

No. 80728-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON  
(Court of Appeals 57293-8-I)

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RONALD LUNSFORD and ESTER LUNSFORD,

*Respondents*

v.

SABERHAGEN HOLDINGS, INC.,

*Petitioner.*

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**MOTION OF COALITION FOR LITIGATION JUSTICE, INC.,  
CHAMBER OF COMMERCE OF THE UNITED STATES OF  
AMERICA, NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION  
OF WHOLESALE-DISTRIBUTORS, NATIONAL ASSOCIATION  
OF MUTUAL INSURANCE COMPANIES, PROPERTY  
CASUALTY INSURERS ASSOCIATION OF AMERICA, AND  
AMERICAN INSURANCE ASSOCIATION TO RE-APPLY FOR  
*AMICI CURIAE* STATUS IN SUPPORT OF PETITIONER**

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The Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Federation of Independent Business Legal Foundation, National Association of Wholesaler-Distributors, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and American Insurance Association – collectively “*amici*” – filed a motion and accompanying brief on November 21, 2007 as *amici curiae* in support of

the petition for review filed by Petitioner. This Court granted the motion on December 7, 2007. Now that this Court is hearing the case, *amici* seek status as *amici curiae* in the action, incorporating by reference the brief already on file with the Court.

*Amici* are organizations that represent companies doing business in Washington and their insurers. Accordingly, *amici* have a substantial interest in ensuring that Washington's tort system is fair, follows traditional tort law rules, and reflects sound public policy. The decision below violates these core principles.

The issue presented is whether this Court's decisions adopting Restatement (Second) of Torts § 402A (1965) strict product liability as to manufacturers, *see Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969), and sellers, *see Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975), may be applied retroactively. Division One held that Section 402A strict product liability is not limited to post-*Ulmer/Tabert* asbestos exposures; rather, strict liability retroactively applies to *all* litigants whose claims are not otherwise barred, including the Lunsford's claim for asbestos exposure in 1958 – even though strict product liability did not exist in Washington (or anywhere) at the time and would not come into existence in Washington for sellers for another seventeen years.

First, Division One's holding is inconsistent with rulings from this Court. This Court stated in *Taskett v. KING Broad. Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), that it will look to the three-part test adopted by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), to determine whether a state law decision, such as the adoption of strict liability, is to be given retroactive, prospective, or selectively prospective effect. The fair and flexible *Chevron Oil* approach to retroactivity determinations has been employed by this Court with the exception of *Robinson v. City of Seattle*, 119 Wn.2d 34, 77, 830 P.2d 318, 343, *cert. denied*, 506 U.S. 1028 (1992), where the Court announced that it would not apply the selective prospective analysis. More recently, however, this Court has ignored *Robinson* and has, instead, continued to employ a *Chevron Oil* analysis to determine whether to give selectively prospective effect to state-law decisions. See *In re Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006); *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001); *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 926 P.2d 923 (1996); see also *In re Marriage of Anderson*, 134 Wash. App. 506, 141 P.3d 80 (2006). The Court's approach is in accord with the rule in many state courts. Here, however, Division One chose to follow the outlier *Robinson* opinion, concluding that this Court's recent decisions

applying *Chevron Oil* were “erroneous.” *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 344, 160 P.3d 1089, 1094 (2007).

Second, Division One’s ruling proposes a departure from fundamental tort law principles that this Court should recognize as against sound public policy. The retroactive application of Section 402A would subject Washington businesses to devastating liability in asbestos and other latent injury cases. Litigation against small and medium sized businesses would proliferate in Washington.

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The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment.<sup>1</sup> The Coalition’s mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world’s largest business federation. The U.S. Chamber

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<sup>1</sup> The Coalition includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman’s Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Federation of Independent Business Legal Foundation (NFIB), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The National Association of Wholesaler-Distributors (NAW) is a national trade association that represents the wholesale distribution industry. NAW is comprised of direct member companies and a federation of more than 100 national, regional, state and local associations and their member firms which, collectively, total approximately 40,000 companies operating at some 150,000 locations throughout the nation.

NAW's members are a constituency at the core of the U.S. and Washington's economy—the link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end-users. While industry firms vary widely in size, wholesaler-distributors generally are small to medium-size, closely-held businesses providing stable, well-paying jobs to more than 5 million Americans. As product sellers subject to strict liability in tort, NAW's members in Washington State (or located elsewhere in the United States and selling products for use in Washington) have a vital interest in this case.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

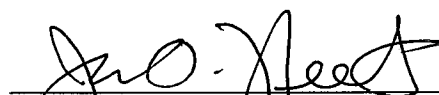
The Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for \$184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Washington, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the

insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

For these reasons, *amici* ask this Court to grant this motion.

Respectfully submitted,



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Dated: June 6, 2008

**PROOF OF SERVICE**

I certify that on June 6, 2008, an original and one copy of the foregoing Motion were served on the Court via overnight mail, postage prepaid, addressed as follows:

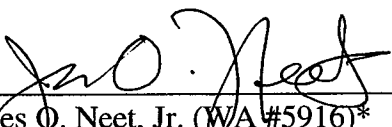
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I further certify that a copy of the foregoing Motion and Brief were sent via the United States Postal Service in a first-class postage-prepaid envelope addressed to the following:

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