhagen fails to establish that this case meets the criteria of RAP 13.4(b). This Court should deny review.

B. ISSUE PRESENTED FOR REVIEW

The issues articulated by Saberhagen in its petition at 1 is misleading. The actual issue presented for review is:

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 WHY THIS COURT SHOULD DENY REVIEW

RAP 13.4(b) sets forth the criteria governing acceptance of review by this Court. This Court will accept review if the Court of Appeals decision conflicts with a decision of the Supreme Court, RAP 13.4(b)(1), the Court of Appeals decision conflicts with other decisions of the Court of Appeals, RAP 13.4(b)(2), or the case presents "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

While *Saberhagen* appears to focus on RAP 13.4(b)(1), it neglects to articulate which particular subsection or subsections of RAP 13.4(b) applies. None do. This Court should deny review of the carefully analyzed decision of the Court of Appeals in this case.

(1) *Robinson Is Controlling Precedent*

As the Court of Appeals notes, *op. at 7-11*, this Court adopted the United States Supreme Court analysis for retroactive application of a common law rule from *Beam Distilling in Robinson v. City of Seattle*, 119 Wn.2d 34, 79, 830 P.2d 318 (1992). *Robinson* has *never* been expressly overruled by this Court, as Saberhagen must readily admit.

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. 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.”

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, 184, 186-89, 916 P.2d 933 (1996). See also, *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 613-14, 94 P.3d 961 (2004) (recognizing *Robinson*).

The only civil cases cited by Saberhagen in its petition 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 are a far cry from supporting the view that *Robinson* has been overruled.

As Saberhagen acknowledges, pet. at 10, *Jain* does not even mention *Robinson* or *Chevron Oil*! Nevertheless, Saberhagen has the audacity to claim *Jain* is a "clear break" from *Robinson*. Pet. at 11. This assertion is groundless. *Jain* applied a new common law principle in a civil case retroactively, just as *Robinson* commands.

The majority in *Frank & Sons* does not even 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, as Saberhagen admits. Pet. at 11.

Moreover, the result of 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.¹ As it must, the Court of Appeals applied this Court's decision in *Robinson*. This Court's decisions are binding on it. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). The Court of Appeals would err if it *failed* to follow such binding precedent. *Id.*

Moreover, Saberhagen contends that this Court overruled *Robinson* *sub silentio*. Pet. at 15-18. But this contention fails in light of the careful reasoning of the Court of Appeals. Op. at 12-15. The Court of Appeals analyzed the very cases cited by Saberhagen in support of its assertion that *Robinson* was somehow silently overruled by this Court. Op. at 12-15. This argument seems to carry little weight as this Court explicitly

¹ As *Robinson* remains controlling precedent, and Saberhagen seeks to overrule it, stare decisis is implicated. 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 Saberhagen has not shown anything to the contrary.

recognized the *Robinson* analysis in *Digital Equipment*. The Court of Appeals correctly noted that this Court's decisions in *State v. Atsbeha*, 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 noted that controlling precedent on the evidentiary issue before the Court, as well as *Robinson*, were never even cited to this Court. Op. at 14. Similarly, *Audett* is a sexual predator civil commitment case. Again, *Robinson* was not even cited to the Court. 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 721.²

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.

² 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.

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 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”). If anything,

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

In sum, the observation of this Court in *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) is correct as to *Robinson*: this Court should “not overrule such binding precedent sub silentio.” As *Robinson* controls on the retroactivity of a common law rule in civil cases, the Court of Appeals decision here does not merit review either under RAP 13.4(b)(1) or (2). 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, as Saberhagen Contends, Its Analysis Does Not Alter the Result Here

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. Op. at 8. Had it done so, it is clear *Chevron Oil* also compels retroactive application of *Ulmer*, *Tabert*, and *Lunsford I*.

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*. *Chevron Oil* does not apply. The Court of Appeals here correctly noted strict liability in asbestos user cases was not a “new rule.”

Even if applied, the *Chevron Oil* test required the announcement of a new rule in those cases, not application of an existing rule. In this case the question is whether the rule of strict liability for asbestos exposure applied in *Mavroudis, Van Hout, Krivanek, Falk, and Lockwood* may be applied to Lunsford. This is a question of application of an existing rule to a new fact pattern, rather than an announcement of a new rule. Neither selective prospective application nor purely prospective application of strict liability is available to Saberhagen.

Op. at 11-12.

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., *Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 355, 378 P.2d 298 (1963) (hair product); *Brewer v. Oriard Powder Co.*, 66 Wn.2d 187, 193, 401 P.2d 844 (1965) (dynamite); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 462, 12 P.2d 409 (1932) (glass in window of car).

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. *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); *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). These cases demonstrate that *Ulmer* and *Tabert* did not constitute a “clear break with the past.”

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* (4th 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. The 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. 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.

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

(3) This Case Does Not Present an Issue of Substantial Public Interest

Under RAP 13.4(b)(4), this case does not present an issue of substantial public importance; the retroactivity of a new common law principle in civil cases is hardly the type of issue on which the public fastens its attention. However, even if RAP 13.4(b)(4) were somehow applicable, the rule in *Robinson* applying new common law rules in civil cases retroactively is a salutary one, particularly in asbestos cases; all of the equities in this case weigh in favor of denying review as the rule of *Lunsford I* should apply retroactively given the long latency period for mesothelioma.

In many asbestos cases, the individual worked in the 1940s, 1950s, or 1960s, and was exposed to asbestos products which were used in shipbuilding and repairs, construction, and automotive work. Asbestos-related cancers generally do not manifest themselves years after the date of first exposure. The average time period between first exposure and the development of mesothelioma may be 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.³

³ 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

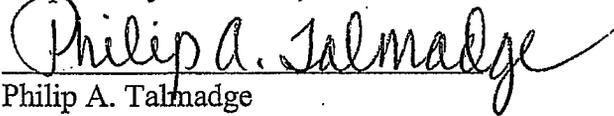
A prospective application of the rule in *Lunsford I* would deprive too many individuals exposed to asbestos products of the benefit of a strict liability cause of action for exposure to asbestos when mesothelioma does not manifest itself for an extraordinarily long period of time. Review here should be denied under RAP 13.4(b)(4).

E. CONCLUSION

Säberhagen has failed to articulate a basis for review by this Court of the well-reasoned opinion of the Court of Appeals. *Robinson* controls on the retroactive application of § 402A strict liability to asbestos exposures pre-dating 1969. *Robinson* properly holds that new common law rules in civil cases should be applied retroactively. Even if *Chevron Oil* somehow applied, as Säberhagen contends, the result would be the same. § 402A should apply retroactively to pre-1969 asbestos exposures. This Court should deny review. RAP 13.4(b).

DATED this 26th day of October, 2007.

Respectfully submitted,



Philip A. Talmadge

WSBA #6973

Talmadge Law Group PLLC

18010 Southcenter Parkway

Tukwila, WA 98188

(206) 574-6661

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looks not to the manufacturer's or seller's fault, but the danger of the product and the consumer's expectations. *Id.* at 254.

Zachary Herschensohn
WSBA #33568
Brayton Purcell LLP
111 SW Columbia Street
Suite 250
Portland, OR 97201
(503) 295-4931
Attorneys for Respondents Lunsford

APPENDIX

FACTS

Ronald Lunsford suffers from mesothelioma. He and his wife, Esther Lunsford (together, Lunsford) contend that this was caused in part by respirable asbestos released from insulation supplied by the Brower Company/Saberhagen Holdings, Inc. The claims in this appeal concern only household exposure to asbestos in 1958, carried in Lunsford's father's clothing from his employment at the Texaco refinery in Anacortes, Washington.

In its first appearance in the court below, Saberhagen moved for summary judgment, arguing that because Lunsford himself was not a "user or consumer" of a defective product, he was not entitled to strict liability coverage. The trial court agreed and entered partial summary judgment. Lunsford appealed. On appeal, Saberhagen argued that the trial court correctly dismissed Lunsford's strict product liability claims because he failed to show that he was a "user" or "consumer" of Brower-supplied asbestos products within the meaning of Restatement (Second) of Torts § 402A. This court reversed, holding that, "policy rationales support application of strict liability to a household family member of a user of an asbestos-containing product, if it is reasonably foreseeable that household members would be exposed in this manner." Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 793, 106 P.3d 808 (2005) (Lunsford I). Whether Lunsford fit into that category was for the jury to decide—it was incorrect for the trial court to conclude as a matter of law that Saberhagen could

not reasonably foresee that Lunsford would come into contact with its asbestos.

In that same appeal, Saberhagen, for the first time, also raised the argument that when two Washington appellate cases, Ulmer and Tabert, adopted § 402A strict product liability, it was a new rule that should not be applied retroactively under a three-part test from Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971); see also Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 148-50, 542 P.2d 774 (1975); Ulmer v. Ford Motor Co., 75 Wn.2d 522, 531-32, 452 P.2d 729 (1969). Because Saberhagen had not presented its retroactivity argument to the trial court below, this court declined to address that issue, leaving it to Saberhagen to raise on remand.

On remand, Saberhagen brought this argument before the court in its second motion for summary judgment. There, Saberhagen contended that “[b]ecause § 402A was not the law of Washington in 1958, and because there was no other applicable theory of strict liability at that time, as a matter of law Saberhagen cannot be held liable to plaintiffs under a strict liability theory.” On October 21, 2005, the trial court granted Saberhagen’s motion for partial summary judgment. Lunsford appeals.

ANALYSIS

I. Summary Judgment Standard

On review of summary judgment courts engage in the same inquiry as the trial court. Highline Sch. Dist. v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is appropriate if there is no issue of material fact

and the moving party is entitled to judgment as a matter of law. Police Guild v. City of Seattle, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). The moving party bears this burden of proof. Young v. Key Pharm., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Based on this standard, Saberhagen bears the burden of proof that it was entitled to judgment as a matter of law.

II. Review on Appeal

Saberhagen contends that Lunsford is attempting to raise the retroactivity argument, and should be precluded from doing so because he did not raise this argument below. Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5. But if an issue raised for the first time on appeal is "arguably related" to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. See State Farm Mut. Auto. Ins. Co. v. Amirpanahi, 50 Wn. App. 869, 751 P.2d 329 (1988).

As noted above, Saberhagen first raised the issue of retroactive application of § 402A in the appeal of Lunsford I. There, Saberhagen argued that

[w]hile § 402A was eventually adopted and applied to manufacturers . . . in the 1969 Ulmer decision, and was applied to product sellers . . . in the 1975 Tabert decision, it would be fundamentally unfair to Saberhagen to retroactively impose upon its business activities and conduct in 1958 duties and liabilities that did not exist yet and would not come into existence for another 17 years.

On remand, Saberhagen argued that “[b]ecause § 402A was not the law of Washington in 1958, and because there was no other applicable theory of strict liability at that time, as a matter of law Saberhagen cannot be held liable to plaintiffs under a strict liability theory.” Lunsford, characterizing Saberhagen’s argument as a “retroactivity” argument, countered that “[i]n recognition of these long-standing rules, the courts of this State have frequently, without caveat, applied strict liability to asbestos actions in which the plaintiff’s exposure occurred prior to the publication of Restatement § 402A.” Lunsford goes on to list five cases in which plaintiffs recovered on theories of strict product liability for asbestos exposure occurring at least in part before 1958. Finally, in the summary judgment hearing, Lunsford’s counsel argued “[b]ut the fact is those exposures occurred prior to the adoption of either one [Ulmer or Tabert] in ‘68 or in ‘75. And by implication, the court of appeals has consistently applied strict liability to those exposures that have occurred prior.”

Saberhagen’s objection is not well taken. Saberhagen asserts that strict liability should not be applied to exposures occurring before the adoption of § 402A in Ulmer and Tabert. This is a question of prospective versus retroactive application. Lunsford recognized Saberhagen’s argument for what it was and responded. The issue of retroactive application of § 402A is properly before us.

III. Adoption of Strict Liability for Product Defects

The Washington Product Liability Act (WPLA) does not govern Lunsford’s claim because he was exposed to asbestos before its adoption. Mavroudis v.

Pittsburgh-Corning Corp., 86 Wn. App. 22, 33-34, 935 P.2d 684 (1997) (a cause of action "arises" when the plaintiff was exposed to asbestos, not when he discovered his injury); Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 472, 804 P.2d 659 (1991) (applying the law in effect prior to the WPLA because the plaintiff's claim arose prior to that act).

The parties disagree as to whether Restatement (Second) of Torts § 402A (1965) retroactively applies to Lunsford's claim. Section 402A reads:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

In 1969, the Washington Supreme Court, after extensive review of product liability cases beginning in 1913, adopted the strict liability contained in § 402A as the law of this jurisdiction. Ulmer, 75 Wn.2d 522, 531-32. That decision applied only to the liability of manufacturers.

In 1975, the Washington Supreme Court after further review of product liability cases, extended § 402A strict liability to those in the business of selling or distributing a product. Tabert, 86 Wn.2d 145, 148-49. Both Ulmer and Tabert

were remanded for trial with instructions to apply the strict liability rules announced in the appellate decision. Ulmer, 75 Wn.2d at 532; Tabert, 86 Wn.2d at 155-56.

Numerous appellate decisions have applied strict liability to claims arising from exposures to asbestos that occurred before the adoption of § 402A. See e.g. Mavroudis, 86 Wn. App. at 22 (upholding a jury verdict finding strict liability under pre-WPLA law based on inadequate warnings of exposure occurring between 1957 and 1963); Van Hout v. Celotex Corp., 121 Wn.2d 697, 853 P.2d 908 (1993) (holding that under pre-WPLA law, strict liability should have been applied for exposure occurring between 1946 and 1980); Krivanek v. Fibreboard Corp., 72 Wn. App. 632-33, 865 P.2d 527 (1993) (upholding a jury verdict based on pre-WPLA strict liability standards for exposure occurring between 1953 and 1986); Falk v. Keene Corp., 113 Wn.2d 645; 782 P.2d 974 (1989) (holding that the WPLA did not change the standard to negligence—it remained strict liability as explained in § 402A and as adopted by Ulmer and Tabert—and remanding for application of strict liability to claims arising from exposure between 1947 and 1953); Lockwood v. AC&S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987) (upholding a jury verdict finding AC&S strictly liable for exposure to asbestos occurring between 1942 and 1972). In none of these cases did the court limit the application to the specific facts of each situation.

IV. Retroactive Application

Saberhagen argues that the adoption of § 402A by Ulmer and Tabert was

a new rule and is therefore subject to a three-part analysis under Chevron Oil to determine whether it should apply retroactively. Since none of the Washington cases previously applied the Chevron Oil test and squarely addressed the issue, Saberhagen argues the test should be applied here. Under Saberhagen's analysis, the adoption of § 402A should not apply retroactively to Lunsford's exposure.

The United States Supreme Court in 1971 announced a three-prong test to determine whether a new federal rule of law in a civil case would be applied purely prospectively, selectively prospectively, or retroactively:

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 where 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.

Chevron Oil Co v. Huson, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) (internal citations and quotation omitted). This is the test Saberhagen invokes. However, the United States Supreme Court has long ago limited the use of the Chevron Oil analysis by rejecting selectively prospective application of new decisional law. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529,

111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991) (holding that it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so, "principles of equality and stare decisis here prevailing over any claim based on a Chevron Oil analysis"). Beam Distilling, 501 U.S. at 540. Prior to Beam Distilling, courts had three choices in civil matters: pure prospectivity, selective prospectivity, and pure retroactivity. The "purely prospective method of overruling" occurs when "a new rule is [not] applied . . . to the parties in the law-making decision . . . [t]he case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision." Beam Distilling Co., 501 U.S. at 536. Selective prospectivity allowed retroactive application of a newly decided rule to some litigants but not others, based on the equities of the case. Beam Distilling, 501 U.S. at 540-43. Pure retroactive application requires that once a rule is applied to the parties before the court it is applied to all:

Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules.

Beam Distilling, 501 U.S. at 543. Once rung, the bell is not unrung.

To the extent this court finds strict liability applicable to asbestos claims, Saberhagen seeks purely prospective application of any new rule, or selective prospective application of any existing rule. But after Beam Distilling, courts are

left with only two choices: purely prospective application of a new principle or rule of law overruling past precedent or deciding an issue of first impression, or purely retroactive application of such a principle or rule of law.

The Washington Supreme Court first applied Chevron Oil in Taskett v. King Broad. Co., 86 Wn.2d 439, 448, 546 P.2d 81 (1976). This was to determine whether a new state rule, announced in that case, should be applied retroactively. But in 1992 in Robinson v. City of Seattle, the court rejected the Chevron Oil test. 119 Wn.2d 34, 830 P.2d 318 (1992). Finding that “[t]he practice of retroactive application is ‘overwhelmingly the norm’” the Robinson court adopted Beam Distilling’s rejection of selective prospectivity.¹ Id., at 79.

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. Id., at 80. “To apply an appellate decision ‘retroactively’ means to apply its holding to causes of action which arose prior to the announcement of the decision.” Id., at 71 (emphasis added).

¹ In explaining its choice to abolish selective prospectivity of state appellate decisions, the Robinson court relied heavily on the reasoning in Beam Distilling:

“The plurality in Beam Distilling holds that selective prospectivity is not available in the civil context. The opinion concludes that once the Supreme Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata.”

Robinson, 119 Wn.2d at 75 (citing Beam Distilling, 501 U.S. at 543-44) (other citations omitted).

“To this extent, our decision here does limit the possible applications of the Chevron Oil analysis, however irrelevant Chevron Oil may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case. . . .”

Robinson, 119 Wn.2d at 76, (quoting Beam Distilling, 501 U.S. at 543) (other citations omitted).

"[T]here is no balancing the equities to determine whether we should now apply rules which were applied retroactively" in the previous decisions. Id., at 80.

Litigants are not

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.

Id., at 80. (quoting Beam Distilling, 501 U.S. at 543). Consequently, the Robinson court upheld retroactivity as sound and abolished the selective prospectivity analysis in the application of state appellate decisions. Id. Two options are available to a court when adopting a new rule: pure prospective application and retroactive application. Applying the new rule in the case before it necessarily invokes retroactivity.

V. Strict Product Liability Applies to Lunsford

Because Ulmer and Tabert adopted § 402A strict product liability, and Mavroudis, Van Hout, Krivanek, Falk and Lockwood all applied the theory to claims regarding exposure to asbestos to the parties before the court, Robinson requires that strict product liability apply to Lunsford. It does not matter that none of those courts applied the Chevron Oil test; the issue of retroactivity is already resolved with respect to asbestos exposure claims.

Even if it applied, the Chevron Oil test required the announcement of a new rule in those cases, not application of an existing rule. In this case the

question is whether the rule of strict liability for asbestos exposure applied in Mavroudis, Van Hout, Krivanek, Falk and Lockwood may be applied to Lunsford. This is a question of application of an existing rule to a new fact pattern, rather than an announcement of a new rule. Neither selective prospective application nor purely prospective application of strict liability is available to Saberhagen.

VI. Robinson is Not Overruled Sub Silentio

Saberhagen argues that the Robinson retroactivity rule has been overruled sub silentio by two recent cases from the Washington Supreme Court: In re the Det. of Audett, 158 Wn.2d 712, 147 P.3d 982, 986-87 (2006) and State v. Atsbeha, 142 Wn.2d 904, 916-17, 16 P.3d 626 (2001). In these cases, the Supreme Court used the analysis from Chevron Oil to determine whether previously announced "new" rules were appropriately applied to the defendants in Audett and Atsbeha. Saberhagen contends that because the Washington Supreme Court used the Chevron Oil analysis, Robinson's retroactivity rule has been overruled sub silentio.

We do not agree. The Washington Supreme Court "will not overrule such binding precedent sub silentio." State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). While use of Chevron Oil is contrary to Robinson, we note no one asked the court to overrule Robinson in either case. In fact, no party cited either Chevron Oil or Robinson to the court. A close look at the cases shows that the interjection of Chevron Oil was erroneous.

Atsbeha, a criminal case, involved the application of a change in the law

of evidence announced in State v. Ellis, 136 Wn.2d 498, 963 P.2d 843 (1998). The Chevron Oil test by its own terms only applies in a case in which a new rule is being adopted, not when a relatively new rule from another decision is being applied. Further, while the Washington Supreme Court cited to its earlier decision in Digital Equip. Corp. v. Dept. of Revenue for the elements of the Chevron Oil test, the next paragraph of that decision cites Robinson for the proposition that the precedential weight of Chevron Oil had been called into question by recent United States Supreme Court decisions. 129 Wn.2d 177, 184, 916 P.2d 933 (1996). The Digital court concluded, "Chevron Oil no longer controls in this area." Id., at 188. Moreover, Chevron Oil was a test for application of a new rule adopted in a federal civil case, and has not been applied to application of a new rule adopted in a state criminal case. There was no precedent for use of Chevron Oil in this context.

However, under binding state precedent, the same result would have been reached. The United States Supreme Court has held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Washington courts have cited Griffith with approval: "A new rule announced by the state or federal Supreme Court applies to all cases pending direct review at the time the rule is announced." State v. Gamble, 118 Wn. App. 332, 335-36, 72

P.3d 1139 (2003) reversed in part on other grounds by 154 Wn.2d 457 (2005); see also In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 325-26, 823 P.2d 492 (1992). The rule announced in Ellis was applied to Ellis; under Griffith and St. Pierre, the rule should have retroactively applied to Atsbeha without reference to a Chevron Oil analysis.

While Griffith and St. Pierre should have been controlling precedent, neither case was cited in the briefing to Atsbeha. And, the parties did not ask that these cases be overruled in name or theory; nor did they cite Chevron Oil to the court as the test. Further, to the extent that the Rules of Evidence were at issue and could also apply in a civil context, Robinson would have been the controlling authority. However, it also was not cited by either party. This reinforces the conclusion that the court did not intend to overrule binding precedent sub silentio.

In Audett the Washington Supreme Court referred to the Chevron Oil analysis as instructive to determine whether to apply new civil commitment procedures from In re the Detention of Williams, 147 Wn.2d 476, 55 P.3d 597 (2002) overruled on other grounds by 117 Wn. App. 611 (2003). But, the Audett opinion was not purporting to adopt a new rule, which is the first requirement of the Chevron Oil test. Digital Equip., 129 Wn.2d at 184. Under Robinson, "once this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by procedural requirements." Robinson, 119 Wn.2d at 77. The new rule had been announced

and applied in Williams, therefore it applied to all subsequent litigants including, Audett. While the Audett court reached the result required by Robinson, the reference to Chevron Oil is at odds with Robinson and Digital Equip. The parties did not ask the court to overrule Robinson or Digital; they did not even cite Robinson, Digital or Chevron Oil to the court. Further, the Audett opinion does not mention Beam, Robinson or Digital all of which disavow Chevron Oil. We conclude that the court was not asked to and did not intend to overrule Robinson sub silentio.

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 of Torts.

VII. Admissibility of American Law Institute (ALI) Documents

We find that the trial court was correct when it denied Lunsford's motion to strike documents describing the proceedings of the ALI as inadmissible hearsay. Evidence Rule (ER) 803(a)(16) provides a hearsay exception for "[s]tatements in a document in existence 20 years or more whose authenticity is established." ER 901(b)(8) and 902(e) provide for authentication of ancient documents. The reasons for this exception were explained in Bowers v.

No. 57293-8-1/ 16

Fibreboard Corp., 66 Wn. App. 454, 461-63, 832 P.2d 523 (1992), rev. denied, 120 Wn.2d 1017 (1992). They do not bear repeating. The ALI documents recorded proceedings from 1958, 1961 and 1964. They have been in existence for more than 20 years. They are authenticated as official publications under 902(e). The documents meet the hearsay exception under ER 803(a)(16).

We reverse and remand.

Appelwick, CJ.

WE CONCUR:

Denz, J.

Schindler, ACS

DECLARATION OF SERVICE

On said day below I deposited in the U. S. Mail a true and accurate copy of the following documents: Answer to Petition for Review, Supreme Court Cause No. 80728-1, to the following:

Timothy K. Thorson
Neal J. Philip
Linda B. Clapham
Carney Badley Spellman, P.S.
701 5th Avenue, Suite 3600
Seattle, WA 98104-5017

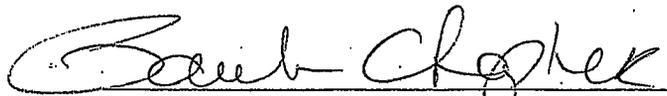
Zachary Herschensohn
Brayton Purcell, LLP
111 SW Columbia Street, Suite 250
Portland, OR 97201

Original sent by email for filing:

Supreme Court
415 12th Street W.
PO Box 40929
Olympia, WA 98504-0929

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: October 20th 2007, at Tukwila, Washington.



Paula Chapler, Legal Assistant
Talmadge Law Group PLLC

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TO E-MAIL