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SUPREME COURT NO. 80728-1

COA NO. 57293-8-I

SUPREME COURT
OF THE STATE OF WASHINGTON

RONALD LUNSFORD and ESTER LUNSFORD,

Respondents,

v.

SABERHAGEN HOLDINGS, INC.,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This case presents the question of whether this Court will continue its tradition of exercising discretion in determining the extent to which its decisions announcing new rules will apply retroactively. This Court's decisions over the past 45 years—at least as early as 1963¹ and as recently as 2006²—reflect that it has long considered itself to have such discretion, guided by one or more of the equitable factors identified in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

The court of appeals refused to follow these cases or to apply the *Chevron Oil* analysis in determining the extent of retroactivity of two of this Court's landmark products liability cases: *Ulmer v. Ford Motor Co.*³ and *Seattle First National Bank v. Tabert*,⁴ establishing strict liability causes of action against product manufacturers and sellers, respectively. In its view, Washington courts can no longer consider the *Chevron Oil* test in evaluating retroactivity of judicial decisions because that test was abolished by this Court's 1992 decision in *Robinson v. City of Seattle*.⁵ But *Robinson* has never before been cited for that proposition, and this Court's continued

¹ See *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 664-73, 384 P.2d 833 (1963).

² See *In re Detention of Audett*, 158 Wn.2d 712, 719-20, 147 P.3d 982 (2006).

³ 75 Wn.2d 522, 452 P.2d 729 (1969).

⁴ 86 Wn.2d 145, 542 P.2d 774 (1975).

⁵ 119 Wn.2d 34, 830 P.2d 318 (1992).

consideration of equitable *Chevron Oil* factors in post-*Robinson* retroactivity cases reflects that *Robinson* has been limited to its facts or overruled.

Washington courts should continue to exercise discretion in appropriate cases to give selectively-prospective effect to decisions adopting new rules. The court of appeals' decision should be reversed, and the case should be remanded to the trial court to decide, upon a full record, whether to give selectively-prospective effect to *Ulmer* and *Tabert* based on the *Chevron Oil* factors. Saberhagen submits that consideration of those factors here will ultimately establish an extraordinarily compelling case for the exercise of discretion and for the conclusion that *Ulmer* and *Tabert* must in fairness be applied with selective prospectivity only.

II. ARGUMENT

A. The Court Continues to Have Discretion under the *Chevron Oil* Analysis to Determine the Retroactivity of Its Decisions.

1. *Robinson* has been either overruled *sub silentio* or limited to its facts.

Robinson has never before been cited for the proposition that the *Chevron Oil* test has been abolished in Washington and that *all* court decisions are fully retroactive, regardless of the circumstances. To the contrary, since deciding *Robinson*, this Court has repeatedly employed *Chevron Oil* factors in deciding the extent to which its prior decisions should apply retroactively. See *Audett*, 158 Wn.2d at 722; *State v. Atsbeha*, 142

Wn.2d 904, 916, 16 P.3d 626 (2001); *Jain v. State Farm Mut. Auto. Ins. Co.* 130 Wn.2d 688, 692, 926 P.2d 923 (1996); accord *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 756-66, 966 P.2d 1232 (1998) (Sanders, J., dissenting). See Petition for Review (“Petition”) at 8-15.

This Court has done so with the blessing of the U.S. Supreme Court, which has made clear that, while a harsher rule may apply when *federal* courts interpret decisions of *federal* law, *state* courts are free to adopt their own rules regarding the retroactivity of state-law decisions. See *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 100, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), citing *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-66, 53 S. Ct. 145, 77 L. Ed. 360 (1932). See also *Danforth v. Minnesota*, 552 U.S. ___, 128 S. Ct. 1044, 1045-46, 169 L. Ed. 2d 859 (2008). Since *Robinson*, this Court and those of many other states have accepted this invitation and have elected to maintain their discretion under *Chevron Oil* to give selectively-prospective effect to a rule of state civil law announced in a prior decision. See *Audett*; *Atsbeha*; *Jain*; *Dempsey v. Allstate Ins. Co.*, 325 Mont. 207, 104 P.3d 483 (2004) (characterizing this as the “more common approach” of state courts after *Harper*).⁶ See also

⁶ *Dempsey* recites a history of retroactivity case law in Montana that closely parallels Washington’s. Like this Court, the Montana Supreme Court had a “long history” of giving prospective effect to certain decisions. 104 P.3d at 211. In 1996 the court followed *Harper* and held that it would give fully retroactive effect to *all* of its judicial

Petition at 7-15 and n.13 (gathering cases).⁷ *Chevron Oil* thus remains alive and well in Washington jurisprudence, and *Robinson* is limited to its facts⁸ or was overruled *sub silentio* (see Petition at 9-18).

2. The *Chevron Oil* test may be applied not just in the particular case that announces a new rule, but also in subsequent cases.

In addition to incorrectly holding that selective prospectivity and the *Chevron Oil* analysis had been abolished in Washington, the court of appeals was also incorrect when it observed that “[t]he *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.” 139 Wn. App. at 345. To the contrary, *Chevron Oil* itself considered whether to give

decisions. *Id.* In three subsequent decisions, however, the court reverted to the *Chevron Oil* test to determine whether prospective application was appropriate. *Id.* After reviewing decisions of other states, the *Dempsey* court ultimately decided to reject the rigid and harsh approach of *Harper* in favor of its longstanding discretionary approach guided by *Chevron Oil*. *Id.* at 216-18.

⁷ See also *Mayer Unified Sch. Dist. v. Winkleman*, ___ P.3d ___, 2008 WL 2128065 at *21 n.10 (Ariz. App. 2008); *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 301 Wis.2d 178, 732 N.W.2d 804 (2007).

⁸In *Robinson*, the Court gave full retroactive effect to two prior decisions invalidating municipal ordinances pursuant to a statute. Retroactivity of decisions invalidating ordinances and statutes might arguably be appropriate under a Blackstonian model of judicial decision-making, since the ordinances had been invalid *from their inception*, and hence the Court’s declaration of their invalidity should likewise be retroactive to their inception. See, e.g., *Sunburst*, 287 U.S. at 365 (alluding to some courts’ justification of retroactivity according to “the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration”); cf. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549, 111 S. Ct. 2349, 114 L. Ed. 2d 481 (1991) (Scalia, J., concurring). But this model is utterly inapplicable in the realm of the common law, where the Court has in effect judicially enacted new substantive laws (e.g., strict liability) that did not exist before.

selectively-prospective effect to *another* decision.⁹ *Chevron Oil*, 404 U.S. at 105-07. Similarly, Washington case law reflects that the retroactivity of decisions is typically addressed in *subsequent* cases. See *Audett*, 158 Wn.2d at 986-87; *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 785, 567 P.2d 631 (1977) (“We usually determine the general or unlimited retroactive effect of our overruling decisions only when the question arises in subsequent cases.”).

B. The Chevron Oil Factors Lead to a Conclusion that Ulmer and Tabert Should Not Be Applied Retroactively to This Case.

As summarized above, this Court applies the *Chevron Oil* factors when deciding whether to apply a newly-announced rule with selective prospectivity. Under that analysis, the court must:

1. determine whether the decision established 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;
2. 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; and
3. weigh the inequity imposed by retroactive application.

Audett, 158 Wn.2d at 720-21. Saberhagen believes that the analysis of these factors should be conducted in the trial court, where the parties would have

⁹ *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969).

the opportunity to develop a factual record. However, if this Court elects to undertake this analysis itself, on the present record, the result must be to refuse retroactive application of *Ulmer* and *Tabert* to the present case.

1. First *Chevron Oil* factor: strict liability for product manufacturers and sellers was a “new rule” that was not “clearly foreshadowed” in 1958.

Section 402A was first published by the American Law Institute (ALI) in 1965. This Court adopted 402A in 1969 as to manufacturers only. *Ulmer*, 75 Wn.2d at 530. It was extended to product sellers in 1975. *Tabert*, 86 Wn.2d at 150. Those decisions dramatically changed prior law concerning the liability of product manufacturers and sellers.¹⁰

In 1958, product sellers generally could *not* be held strictly liable for injuries caused by defective products. See *Larson v. Farmers' Warehouse Co.*, 161 Wash. 640, 644, 297 P. 753 (1931) (noting general rule that product sellers are not subject to claims such as “implied warranty”). Claims against *manufacturers* sounded either in negligence or

¹⁰ The *Tabert* and *Ulmer* decisions received considerable public attention when they were issued. See CP 101 (SEATTLE POST-INTELLIGENCER, Mar. 21, 1969: “In a far-reaching decision with consumer protection impact, the State Supreme Court yesterday held that an auto maker or other manufacturer, no matter how careful he is, is liable for damages to the user if the product fails.”); CP 98-100 (SEATTLE TIMES, Nov. 27, 1975: “*Supreme Court Says Sellers are Liable* . . . The State Supreme Court extended the boundaries of consumer protection yesterday by widening the liability for faulty products to include not just the maker, but the seller”).

warranty. Warranty did not require fault, but it did require privity.¹¹ *La Hue v. Coca-Cola Bottling Co.*, 50 Wn.2d 645, 647, 314 P.2d 421 (1957).

There were exceptions to the privity requirement. Courts in Washington and elsewhere had carved out narrow exceptions in *food product* cases, characterizing the claim as one of *implied* warranty. See *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913). Such exceptions were based on the special importance of food, which favored an implied warranty that purchased food is wholesome and fit for consumption. *Id.*; *Brewer v. Oriard Powder Co.*, 66 Wn. 2d 187, 191, 401 P.2d 844 (1965); RESTATEMENT (SECOND) OF TORTS § 402A at 74B-75 (Council Draft No. 8, 1960) [CP 107-08]. This and similar exceptions¹² notwithstanding, “the general rule” in 1958 was *non*-liability of the manufacturer, absent privity. See *La Hue*, 50 Wn.2d at 647.

A nationwide trend toward eliminating the privity requirement and adopting strict liability developed quickly, dramatically, and *after* 1958.

¹¹ It is significant that Mr. Lunsford not only lacks privity with Brower; he lacks privity *with anyone*. Saberhagen is not aware of any pre-1958 Washington case allowing an implied warranty claim to a plaintiff who did not at least buy the defective product from *someone*. See note 16, *infra*. Prosser himself canvassed the case law in 1964 and told the ALI that he had found *no* such cases allowing bystanders to assert strict liability claims. See 41 ALI PROC. 352-53 (1964) [CP 124].

¹² Apparently based upon the same rationale as the food exception, i.e., that such items are intended to come into direct contact with the human body, several Washington decisions recognized exceptions for clothing, drugs, and cosmetics. See, e.g., *Ringstad v. I. Magnin & Co.*, 39 Wn.2d 923, 239 P.2d 848 (1952); *Brewer*, 66 Wn. 2d at 191.

In January 1958, the Advisory Committee of the ALI (led by William L. Prosser, Reporter) discussed a proposed new restatement section that would reflect the recently-developed implied warranty exception to the privity requirement for actions against manufacturers of *food products only*. See RESTATEMENT (SECOND) OF TORTS § 402A (Prelim. Draft No. 6, 1958) [CP 110-12]. The Preliminary Draft was presented to the ALI in 1961. But Prosser told the Institute that much had changed in the law of strict liability in the few years since the Preliminary Draft, and the pace of change was accelerating at a shocking rate:

So much for food. Actually, beginning a very short time ago, a great many jurisdictions are now applying the rule of this section to products *other than food*. You will find . . . several cases applying it to articles for what might be called *intimate bodily use* which is external rather than internal—things like hair dye, soap, permanent wave solutions, surgical pins for setting a bone fracture, polio vaccine in California, and then getting beyond what might be called bodily use in any sense of the word, you find very recently a *quite spectacular eruption of cases* which extended the rule of this section to other products not for external use at all. . .

This is perhaps the most spectacular development that I have witnessed in my lifetime in the American law of Torts.

. . . .
[Y]ou will notice how late most of the cases are—the *great majority of them since 1958*—this rather *spectacular* extension of the whole thing to things like automobiles. There is a great deal of contrary authority even in the states which accept the food liability. California, for instance, thus far has refused to extend to anything beyond food They won't apply it to pumps, insecticides—anything like

that—so that here what appears . . . is a definite minority rule. It is a minority of the jurisdictions—about 7 or 8 of them—which have suddenly kicked over the traces in a *spectacular fashion since 1958*. There seems to be every indication that that is spreading and spreading rapidly, but it is still a small minority.

38 ALI PROC. 51-52, 71-72 (1961) (emphasis added) [CP 115-16, 118-19].

By the end of the 1961 conference, Prosser convinced the ALI that the “spectacular” development of the law *since 1958* warranted expanding the scope of 402A’s strict liability from food products *only*, to products intended for “intimate bodily use.” Prosser was directed to redraft the section accordingly, expand the comments and resubmit them the following year. *Id.*; 41 ALI PROC. 349 (1964) [CP 122].

Remarkably, by the time the ALI reconvened in 1964, Prosser felt it necessary to propose yet *another* expansion—this time to *all* products—due to the continued, “explosive” expansion of the law since the prior revised draft. *Id.* at 349-50 [CP 122]. Prosser noted:

[I]t becomes apparent that if our Section of the Restatement which we have approved is to be published this summer in Volume 2 of the Restatement, it will be on the verge of becoming dated before it is published.

[T]his is the speediest development in the law of torts that I have encountered in my lifetime, as well as being one of the most spectacular.

Id. at 350-51 (emphasis added) [CP 123]. After lengthy discussion, the ALI approved the expansion to all products and the section was published in its current form in 1965.

Clearly, in 1958 (when Mr. Lunsford claims exposure to Brower products), *no one*—not William Prosser, not the American Law Institute, and certainly not Brower—could have foreseen the “spectacular” development of the law of strict liability that would eventually lead to 402A in 1965, its adoption in *Ulmer* in 1969 as to manufacturers, and its adoption in *Tabert* in 1975 as to product sellers. The Lunsfords contend that *Ulmer*'s adoption of 402A in 1969 was “clearly foreshadowed” by the implied warranty cases cited in *Ulmer*; but they ignore that most of those cases were decided *after 1958*,¹³ i.e., *after* Mr. Lunsford's alleged exposure to Brower products. As for the few implied warranty cases cited in *Ulmer* that were decided *before 1958*,¹⁴ they were largely confined to the narrow categories of *food, cosmetics, and clothing*, i.e., the categories that, according to Prosser's observation in 1961, defined the outer limits of implied warranty claims in which courts dispensed with a privity

¹³ *Pulley v. Pacific Coca-Cola Bottling Co.*, 68 Wn.2d 778, 415 P.2d 636 (1966); *Esborg v. Bailey Drug Co.*, 61 Wn.2d 347, 378 P.2d 298 (1963); *Brewer (1965)*; *Brown v. General Motors Corp.*, 67 Wn.2d 278, 407 P.2d 461 (1965); *Wise v. Hayes*, 58 Wn.2d 106, 361 P.2d 171 (1961); *Dipangrazio v. Salamonsen*, 64 Wn.2d 270, 393 P.2d 936 (1964).

¹⁴ *La Hue (1957)*; *Nelson v. West Coast Dairy Co.*, 5 Wn.2d 284, 105 P.2d 76 (1940); *Mazetti (1913)*.

requirement.¹⁵ Notably, in 1958 (the year of Mr. Lunsford's alleged exposure), Prosser considered the availability of such claims to be even narrower, being allowed *only* against manufacturers of *food products*, and characterized Washington as one of the states allowing only this narrow exception. CP 111-12.

Notwithstanding the astonishing developments that would follow in the coming decade, the law *in 1958* was fairly settled in Washington: with narrow exceptions, privity was required for warranty claims.¹⁶ Nothing in Washington's law as of 1958 "clearly foreshadowed" for Brower a development that Prosser himself did not see coming."¹⁷

¹⁵ *Ulmer* also cited a 1932 case involving a defective windshield, *Baxter v. Ford Motor Co.*, 168 Wn.2d 456, 12 P.2d 409 (1932). However, *Baxter* was decided on an *express* rather than implied warranty theory. Despite plaintiff's lack of privity with the manufacturer, *Baxter* ruled that the manufacturer should be held to the express representations it used to create consumer demand. *Id.* See *Fleenor v. Erickson*, 35 Wn.2d 891, 215 P.2d 885 (1950) (holding that, outside of narrow exceptions, "[t]he general rule is that if there is no privity there can be no warranty, either express or implied"; distinguishing *Baxter* on grounds that it involved *express* representations). Accord *Murphy v. Plymouth Motor Corp.*, 3 Wn.2d 180, 182-83, 100 P.2d 30 (1940).

¹⁶ In 1962, this Court stated that, regardless of the exceptions under which implied warranty claims are permitted without privity: "for there to be recovery on a breach of an implied warranty, the plaintiff must have bought something from somebody." *Kasey v. Suburban Gas Heat*, 60 Wn.2d 468, 475, 374 P.2d 549 (1962) (gas explosion case where the Court prohibited implied warranty claim asserted by neighbor against gas supplier, as neighbor was not in privity with gas supplier). The law would have prohibited an implied warranty claim by a bystander such as Mr. Lunsford who did not purchase the defective product.

¹⁷ Any non-manufacturing product sellers such as Brower who happened to consult the Restatement of Torts as it existed in 1958 would have learned that, so long as they had no reason to know that the product they sold was dangerous, they could not be held liable for injuries to third persons. RESTATEMENT OF TORTS § 402 (1948 Supp.).

2. **Second *Chevron Oil* factor: the purposes of 402A strict liability are not furthered by retroactive application.**
 - a. **Retroactive application of *Ulmer* and *Tabert* would defeat the “risk spreading” purpose of 402A strict liability.**

The rationale underlying strict liability is to compensate injured parties through a mechanism that spreads the costs and risks associated with the product. According to this rationale, liability without fault should be imposed upon product manufacturers and sellers because they can spread the risk or absorb the loss through obtaining insurance or raising the price of the product. See RESTATEMENT (SECOND) OF TORTS § 402A, cmt. c (1965). See also Cortese & Blaner, *The Anti-Competitive Impact of U.S. Prod. Liability Laws*, 9 J.L. & COMM. 167, 175, 181-82 (1989).

The risk-spreading goals of strict liability would not be served by retroactive application of *Ulmer* and *Tabert* to events occurring in 1958. Because strict products liability was unforeseeable in 1958, Brower and other product sellers would have had no reason to procure insurance against such risks in 1958 (and insurers would have no basis upon which to evaluate those risks and to charge appropriate premiums). Tort policy may reasonably expect product manufacturers and sellers to insure against *conceivable* risks, but it cannot reasonably expect them insure against the *inconceivable* risks that do not exist under current or foreseeable

developments in the law. See Henderson & Twerski, *A Proposed Revision of Section 402A of the Rest. (Second) of Torts*, 77 CORNELL L. REV. 1512, 1517 (1992). Similarly, Brower had no reason to raise the price of its products incrementally in 1958 to spread the cost of a non-existent risk among its customers. Indeed, how would Brower know by what margin to increase the price?

In planning, conducting, and protecting their businesses in 1958, manufacturers and sellers were entitled to rely upon the liability limitations and theories Washington courts had announced before then. Thus, retroactive application of *Ulmer* and *Tabert* would not serve or advance the risk-spreading policies underlying strict liability.¹⁸

¹⁸Indeed, in this case any risk-spreading function is truly minimal. The date of sale of the product (1958) and the date of the Lunsford's claim (2002) are separated by *more than 40 years*. The product, asbestos-containing insulation, has long been off the market and is currently banned. See 40 C.F.R. 763.163 *et seq.* (2005); S. Rep. No. 109-97, at 15 (2005). Most of the major insulation manufacturers have gone bankrupt due to the "elephantine mass" of asbestos litigation. *Id.* at 19; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999). Thus, the cost of Brower's strict liability to the Lunsfords could not be spread through adjusting the price of the product or by procuring insurance after the fact.

This same grim predicament faces more than 8,400 U.S. companies involved in asbestos litigation today, and the numbers are growing, as plaintiffs like the Lunsfords sue scores of defendants in multiple suits. S. Rep. 109-97, at 12; CP 93-94 (service list of 37 companies in Lunsfords' California suit). Asbestos litigation has forced more than 70 companies into bankruptcy, with more bankruptcies between 2000 and 2004 than in the 1970's, 1980's and 1990's combined. More than 60,000 jobs have been lost, and future bankruptcies are expected to rise exponentially. *Id.* at 14, 20. The plight of those who suffer from serious asbestos disease is tragic, indeed; but plainly the risk-spreading policy that the Lunsfords cite to support strict liability has little relevance in asbestos litigation.

b. Retroactive application of *Ulmer* and *Tabert* would be inconsistent with current public policy as declared by the Washington State Legislature.

In arguing that 402A strict liability should apply to their claim arising from exposure in 1958, the Lunsfords rely on a second public policy justification: to guarantee “the maximum of protection” to injured persons at the expense of the product seller, regardless of fault. Answer at 11, citing *Tabert*. Yet even if that were the policy of the Washington as of 1969 and 1975 (when *Ulmer* and *Tabert* were decided), it *ceased* being the policy soon thereafter, when the Legislature passed reforms prompted in large part by *Ulmer*, *Tabert*, and 402A.

Momentum for legislative change began almost immediately after *Tabert* in 1975 and increased over the next four years as the product liability controversy continued. SENATE JOURNAL, 47th Leg., Reg. Sess., at 618 (Wash. 1981). Fueling the controversy was the perception (confirmed by the Senate Select Committee on Tort and Product Liability Reform) that products liability insurance costs were “skyrocketing” between 1974 and 1976, creating “a product liability crisis.” *Id.* at 622. Insurance rates for bodily injury and property damages jumped 75% in 1974-75. While products liability insurance remained available in the late 1970’s, *affordability* was problematic. *Id.* at 623.

Among the areas of greatest concern identified by the Senate Select Committee and seen as contributing to the insurance and product liability crisis were the 402A strict liability standards adopted in *Tabert*¹⁹ and the joint and several liability exposure of non-manufacturing product sellers.²⁰ In enacting legislation to address such issues, the Legislature made no secret of its concern over existing products liability law and underlying policy, and the need for reform:

The purpose this amendatory act is to enact further reforms in the tort law to create *a fairer and more equitable* distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial motivation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the

¹⁹See SENATE JOURNAL, 47th Leg., Reg. Sess., at 624-25 (Wash. 1981) ("With its adoption of Section 402A . . . the Washington court has *purported* to extend strict liability to manufacturers of defective products, regardless of the nature of the defect" (emphasis added)).

²⁰See SENATE JOURNAL, *supra*, at 632 ("One of the complaints most frequently expressed before the Legislature during the whole course of the product discussion over the past few years has been the alleged inequity of holding the non-manufacturing product seller liable for product defects over which it had no control . . ."); 1981 FINAL LEGISLATIVE REPORT, 47th Wash. Leg., at 126 ("Proponents of legislation point to the significant increase in product liability insurance premiums which occurred in the early 1970's which they say resulted from judicial decisions increasing the exposure of product sellers to liability for defective products"); Philip Talmadge, *Washington's Product Liability Act*, 5 U. PUGET SOUND L. REV. 1, 5-6, n.28 (1981) (Senate Select Committee Chairman attributes "extreme variations" in product liability insurance premiums from 1973-79 to uncertainty among insurers about the trend in Washington product liability law).

high cost of insurance on to the consuming public in general.

LAWS OF 1981, ch. 27, § 1 (emphasis added). Accordingly, reform legislation proceeded from a new, more balanced policy, in which the interests of *injured consumers*, while important, did not trump all others:

It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer *in a balanced fashion* in order to deal with these problems.

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be *unduly* impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.

Id. (emphasis added). To restore a more balanced products liability system, the 1981 WPLA contained important changes benefiting product manufacturers and sellers, including a substantial limitation of liability for product sellers (such as Brower), allowance of evidence of state of the art, provision of an absolute defense where a product is in compliance with government specifications, a 12-year statute of repose/useful safe life, and adoption of comparative fault. *See RCW 7.72.030 et seq.*

If the Lunsfords are correct that 402A, *Ulmer*, and *Tabert* embodied a monolithic policy of guaranteeing consumers “the maximum

of protection,” then that fact today is of merely historical significance; it has *not* reflected Washington products liability policy *since 1981*. Applying 402A strict liability to an exposure *in 1958* would unnecessarily and unwisely perpetuate and expand the unsatisfactory products liability scheme that instigated legislative reform in 1981. The WPLA represents *current* public policy, which favors a *balanced* approach to protect the interests of manufacturers, sellers and insurers, while not “*unduly* impairing” the recovery rights of injured consumers.

3. Third *Chevron Oil* factor: retroactive application would be inequitable.

The equities militate strongly against retroactive application of *Ulmer* and *Tabert* in this case. Brower could have had no inkling in 1958 that it might one day be held liable, regardless of fault, to persons other than its customers for injuries caused by the products it sold. There is no plausible means by which Brower could have acted to protect itself or to distribute the costs that might one day be imposed.

In contrast to the inequity that would result for *Saberhagen* if the *Lunsfords*' strict liability claims are allowed, no inequity will result for the *Lunsfords* if the strict liability claims are dismissed. They will retain precisely the same legal claims—no more and no less—as every other person who was injured by a product in Washington State in 1958.

The Lunsfords have never disputed that if Mr. Lunsford had become ill *in 1958* as a result of his alleged exposure and had sued Brower that year, he would have had no cause of action for strict liability. The *only* reason that Mr. Lunsford can advance the argument for strict liability now is because his illness did not show up until 42 years after his exposure and, in the interim, the law developed in a way he considers more favorable. The nature of a product seller's liability should not turn upon how long it takes for an injury to manifest itself. Mr. Lunsford's remedies should be no greater and no less than those of any other person injured by a defective product in Washington in 1958.²¹

There is *no* evidence suggesting that the Lunsfords—who have previously sued and resolved their claims against 37 other companies in a California lawsuit (*see* CP 93-94)—will suffer *any* harm if 402A is not retroactively applied to 1958.²² But leaving aside their *actual* recoveries to date and the recoveries they may yet obtain on their *negligence* cause of

²¹In any event, even if it were a hardship for the Lunsfords to pursue Saberhagen with only a negligence claim, Washington courts have noted that non-retroactive application of certain judicial decisions is appropriate, even if “of necessity, hardships result.” *Erdman v. Lower Yakima Valley B.P.O.E Lodge No. 2112*, 41 Wn. App. 197, 212, 704 P.2d 150 (1985). *See Cunningham v. Lockard*, 48 Wn. App. 38, 42, 736 P.2d 305 (1987).

²²Moreover, the Lunsfords' unsupported suggestion that denying retroactive application of *Ulmer* to pre-*Ulmer* exposures “could eliminate strict liability for most mesothelioma cases” (Answer at 14) completely ignores that many mesothelioma cases—and *even the Lunsfords' case itself* (CP 89, alleging exposures in 1970-74)—also allege *post-Ulmer* exposures. Those exposures could plainly support 402A strict liability claims against proper parties, since *Ulmer* would apply *prospectively* to such claims.

action, the fact remains that the theoretical “harm” they contend will result if 402A is not retroactively applied boils down to this: if 402A is not retroactively applied to Mr. Lunsford’s injury in 1958, he will be left with “only” the rights and remedies that were available to every other person who was injured that year by defective products. This supposed “harm” hardly constitutes inequity under *Chevron Oil*.

By contrast, applying 402A retroactively *would* be inequitable for Brower and other manufacturers or sellers of asbestos-containing products. It would single them out among virtually all other product manufacturers and sellers in 1958 for the imposition of unforeseeable and devastating forms of liability against which they could not have protected themselves. The Lunsfords suggest that any such resulting inequity is ameliorated by the option of seeking contribution from other responsible parties. However, many of the largest and most significant “responsible parties”—more than 70 to date—are bankrupt as a result of asbestos litigation, and the pace of asbestos-related bankruptcies is accelerating exponentially. See discussion *supra* at ____, n. ____.

Finally, it is important to avoid the confusion the Lunsfords invite in their quotation from *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), where this Court compared the equities as between an

innocent person whose reputation was destroyed though libel and an unscrupulous television station that *negligently* libeled that person and was *at fault*. Answer at 12-13. By contrast, retroactive application of 402A would impose *strict liability* upon parties *without fault*. Refusing to apply 402A retroactively will not affect Mr. Lunsford's right to proceed *in negligence* against a party who, like the TV station in *Taskett*, caused the injury through unreasonable conduct falling below the standard of care; in short, someone who was *at fault*.

III. CONCLUSION

The court of appeals was plainly wrong in holding that selective prospectivity of judicial decisions and the *Chevron Oil* analysis were abolished in *Robinson*. Accordingly, this Court should reverse and remand the case to the trial court for consideration of selective prospectivity of the *Ulmer* and *Tabert* decisions' adoption of 402A, according to the factors set forth in *Chevron Oil*.

Respectfully submitted this 7th day of July, 2008.

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