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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 RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... i-iii

I. INTRODUCTION 1

A. The Declaratory Theory 1

B. The Realist Theory 2

C. WSTLA's Position 3

II. ARGUMENT 4

A. This Court Long Ago Rejected the Declaratory Theory 4

B. The Declaratory Theory Is Inconsistent with the Principles Underlying *Stare Decisis* 8

C. Automatic Retroactivity Ignores Reality Because Retroactivity Ordinarily Is Not Considered in the Rule-Adopting Decision 9

D. The Holding of *Robinson* May Appropriately be Limited to Its Context 12

III. CONCLUSION 16

TABLE OF AUTHORITIES

CASELAW

Federal

Am. Trucking Ass'ns v. Smith,
96 U.S. 167, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990).....13-14

Chevron Oil Co. v. Huson,
404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).....*passim*

Danforth v. Minnesota,
522 U.S. ___, 128 S. Ct. 1044, 169 L. Ed. 2d 859 (2008).....13

Erie R.R. v. Tompkins,
304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).....13

Great N. Ry. Co. v. Sunburst Oil & Ref. Co.,
287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).....6

Harper v. Virginia Dep't of Taxation,
509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).....*passim*

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991).....6, 12

Southern Pac. Co. v. Jensen,
244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).....2, 5

Washington Cases

Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1,
24 Wn.2d 816, 881 P.2d 986 (1994).....11

Bowman v. State,
162 Wn.2d 325, 172 P.3d 681 (2007).....15

Cascade Sec. Bank v. Butler,
88 Wn.2d 777, 567 P.2d 631 (1977).....9

Crown Controls, Inc. v. Smiley,
110 Wn.2d 695, 756 P.2d 717 (1988).....8

Page

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

In re Williams,
147 Wn.2d 476, 55 P.2d 597 (2002).....6, 15

Johnson v. Morris,
87 Wn.2d 922, 557 P.2d 1299 (1976).....15

Lau v. Nelson,
92 Wn.2d 823, 601 P.2d 527 (1979).....6, 9

R/L Assocs., Inc. v. City of Seattle,
113 Wn.2d 402, 70 P.2d 838 (1989).....14

Roberts v. Johnson,
91 Wn.2d 182, 588 P.2d 201 (1978).....6

Robinson v. City of Seattle,
119 Wn.2d 34, 830 P.2d 318 (1992).....12, 14, 16

San Telmo Assocs. v. City of Seattle,
108 Wn.2d 558, 740 P.2d 1379 (1987).....14

Seattle-First Nat'l Bank v. Tabert,
86 Wn.2d 145, 542 P.2d 774 (1975).....11, 12, 16

State ex rel. Washington State Fin. Comm. v. Martin,
62 Wn.2d 645, 384 P.2d 833 (1963).....1, 5, 8, 9, 11

State v. Moen,
129 Wn.2d 535, 919 P.2d 69 (1996).....15

Ulmer v. Ford Motor Co.,
75 Wn.2d 522, 452 P.2d 729 (1969).....4, 10-12, 16

Other States

Beavers v. Johnson Controls World Servs., Inc.,
118 N.M. 391, 881 P.2d 1376 (1994).....1, 7, 8

Page

STATUTES AND RULES

CR 35 16

OTHER AUTHORITIES

1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765 1

5 J. Bentham, THE WORKS OF JEREMY BENTHAM 235 (1808) 2

R. Posner, HOW JUDGES THINK 81 (2008) 2

RESTATEMENT (SECOND) OF TORTS § 402A (1965) 4, 10

Shannon, *The Retroactive & Prospective Application of Judicial Decisions*, Harv. J. L. & Pub. Pol'y 811 (2003) 12

I. INTRODUCTION

In reiterating Respondent Lunsfords' call for an end to this Court's long tradition of exercising discretion in determining the extent to which its decisions announcing new law will apply retroactively, Amicus WSTLA Foundation ("WSTLA") resurrects the interesting, but now largely historical debate between adherents to the *declaratory* and *realist* theories of jurisprudence. Although fairly characterized as "one of the great jurisprudential debates of the twentieth century,"[1] the debate in Washington was resolved 45 years ago in favor of realism. *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 664, 384 P.2d 833 (1963).

A. The Declaratory Theory

Without acknowledging that this Court has soundly rejected it, WSTLA urges a return to the declaratory theory, under which judges are said not to *make* law but rather only to *declare* what the law is and always has been. *See* 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765). Accordingly, an overruled decision is simply wrong: it never was the law, but only a mistaken prior statement of what the law was. *Id.* at 70. *See also Martin*, 62 Wn.2d at 664. The new, "correct" statement of the law in the overruling decision is deemed to be what the law has *always* meant—it thus makes no sense to speak of conflicting "old" law and "new" law—and

[1] *Beavers v. Johnson Controls World Servs., Inc.*, 118 N.M. 391, 881 P.2d 1376 (1994).

therefore it applies to everyone, retroactively, concurrently, and prospectively (at least until the next "correction"). Unfortunately, this theory also entails the undesirable result that people can never know the laws by which they are bound but rather must fear that their actions *today* may be scrutinized far in the future according to a law that has not yet been "discovered" or announced.

B. The Realist Theory

The declaratory theory has long been challenged as a fiction that ignores the reality of judicial decision-making: that judges do, in fact, *make* law occasionally and thus perform a legislative function.[2] Under the realist model, the law changes as the decisions change and, thus, it makes sense to distinguish between "old" law and "new" law.

When the old law and the new law differ significantly, courts must decide to whom, in fairness, the *new* law should apply, particularly when faced with those persons who may actually or presumably have relied in good faith upon the *old* law. In such situations, this Court and those of many other states have specifically reserved to themselves the discretion to

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[2] *See, e.g.*, 5 J. Bentham, THE WORKS OF JEREMY BENTHAM 235 (1808); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221, 37 S. Ct. 524, 61 L. Ed. 1086 (1917) (Holmes, J., dissenting) ("judges do and must legislate, but they can do so only interstitially"); R. Posner, HOW JUDGES THINK 81 (2008) ("Appellate judges are *occasional legislators*") (emphasis in original).

consider one or more equitable, *Chevron Oil*[3]-type factors such as reliance, policy, and resulting injustice in making retroactivity determinations.

C. WSTLA's Position

WSTLA calls for an end to the ability of this Court to exercise such discretion and for the resurrection of declaratory theory. No more, it argues, should this Court permit itself the discretion to limit the retroactive effect of a prior holding announcing and applying a new, substantive common law rule, i.e., to apply the new rule with "selective" prospectivity.[4]

As explained below, there are three fundamental problems with WSTLA's argument. First, as noted above, this Court *rejected* the declaratory theory 45 years ago. As recently as 2006, it has reaffirmed its power and discretion to give selectively-prospective effect to prior decisions. *In re Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006).

Second, although WSTLA appeals to *stare decisis,* this Court has recognized that prospective decision-making is *consistent* with the major

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[3] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971).

[4] It is surprising that WSTLA would take any position on the subject of retroactivity, as retroactivity can obviously have serious implications for *both* defendants *and* plaintiffs, depending on the circumstances. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 121, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) (O'Connor, J., dissenting) ("[N]onretroactivity in the civil context does not necessarily favor plaintiffs or defendants; 'nor is there any policy reason for protecting one class of litigants over another'"). Indeed, if the U.S. Supreme Court in *Chevron Oil* had adopted WSTLA's current view of mandatory, non-discretionary retroactivity, the new judge-made law at issue in that case would have been retroactively applied to the plaintiff, *barring* his action for personal injuries. *Chevron Oil*, 404 U.S. at 105-06.

principle underlying *stare decisis*, i.e., recognition of settled expectations arising from reliance on prior law.

Third, WSTLA simply ignores the reality of judicial decision-making when it suggests that all court decisions announcing new rules of law should be *presumed* to have involved consideration of equitable, *Chevron Oil* factors bearing on retroactivity, even when the decisions make no mention of them. WSTLA Brief at 6. As this Court has recognized, the court in a rule-adopting case ordinarily is *not* asked to consider, and does not consider, the issue of retroactivity.

This Court should continue to employ realist jurisprudence and to reserve discretion to give selectively-prospective effect to prior decisions announcing new law when justice requires. The court of appeals' decision that this Court has renounced its discretion in this area is erroneous and must be reversed.

II. ARGUMENT

A. This Court Long Ago Rejected the Declaratory Theory.

More than 45 years ago (and six years before this Court adopted Restatement (Second) of Torts § 402A in *Ulmer v. Ford Motor Co.*[5]), this Court rejected the declaratory theory espoused by WSTLA, the Lunsfords, and the court of appeals. The Court stated:

[5] 75 Wn.2d 522, 452 P.2d 729 (1969).

> We wish that we could view our role as judges with the Olympian detachment expressed by the ancient writers who, when called upon to overturn a decision, could indulge in the philosophy that, since judges did not make but simply found the law, the overruled decision was not and never had been the law.

Martin, 62 Wn.2d at 663-64. *See also Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221, 37 S. Ct. 524, 61 L. Ed. 1086 (1917) (Holmes, J., dissenting) (rejecting declaratory view of common law as "a brooding omnipresence in the sky"). The Court observed that the "heavy hand of the old declaratory theory" had led courts to "strive for distinctions where none exist to escape the implications of a bad rule." *Id.* at 666. The Court decided that the better rule was to reserve discretion to engage in prospective decision-making where appropriate to avoid injustice:

> Better to overrule [a bad rule] flatly, and say so, giving the overruling decision prospective effect, than attain the same end through sophistry and evasion. In the long run, a search for distinctions, where there are no real differences, in order to bring a case to a just conclusion, contributes more to uncertainty in the law than does an outright reversal of policy and cancels two of the things upon which the law depends -- reason and experience.

Id. The Court observed that prospective overruling had been used for "more than a century." *Id.*

This Court has often considered whether to give selectively-prospective effect to an overruling decision and has decided to give such

effect where appropriate to avoid injustice. For example, in *Lau v. Nelson*, 92 Wn.2d 832, 828-29, 601 P.2d 527 (1979), this Court gave selectively-prospective effect to a prior decision[6] where the Court had abandoned the gross negligence standard and held that the duty of a host driver is that of exercising ordinary care.

This Court reaffirmed its rejection of the declaratory theory in 2006 in *Audett*, holding: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Id.*, 158 Wn.2d at 720, quoting *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 77 L. Ed. 360 (1932). In deciding whether to give selectively-prospective effect to its prior decision in *In re Williams*, 147 Wn.2d 476, 55 P.2d 597 (2002), this Court engaged in a lengthy analysis of the *Chevron Oil* factors, which it held "determine whether a case should be given prospective application or selective prospectivity." *Audett*, 158 Wn.2d at 721.

Although the U.S. Supreme Court abolished selective prospectivity of its federal, civil law decisions in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), and *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74

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[6] *Roberts v. Johnson*, 91 Wn.2d 182, 588 P.2d 201 (1978).

(1993), most state courts have taken advantage of the "freedom state courts . . . enjoy to limit the retroactive operation of their own interpretations of state law."[7] *Harper*, 509 U.S. at 100, citing *Sunburst Oil*, 287 U.S. at 364-66.

In *Audett*, this Court cited with approval the New Mexico Supreme Court's decision in *Beavers v. Johnson Controls World Services, Inc.*, 118 N.M. 391, 881 P.2d 1376 (1994), parenthetically describing *Beavers* as "adopting [a] presumption of retroactivity for a new rule imposed by a judicial decision in a civil case" and "holding [that the] presumption may be overcome by a sufficiently weighty combination of one or more of the *Chevron Oil* factors." *Audett*, 158 Wn.2d at 722. *Beavers* was sharply critical of the *Harper* majority opinion and instead adopted the reasoning of Justice O'Connor's dissenting opinion. *Beavers*, 881 P.2d at 1380-83. Noting that it had repeatedly given selectively-prospective effect to certain state-law decisions, the New Mexico Supreme Court stated in *Beavers*:

> We . . . decline to follow the Supreme Court's lead in holding that we lack the power to apply a new rule prospectively—whether the rule is derived from overruling a past precedent or fashioning a new precedent—even though (as in this case) the decision announcing the new rule has already been applied retroactively to the conduct of the litigants in the case in which the rule was announced.

[7] *See, e.g., In re Audett*, 158 Wn.2d 712, 720-21, 147 P.3d 982 (2006). *See also* Petition for Review at 14 n.13 (gathering cases) and Petitioner's Supplemental Brief at 4 n.7 (gathering additional cases).

881 P.2d at 1382.

By considering whether to give selectively-prospective effect to a prior decision under the *Chevron Oil* factors, supported by its favorable citation of *Beavers*, this Court unequivocally reaffirmed its rejection of the declaratory theory and its reservation of the power to apply selective prospectivity in the appropriate circumstances.

B. The Declaratory Theory Is Inconsistent with the Principles Underlying *Stare Decisis.*

In advocating for the declaratory theory, WSTLA appeals to the doctrine of *stare decisis*. But in *Martin*, this Court recognized prospective overruling as a "component of stare decisis." 62 Wn.2d at 670. The essence of *stare decisis* is recognition of *settled expectations* arising from reliance on prior law:

> The continuity of legal principles allows citizens to choose courses of action with a reasonable expectation of what the future legal consequences will be, even if those consequences might not arise for a considerable period of time.

Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 704-05, 756 P.2d 717 (1988). *See also Harper*, 509 U.S. at 551-52 ("At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under

them.") (O'Connor, J., dissenting). This Court in *Martin* found prospective overruling to be *supportive* of the reliance interests underlying *stare decisis*:

> If rights have vested under a faulty rule . . . [or] where, as here, subsequent events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected. . . . The courts can act to do that which ought to be done, free from the fear that the law itself is being undone.

62 Wn.2d at 666.

Declining to apply a new rule of law to parties who may have justifiably relied upon established law and had no reason to anticipate a change in the law is thus consistent with the principles underlying *stare decisis*.

C. Automatic Retroactivity Ignores Reality Because Retroactivity Ordinarily Is Not Considered in the Rule-Adopting Decision.

The declaratory theory advocated by WSTLA ignores the fact that retroactivity issues are typically not considered in an overruling decision, but only in later decisions. *See Cascade Security 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"). The Court ordinarily does not address the issue of retroactivity unless one of the parties requests a ruling on the issue, and often they do not.

A common rationale against selective prospectivity—that it fails to treat similarly-situated parties alike—has been rejected for precisely this reason. The argument goes like this: Why should Saberhagen not be subject to retroactive liability under Restatement (Second) of Torts § 402A when that rule was applied retroactively to the conduct of the defendant in the overruling case, Ford Motor Company? The answer is that there are fundamental differences between Ford and Saberhagen, not the least of which is this: *Saberhagen* litigated and preserved the retroactivity question; *Ford* did not. Applying Justice O'Connor's reasoning in *Harper* to the present parties:

> [Ford] did not even brief the question of retroactivity in [*Ulmer v. Ford*]. [Saberhagen], in contrast, actually prevailed on the question in the court below.
>
> . . .
>
> If the Court is concerned with equal treatment, that difference should be dispositive. Having failed to demand the unusual, prospectivity, [Ford] in [*Ulmer*] got the usual—namely, retroactivity. [Saberhagen] in this case *has* asked for the unusual. . . . [P]rinciples of equality [do not] support forcing [Saberhagen] to bear the harsh consequences of retroactivity simply because, years ago, [Ford] failed to press the issue—and we neglected to consider it.

Taken from *Harper*, 509 U.S. at 122 (O'Connor, J., dissenting) (bracketed material supplied).

Contrary to WSTLA and the Lunsfords, there is simply no basis to believe that the Court considered the retroactivity issue in *Ulmer* (or *Tabert*[8]); that issue was neither raised by the parties nor addressed by the Court. To the contrary and as WSTLA admits, a decision that does not address and decide an issue is not precedential on that issue. *See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) ("In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."). As Justice O'Connor observed,

> It is one thing to say that, where we have considered prospectivity in a prior case and rejected it, we must reject it in every case thereafter. But it is quite another to hold that, because we did *not* consider the possibility of prospectivity in a prior case and instead applied a rule retroactively through inadvertence, we are foreclosed from considering the issue forever thereafter.

Harper, 509 U.S. at 117 (O'Connor, J., dissenting).

When *Ulmer* (1969) and *Tabert* (1975) were decided, this Court, as it does now, reserved for itself full discretion to consider the issue of retroactivity, even in a subsequent case. *See Martin*, 62 Wn.2d at 663-66; *Audett*, 158 Wn.2d at 720. To now "assume" against all appearances and logic that the retroactivity issue was "fully considered by the Court under a

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[8] *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975).

Chevron Oil-type analysis" in *Ulmer* and *Tabert* is not only inconsistent with this Court's rejection of the declaratory theory, it is inconsistent with reality.

D. The Holding of *Robinson* May Appropriately be Limited to Its Context.

WSTLA and the Lunsfords assert that this Court no longer has discretion to employ selective prospectivity after *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992).[9] Although *Robinson* may have been overruled *sub silentio* by this Court in *Audett* and other decisions,[10] this Court need not overrule *Robinson*. Instead, *Robinson* can appropriately be limited to its factual context.

Robinson was decided less than a year after the multiple-opinion *Beam Distilling* case,[11] in which a plurality of the U.S. Supreme Court held that selective prospectivity would no longer be considered as to federal, civil law decisions. Notably, the *Beam Distilling* rule follows from a significant distinction between federal and state courts: *federal* courts (in contrast to state courts) rarely engage in the creation of a federal substantive "common law," but rather are typically confined to

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[9] WSTLA's approach appears to be inspired by a law review article whose author argues in favor of the declaratory theory and against *all* forms of prospective decision-making, both pure prospectivity and selective prospectivity. *See* Shannon, *The Retroactive & Prospective Application of Judicial Decisions*, 26 HARV. J. L. & PUB. POL'Y 811 (2003). This Court has *never* adopted a ban on purely prospective decision-making—even in *Robinson*.

[10] *See* Petition for Review at 9-17.

[11] *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed.2d 481 (1991).

interpreting the U.S. Constitution and federal statutes and regulations (or in deciding disputes according to applicable *state* law).[12] Thus, a justification for applying the declaratory theory in this context is that, when a court interprets or invalidates a statute or regulation, it is analyzing an independent source of law that has remained what it is, irrespective of judicial interpretations, since the day it was enacted. If a 50-year-old statute is today declared unconstitutional, it may arguably make sense to consider that statute void *ab initio*, since the language of the defective statute (and of the Constitution under which it is judged) has been the same since the beginning. Justice Scalia has explained the rationale for full retroactivity in such situations as follows:

> To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the question is not whether some decision of ours "applies" in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute. Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective

[12] *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) ("there is no federal general common law"); *Danforth v. Minnesota*, 522 U.S. __, 128 S. Ct. 1029, 1046, 169 L. Ed. 2d 859 (2008), quoting *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 201, 110 S. Ct. 2323, 110 L. Ed. 2d 148 (1990) (Scalia, J., concurring in judgment) ("[W]hile there are federal interests that occasionally justify this Court's development of common-law rules of federal law, our normal role is to interpret law created by others and "not to prescribe what it shall be").

> form does not make sense. Either enforcement of the statute at issue in [*Am. Trucking Ass'ns v.*] *Scheiner*[, 483 U.S. 266, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987)], (which occurred before our decision there) was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision; and if it was not, then *Scheiner* was wrong, and the issue of whether to "apply" that decision needs no further attention.

Am. Trucking, 496 U.S. at 201 (Scalia, J., concurring in judgment).

Notably, Justice Scalia's rationale has *no application* where judge-made, *common law* rules are involved. In contrast to statutes and the Constitution, i.e., *external* sources of law whose language has not changed from the start, with common law, *the law itself* changes over time as the decisions change. When this Court announces a new substantive common law right (e.g., a strict liability cause of action), it makes no sense to say that the Court is somehow "declaring what the law has always been" or that the *prior* common law of torts is being declared void *ab initio*.

Justice Scalia's reasoning in the federal context thus may arguably find some application in a comparable state context, e.g., where a state court decision invalidates a state statute or other legislative act. Indeed, that is precisely the context of *Robinson*, where this Court considered the retroactivity of two prior decisions[13] invalidating legislative acts (i.e.,

[13] *See R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 70 P.2d 838 (1989); *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 558, 740 P.2d 1379 (1987).

municipal ordinances) under a state statute. As in the federal context, it is at least arguably appropriate that such invalidation be deemed fully retroactive without exception, since the defective language of the ordinances themselves had not changed from the beginning and therefore they should be considered invalid from the beginning. But the same cannot be said of judicial decisions overruling *common law* rules or adopting new ones.

This Court in *Audett* may have recognized a distinction between those cases in which it construes a statute and those in which it announces a new rule. The Court noted authority for the proposition that, "when an appellate court construes a statute, its construction is deemed to relate back to the promulgation of the statute." *Audett*, 158 Wn.2d at 719, citing *Johnson v. Morris*, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976); *State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996). *See also Bowman v. State*, 162 Wn.2d 325, 335, 172 P.3d 681 (2007). In contrast, if a decision announced a new rule, "whether to apply the rule retroactively requires further analysis" guided by the *Chevron Oil* factors." *Audett*, 158 Wn.2nd at 720. Analyzing the prior decision at issue, the Court observed, "we did not merely construe a statute . . . [but] set forth a new rule of law." *Id.*, discussing *In re Williams*, 158 Wn.2d 712, 147 P.3d 982 (2002) (holding

that a trial court is prohibited from ordering a CR 35 examination in a sexually violent predator proceeding).

Accordingly, for the purpose of retroactivity analysis, *Robinson* may properly be distinguished from *Audett* and other cases adopting a *Chevron Oil* analysis on the grounds that they involved consideration of *fundamentally different* sources of law, i.e., legislative acts vs. common law decisions. In the present case, this Court is faced with determining the retroactivity of common law decisions (*Ulmer* and *Tabert*) overruling prior common law decisions, rather than with invalidating a legislative act. Accordingly, the *Chevron Oil* analysis announced in *Audett* should control, rather than *Robinson's* statutory model.

III. CONCLUSION

The reasons for this Court's continued rejection of the declaratory theory of the law remain sound. The Court should adhere to its decision in *Audett* and maintain its discretion to give selectively-prospective effect to a prior decision.

Respectfully submitted this 20th day of October, 2008.

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