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## I. INTRODUCTION AND SUMMARY

Petitioners Mine Safety Appliances Company, American Optical Corporation, and North Safety Products (the “Respirator Manufacturers”) ask this Court to apply the Washington Supreme Court’s decisions in *Simonetta* and *Braaten* reflexively, as if those decisions established an **absolute rule** that a manufacturer of one product never has a duty to warn of hazards of another product. The Respirator Manufacturers claim that if they have a duty to warn respirator users how to avoid exposure to hazardous substances that their respirators are designed to filter, then floodgates would open and “lead to the imposition of liability on every tool, equipment, and clothing manufacturer whose products could be sued around a hazardous substance.” Opening Brief at 11. Their hyperbole is plainly wrong.

*Simonetta* and *Braaten* did announce a **general rule** that manufacturers have no duty to warn of dangers of a product that the manufacturer did not make. Thus, the evaporator manufacturer in *Simonetta*, the valve and pump manufacturers in *Braaten*, and presumably the hammer and wrench manufacturers whose products

Mr. Macias also handled in the Todd Shipyards tool room, do not have a duty to warn of dangers of exposure to hazardous products they did not manufacture.

But the Court in *Simonetta* and *Braaten* also made clear that it was establishing a **general rule** as to which there are and will be exceptions. The Court in both cases delineated the policies and factors courts must consider to determine whether a specific defendant, in this case the Respirator Manufacturers, has a duty to warn how to use their products to avoid exposure to hazardous substances. Respirators are palpably different from products such as hammers and wrenches, because respirators belong to a category of products whose specific design and purpose is to prevent exposure to hazardous substances. The specific safety purpose of respirators distinguishes them from the equipment at issue in *Simonetta* and *Braaten* and demonstrates why the Respirator Manufacturers were in the best position to warn Mr. Macias how to prevent exposure to the hazardous substances that their respirators were designed to filter.

The Respirator Manufacturers say that Mr. Macias' argument based on the safety purpose of respirators is a recasting of the claim

that the Respirator Manufacturers have a duty to warn because exposure to hazardous substances while using their respirators is *foreseeable*, an argument rejected by the Court in *Simonetta* and *Braaten*. The purpose of a product, however, involves more than simply the foreseeability of its uses. That respirators are designed to prevent human exposure to hazardous substances means not only that they will foreseeably work in an environment where hazardous substances are present, but also that the manufacturers developed and designed their respirators, and consumers use and reasonably rely on them, to prevent exposure to those hazardous substances. In other words, foreseeability may not create a duty, but neither does it preclude the existence of such a duty.

That critical distinction places the Respirator Manufacturers “in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained.” *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 355, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 392, 198 P.3d 493 (2008) (discussing same policy rationale). That distinction also demonstrates why the

Respirator Manufacturers had a duty to warn based on “the intrinsic nature of the product,” *Little v. PPG Industries, Inc.*, 92 Wn.2d 118, 122-23, 594 P.2d 911 (1979) (under strict liability), and based on “logic, common sense, justice, policy, and precedent,” *Simonetta*, 165 Wn.2d at 344 (under negligence law).

By encouraging this Court to apply the general rule stated in *Simonetta* and *Braaten* reflexively and unthinkingly, as if it were an absolute rule, it is the Respirator Manufacturers, not Mr. Macias, who seek to wreak havoc on established tort principles. The record demonstrates that at least one of the Respirator Manufacturers logically provided warnings regarding the use and maintenance of its respirators to prevent hazardous substance exposure. Yet under the Respirator Manufacturers’ reading of the law, they would have no duty to provide such warnings. The legal rule they would have this Court announce would mean that a manufacturer of various types of safety products designed to protect against exposure to hazardous substances (*e.g.*, a HazMat suit, a welding shield, a hazardous waste storage tank, an x-ray or nuclear radiation screen, etc.) would never have a duty under any circumstances to warn about steps necessary to

avoid exposures to hazardous substances they did not manufacture, even though the very purpose and design of their products was to protect against such exposures.

As discussed below, the Respirator Manufacturers' position is illogical, contrary to public policy, and legally wrong. The law in Washington and elsewhere does not absolve safety equipment manufacturers of the duty to warn about hazardous exposures that their safety products are designed to guard against and prevent. This Court should affirm the denial of the Respirator Manufacturers' motions for summary judgment, and it should remand for trial.

## **II. STATEMENT OF THE CASE**

From 1978 to 2004, Plaintiff Leo Macias was employed as a tool keeper at Todd Shipyards where his daily job duties included cleaning respirators and replacing respirator filter cartridges. CP 228-240. As part of his work he cleaned and handled thousands of respirators that were covered with asbestos dust accumulated from the workplace. CP 320-322, 329. These respirators were made by the Respirator Manufacturers. CP 228 & 406.

Mr. Macias is now a 64-year-old living mesothelioma victim. CP 393-394. Mesothelioma is a cancer of the lining of the lung or stomach that is invariably fatal, and is a signature disease of asbestos exposure. Mr. Macias was diagnosed with mesothelioma in May 2008. CP 394. Plaintiffs filed this lawsuit in June 2008. CP 1-4.

Mr. Macias testified that he believed his asbestos exposure came “mostly” from his cleaning and handling of used respirators after they were returned to the tool room by other workers at the shipyard. CP 220; *see also* CP 228-240 (describing cleaning and handling). He spent most of his time in the tool room where he cleaned and maintained used respirators “daily.” CP 218 & 404. During busy periods he handled “hundreds” of used respirators and “thousands” of used respirator cartridges in a single shift. CP 405. These dusty respirators had been used by shipyard workers such as pipefitters and welders who wore them to protect themselves from asbestos exposure and returned them to Mr. Macias in the tool room for cleaning. *Id.* Many of the respirators had a dusty film on them from working in a hazardous environment. CP 230 (“They would come back filmy, dusty.”).

Mr. Macias did not know he was at risk from the asbestos dust coating on the used respirators and cartridges, and he never saw a warning on the respirators advising him to take precautions when handling or maintaining them, such as to wear a respirator himself when doing his work, or to wet the respirator before disassembling it. CP 241-242. He testified that had he been so warned, he would have heeded the warnings and taken precautions. CP 242.

In contrast to Mr. Macias' lack of knowledge of the risks posed by the asbestos dust coating on the used respirators he maintained, the Respirator Manufacturers knew "that inhalation of asbestos dust was potentially harmful to human health." CP 533 (Petitioner North Safety's response to RFA No. 6).<sup>1</sup> Petitioner North Safety further admits that its respirator, "properly configured . . . was *designed* to help protect users against asbestos." CP 532 (North Safety's response to Response to RFA No. 3) (emphasis added). It also admits that it "*intended* users to periodically clean the . . .

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<sup>1</sup> Plaintiffs cite the admissions of Petitioner North Safety, which at the time of the summary judgment hearing was the only one of the Petitioners that had answered Plaintiffs' requests for admissions. At trial, Plaintiffs will prove that these admissions apply equally to Petitioners Mine Safety and American Optical.

respirators,” and it “*intended* users to periodically replace the cartridges.” CP 532-533 (North Safety’s response to Response to RFA Nos. 4 & 5) (emphasis added).

Finally, Petitioner North Safety admits that in its instruction manual, it warned users of its respirators that the “‘*replacement of air-purifying elements must be done in a safe area containing uncontaminated, breathable air.*’” CP 533 (North Safety’s Response to RFA No. 5) (emphasis added).

On this record, the Respirator Manufacturers asked the Superior Court to enter summary judgment dismissing Plaintiffs’ claims on the grounds that the Respirator Manufacturers did not manufacture the asbestos dust to which Mr. Macias was exposed, and thus, under the supposed absolute rule announced in *Simonetta* and *Braaten*, they had no duty to warn about the hazards of the asbestos dust on the respirators that he handled and cleaned. *See* CP 202-210 (North Safety motion), CP 189-199 (Mine Safety motion); CP 276-278 (American Optical joinder). In their opposition, Plaintiffs explained why the general rule and specific holdings of *Simonetta* and *Braaten* do not apply to the materially different facts

presented here, and demonstrated that the Respirator Manufacturers had a duty to warn under established negligence and strict liability principles. *See* CP 289-313 (Plaintiffs' opposition). The Superior Court agreed, and denied the Respirator Manufacturers' summary judgment motions. CP 496-501.

### III. ARGUMENT

#### A. Standard of Review.

The Superior Court's denial of the Respirator Manufacturers' motions for summary judgment is reviewed *de novo*. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 230, 119 P.3d 325 (2005). In determining whether summary judgment was properly denied, the Court considers all facts and all inferences from those facts in the light most favorable to Plaintiffs. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Unless the Court concludes that there are no genuine issues of material fact and that the Respirator Manufacturers are entitled to judgment as a matter of law, the denial of summary judgment should be affirmed.

**B. *Simonetta* and *Braaten* Announced a General Rule, Not an Absolute Rule, and Their Fact-Specific Holdings Do Not Establish that the Respirator Manufacturers Had No Duty to Mr. Macias.**

The Respirator Manufacturers would have this Court believe that the decisions in *Simonetta* and *Braaten* established an ***absolute rule*** that a manufacturer of one product ***never*** has a duty to warn of hazards of another product, regardless of the nature or purpose of the manufacturer's product. *See, e.g.*, Opening Brief at 6 (stating with no qualification or exception that those decisions "held that there is simply no duty to warn of the dangers of a product that the manufacturer did not put into the stream of commerce").

To the contrary, the Washington Supreme Court went to great lengths in *Simonetta* and *Braaten* to emphasize that it was announcing only a ***general rule*** that is subject to numerous potential exceptions. *See, e.g., Simonetta*, 165 Wn.2d at 353 (stating that Washington cases "***generally***" do not extend the duty to warn beyond a manufacturer's own product) (emphasis added); *see also Braaten*, 165 Wn.2d at 380 (stating that the "***general rule***" applies to asbestos in replacement packing and gaskets); *id.* at 385 n.7 (discussing the exception to the "***general rule***" that is applied to

manufacturers who incorporate defective components into finished products); *id.* (discussing the exception that applies “where the combination of two products creates a dangerous condition and both manufacturers have a duty to warn”); *id.* at 397 (discussing the exception to the general rule that may apply “with respect to the danger of exposure to asbestos-containing products *specified by the manufacturer to be applied to, in, or connected to their products*”) (emphasis added).

Consistent with announcing only a general rule, the Washington Supreme Court described its holdings narrowly. In *Braaten*, it held:

We hold that the general rule that there is no duty under common law products liability or negligence principles to warn of the dangers of exposure to asbestos in other manufacturers’ products *applies with regard to replacement packing and gaskets.*

*Braaten*, 165 Wn.2d at 380 (emphasis added). Similarly, the Court described its holding in *Simonetta* as follows:

[I]n the companion case, *Simonetta* . . . we held that a manufacturer may not be held liable in common law products liability or negligence for failure to warn of the *dangers of asbestos exposure resulting from another manufacturer’s insulation applied to its products after sale of the products to the navy.*

*Id.* (emphasis added)

Thus, in *Simonetta* and *Braaten* the Court announced a “general rule” as to which indisputably there are exceptions. The Court did not reach – much less decide – whether safety product manufacturers such as the Respirator Manufacturers have a duty to warn about hazardous substances as to which their products are specifically designed to prevent exposure.

**C. Requiring the Respirator Manufacturers to Warn About Exposure to Hazardous Substances Is Consistent with the Policies Underlying Strict Liability and Negligence as Enunciated in *Braaten*, *Simonetta* and Other Washington Cases.**

The Respirator Manufacturers also erroneously argue that *Braaten* and *Simonetta* overruled existing law even though those decisions did not address, much less decide, the duties of a manufacturer of safety products, such as the respirators at issue, whose *very purpose* is to prevent exposure to a hazardous product. Their false argument is based on an opportunistic extraction of language from *Braaten* and *Simonetta* which they strip from its broader factual and legal context, while ignoring the fundamentally

different status of the Respirator Manufacturers as safety equipment manufacturers.

Unlike the claims of the plaintiffs in *Simonetta* and *Braaten*, Plaintiffs' claims in this case focus on products – safety respirators – specifically *designed* to protect against exposure to the hazardous product to which the injured party was exposed. In *Braaten* and *Simonetta*, the Supreme Court held that mere foreseeability or knowledge that a product may be used “in conjunction with” a hazardous product does not create a duty under Washington law. *Simonetta*, 165 Wn.2d at 358-62; *see also Braaten*, 165 Wn.2d at 388 n.8. But Plaintiffs do not claim – nor did the Superior Court hold – that the Respirator Manufacturers have a duty to warn about asbestos exposure solely because it was foreseeable and they knew that their respirators would be used around airborne asbestos.

Plaintiffs' warning claims focus strictly on the intent and design characteristics of the safety respirators, which were specifically designed to protect against the hazardous asbestos to which Mr. Macias was exposed. This fundamental distinction between the claims in *Simonetta* and *Braaten* and Plaintiffs' claims

here is highlighted by the Supreme Court’s limiting observation in *Simonetta* that there was “no claim that the evaporator *itself* contained an unsafe design feature.” *Simonetta*, 165 Wn.2d at 361 (emphasis added). Here, in contrast, Plaintiffs plainly *do* claim that the respirators *themselves* contained an unsafe design feature — they contained inadequate warnings and safety instructions regarding the safe use, handling, cleaning and maintenance of the respirators and used replacement cartridges themselves that were necessary to ensure that the respirators achieved their purpose, namely, protection from exposure to hazardous substances.

In this materially different factual context, the policies underlying common law strict liability and negligence as enunciated in *Braaten*, *Simonetta* and other Washington cases strongly support the conclusion that the Respirator Manufacturers had a duty to warn about the dangers of exposure to hazardous substances when using their respirators because *the very purpose of their products* was to prevent such exposure. There is no more suitable entity upon which to impose such a duty to warn than the manufacturers of these

respirators whose purpose was to prevent the hazardous exposure that harmed Mr. Macias.

1. **Requiring the Respirator Manufacturers to Warn Is Consistent with Policies Underlying Strict Liability.**

In determining the duty to warn under common law strict liability, the nature of the product is of paramount importance. As the Washington Supreme Court has observed:

The evaluation of the product in terms of the reasonable expectations of the ordinary customer allows the trier of fact to take into account *the intrinsic nature of the product*. The purchaser of a Volkswagen cannot reasonably expect the same degree of safety as would the buyer of the much more expensive Cadillac. It must be borne in mind that we are dealing with a relative, not an absolute concept.

*Little v. PPG Industries, Inc.*, 92 Wn.2d 118, 122, 594 P.2d 911

(1979) (emphasis added); *see also Ayers v. Johnson & Johnson Baby*

*Products Co.*, 59 Wn. App. 287, 296, 797 P.2d 527 (1990) (“[W]e

believe only two factors need be considered in a failure to warn case:

(1) *nature of the product*, and (2) deficiency of the warning. Here,

the product was composed of an oil that has the potential for great

harm if it gets into the lungs, but is nevertheless promoted for use on

and around babies. The warning was not merely deficient, it was

nonexistent.”) (emphasis added), *aff’d*, 117 Wn.2d 747, 818 P.2d 1337 (1992).

The Washington Supreme Court’s decision affirming the Court of Appeals in *Ayers* is instructive. The defendant in that case argued that imposing a duty to warn about the hazards of ingesting baby oil would open floodgates and lead to the imposition of liability on manufacturers for failing to warn consumers about hazards of ingesting “a vast assortment of other products, including liquids and solids sold for human ingestion such as milk, carrots, or candy.” *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 757, 818 P.2d 1337 (1992). The Supreme Court was unpersuaded by this hyperbole, and held that the defendant had a duty to warn based on the nature of its product and the circumstances in which it was intended to be used. As the Court explained:

[B]aby oil is ***distinguishable from other products***. Baby oil, which is comprised of 99 percent mineral oil, poses special risks if inhaled, and the manner of its use – on babies and around water – creates a significant risk of aspiration. . . . What makes baby oil unique, and what is the *sine qua non* of our decision, is that baby oil is ***intended for use on babies*** . . . We reject the notion that any product with physical properties similar to, or as dangerous as, those of baby oil may for that reason alone create manufacturer liability for

failure to warn. Because our holding is limited in this way, we reject the argument that upholding the jury's verdict in favor of the Ayerses will dramatically encourage overwarning.

*Ayers*, 117 Wn.2d at 757-59 (emphasis added).

Here, similarly, the Respirator Manufacturers argue that imposing a duty to warn about the hazards of exposure to the hazardous substances that their respirators are specifically designed to protect against would "lead to the imposition of liability on every tool, equipment, and clothing manufacturer whose products could be used around a hazardous substance." Opening Brief at 11. They ignore, just as the defendant did in *Ayers*, the critical difference between the nature of the product at issue in this case, and the nature of those other products.<sup>2</sup>

Under the Respirator Manufacturers' logic, the manufacturer of a HazMat suit would not have to warn users about the proper use

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<sup>2</sup> Although *Ayers* was decided under the Washington Products Liability Act ("WPLA"), which was enacted in 1981, and post-dates the period of Mr. Macias' asbestos exposure, the Supreme Court's statements about the critical importance of considering the nature of the product at issue, and its rejection of the defendant's "floodgates" argument, apply with equal force to the Respirator Manufacturers' efforts to avoid a duty to warn under negligence and common law strict liability.

and cleaning of the HazMat suit because the suit manufacturer was not in the chain of distribution of the radioactive products, asbestos products, or other toxic or hazardous products as to which the suit was specifically designed to prevent exposure. That would be a frightening precedent, indeed. While the “law *generally* does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products,” *Braaten*, 165 Wn.2d at 385 (emphasis added), the law does impose such a duty when the specific purpose of the manufacturer’s safety product is to prevent exposure to the hazardous product at issue. As the Court said in *Simonetta*:

We justify imposing liability on the defendant who . . . is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained.

*Simonetta*, 165 Wn.2d at 355. Here, who is in a better position to obtain insurance against risk of hazardous product exposure than the manufacturer whose product is designed to protect against exposure to the hazardous product in the first place? Certainly the asbestos product manufacturer had a duty to warn of the danger of its

products. But just as certainly, respirator manufacturers have a duty to warn how to avoid exposure to asbestos because the respirator is specifically designed to prevent such exposure. The respirator manufacturer knows far more than the asbestos manufacturer about how the respirator works around airborne asbestos and how it must be safely used, cleaned and maintained to avoid asbestos exposure.

Aware of the logical absurdity of their position, the Respirator Manufacturers seem to say that while they may have a duty to warn about proper use of the respirator by those who wear the respirator, Mr. Macias, as the person designated to maintain the respirators for ongoing use by cleaning them and replacing the used respirator cartridges, somehow stands in a different position. *See* Opening Brief at 19-20. This is a distinction without a difference.

First, the Respirator Manufacturers' characterization of *Simonetta* and *Braaten* as establishing an absolute rule would not abide such a distinction, which simply demonstrates their misuse of those decisions. *See* Opening Brief at 20 (arguing that “[w]hile the purpose of a respirator is to provide protection **while the user is wearing the respirator**, it is physically impossible for the filters in

the respirator to protect someone, like Macias, when he is *not wearing that respirator.*”) (emphasis in original). Because the Respirator Manufacturers are not in the chain of distribution for asbestos products, a supposed absolute rule would be equally applicable to both the wearer *and* the cleaner of their respirators. Thus under the logic of their argument, the Respirator Manufacturers have no duty to warn either a wearer *or* a cleaner of their respirators.

Second, there is no distinction in the law between a wearer and cleaner of a product. A manufacturer has a duty to warn about the risks of operating *and* maintaining its products. Both activities are “uses” of the product and the risk of exposure exists in both operating and maintaining the product. *See Duvon v. Rockwell International*, 116 Wn.2d 749, 807 P.2d 876 (1991) (product was an exhauster designed to remove toxic gas from tanks to allow workers to safely enter the tanks and take in-tank photographs; *held*, that manufacturer’s duty to warn included a duty to warn the plaintiff, an electrician who was repairing the product, about steps necessary to avoid exposure to toxic gas during repair); *see also, e.g., Miller v. Anetsberger Bros., Inc.*, 508 N.Y.S.2d 954, 956 (N.Y.A.D. 1986)

(manufacturer's duty to warn included "a duty to warn the plaintiff of the dangers of cleaning the machine"); *Hertzfeld v. Hayward Pool Prods., Inc.*, 2007 WL 4563446, \*10 (Ohio App. Dec. 31, 2007) (same). The respirators at issue here came with cartridges that needed to be replaced periodically for the respirators to remain functional. Such necessary maintenance is every bit as much a "use" of the respirators as is wearing them.

Third, Petitioner North Safety's warnings in its product manual specifically provide instruction regarding operation *and* maintenance of the respirators, thus contradicting the claimed distinction that the Respirator Manufacturers attempt to draw between warnings about wearing and maintaining respirators. *See* CP 533 (North Safety's Response to RFA No. 5, admitting that it warned users that the "replacement of air-purifying elements must be done in a safe area containing uncontaminated, breathable air").<sup>3</sup>

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<sup>3</sup> In holding that the Respirator Manufacturers had a duty to warn Mr. Macias, the Court will not hold them liable to Mr. Macias. The Respirator Manufacturers will claim at trial that the warnings they gave were adequate and the jury will need to decide on a full evidentiary record if their warnings were adequate.

While the Respirator Manufacturers did not manufacture the asbestos that has harmed Mr. Macias, they designed their respirators to protect against exposure to that asbestos. To suggest, as they do, that a manufacturer of safety equipment has no duty to warn about exposure to the hazardous products against which its equipment is designed to protect is contrary to these principles and policies that support giving safety equipment manufacturers the duty to warn, and turns logic on its head.

**2. Requiring the Respirator Manufacturers to Warn Is Consistent with Policies Underlying Negligence Law.**

Imposing a duty to warn on the Respirator Manufacturers is also supported by the policies and principles of negligence law. Washington courts have repeatedly counseled that the existence of a duty depends on “mixed considerations of logic, common sense, justice, policy, and precedent.” *Simonetta*, 165 Wn.2d at 349; *see also Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005) (same – citing cases). Other important policy considerations include “our social ideas as to where the loss should fall,” *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976), and “the parties’ relative ability to adopt practical means of

preventing injury.” *Wells v. City of Vancouver*, 77 Wn.2d 800, 810 n.3, 467 P.2d 292 (1970) (citation omitted).

The Respirator Manufacturers here and the valve, pump and evaporator manufacturers in *Simonetta* and *Braaten* stand in very different positions with respect to such considerations of logic, common sense, justice, policy, our social ideas of where loss should fall, and the relative ability of the parties to adopt practical means to prevent injury.

In *Braaten* and *Simonetta*, the Supreme Court held that the duty to warn workers of the risks posed by asbestos insulation and asbestos used in gaskets was properly imposed on the manufacturers of the insulation and gaskets, respectively, and that – consistent with the general rule – manufacturers of valves, pumps and evaporators – which were outside the chain of distribution for those asbestos products – did not have a duty to warn about the asbestos products even if they could foresee the use of their products in conjunction with asbestos products. These manufacturers did not manufacture a product whose very purpose was to prevent exposure to hazardous substances.

The Respirator Manufacturers liken their respirators to hammers, saws, clothing, tarps and other tools that may also have been covered with asbestos dust. *See* Opening Brief at 12. But a hammer is not designed to protect the user from exposure to hazardous substances, and the hammer manufacturer is not in a position to insure against the risks of asbestos exposure even if the hammer manufacturer could foresee that its product might be used in conjunction with asbestos products. Just the opposite conclusion is required, however, with respect to a manufacturer of safety equipment whose very purpose is to protect against exposure to asbestos and other hazardous airborne substances.

In short, *Braaten* and *Simonetta* did not address the duty of safety equipment manufacturers to warn about the dangers against which they protect. The policies and principles of negligence law as enunciated in *Braaten*, *Simonetta* and the other Washington cases cited above plainly support requiring the Respirator Manufacturers to warn Mr. Macias.

**D. Requiring the Respirator Manufacturers to Warn Mr. Macias Is Supported by Case Law in Washington and Elsewhere Involving Respirators and Other Similar Safety Products.**

Requiring the Respirator Manufacturers to warn Mr. Macias not only is consistent with principles and policies of common law strict liability and negligence law, but it is also consistent with established case law in Washington and elsewhere imposing a duty to warn on safety equipment manufacturers to warn about hazardous exposures that their safety products are designed and intended to prevent.

**1. Case Law Involving Respirators and Other Similar Safety Products Based on Section 402A of the Restatement and Strict Products Liability Supports Requiring the Respirator Manufacturers to Warn Mr. Macias.**

The Washington Supreme Court has adopted the doctrine of strict products liability set forth in the Restatement (Second) of Torts (“Restatement”) § 402A, and has explicitly adopted the Restatement’s provisions concerning warnings. *Haysom v. Coleman Lantern Co.*, 89 Wn. 2d 474, 479, 573 P.2d 785 (1978). As the Supreme Court stated in *Braaten*:

Under § 402A, liability may be found in the case of inadequate warnings because “[a] product may be

faultlessly manufactured and designed, yet still not be reasonably safe when placed in the hands of the ultimate user without first giving an adequate warning concerning the manner in which to safely use the product.”

*Braaten*, 165 Wn.2d at 384-85 (citation omitted); *see also Little*, 92 Wn.2d at 122 (the focus is on “the warning itself and the reasonable expectations of the user”).

Courts throughout the country that have applied Section 402A of the Restatement and common law strict products liability principles have consistently held that manufacturers of safety products that are specifically designed and intended to protect users from exposure to hazardous products have a duty to warn users how to avoid exposure to those hazardous products. This includes manufacturers of safety respirators such as the ones at issue here, the very purpose of which is to prevent exposure to hazardous substances.

In *Simon v. American Optical Corp.*, 2007 WL 924496 (S.D. Ill. March 27, 2007), for example, the plaintiff suffered from a coal mining respiratory disease that he alleged was caused by a respirator manufacturer’s failure to provide adequate warnings about how to

avoid hazardous exposure to coal, sand and other particulate dust.

*Id.* at \*1. Applying Illinois law, which followed Section 402A of the Restatement,<sup>4</sup> the court held that the plaintiff stated a strict liability claim for failure to warn. *Id.* at \*4-\*5.

In a companion case, *Hargis v. American Optical Corp.*, 2007 WL 924486 (S.D. Ill. March 27, 2007), another plaintiff likewise alleged that he developed coal mining respiratory disease as a result of the respirator manufacturer's failure to warn about the hazardous exposure to airborne particulates, and the court again held based on Section 402A that the plaintiff stated a viable strict liability claim for failure to warn. *Id.* at \*1 & \*4-\*5.

In *Young v. Logue*, 660 So.2d 32 (La. App. 1995), the plaintiff alleged that he contracted silicosis due to the defendants' failure to warn users about the hazards of exposure to silica dust while using the defendants' sandblasting hoods. *Id.* at 37-38 & 55. Applying the Louisiana strict products liability law that pre-dated the enactment of the Louisiana Products Liability Act, the court affirmed the jury

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<sup>4</sup> See *Lamkin v. Towner*, 138 Ill.2d 510, 528, 563 N.E.2d 449 (Ill. 1990) ("This court has indicated that strict products liability in

verdict that the defendants' sandblasting hoods were defective and the defendants were strictly liable for failure to provide adequate warnings about the hazards of exposure to silica dust. *Id.* at 55.

In *Jackson v. H.L. Bouton Co.*, 630 So.2d 1173 (Fla. App. 1994), the plaintiff alleged that the defendant's safety glasses were defective due to the defendant's failure to warn of the risk of injury from exposure to flying objects that could enter the user's eye through spaces between the safety glasses and the user's face. *Id.* at 1175. The plaintiff was injured while he was wearing the safety glasses when a piece of a chisel broke off after he hit it with a sledge hammer, and the piece then struck his left eye. *Id.* at 1174. Based on these facts, and applying Florida's strict products liability law based on Section 402A,<sup>5</sup> the court held that whether the "warnings provided to the user [of the safety glasses] were defective" was a genuine issue of fact to be decided by the jury, and it reversed the trial court's order

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Illinois follows the formulation set forth in section 402A of the Restatement (Second) of Torts").

<sup>5</sup> See *Light v. Weldarc Co.*, 569 So.2d 1302, 1304 (Fla. App. 1990) (following Section 402A).

granting summary judgment to the defendant on strict liability. *Id.* at 1175.

In *W.G.M. Safety Corp. v. Montgomery Sand Co.*, 707 F. Supp. 544 (S.D. Ga. 1988), the plaintiff alleged that the defendant manufacturers' respirators were defective, and that he was seriously injured, due to the manufacturers' failure to warn concerning the hazards of exposure to silica dust that the plaintiff encountered while using the respirators. *Id.* at 545. Applying Georgia's strict liability law, which followed Section 402A,<sup>6</sup> the court held that whether the respirators were defective based on inadequate warnings about the hazards of exposure to silica dust was a question for the jury, and it denied the respirator manufacturers' motions for summary judgment. *Id.* at 547.<sup>7</sup>

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<sup>6</sup> See *Greenway v. Peabody International Corp.*, 163 Ga. App. 698, 703-04, 294 S.E.2d 541 (Ga. App. 1982) (citing Section 402A and stating that "[t]he rules set forth in the Restatement . . . have become incorporated into Georgia case law").

<sup>7</sup> The Respirator Manufacturers seek to distinguish these respirator cases by arguing that the plaintiffs in these cases were wearing the respirator. See Opening Brief at 19-20. As discussed in Section III.C.1., *supra*, whether the user operates or maintains the equipment, the duty is the same.

In short, courts throughout the country that have adopted and applied Section 402A and common law strict products liability principles have consistently held that manufacturers of safety products – such as respirators – that are designed to protect against exposure to hazardous products may be liable for failing to provide adequate warnings about how to avoid exposure to those hazardous products. This Court should affirm the Superior Court’s ruling denying the Respirator Manufacturers’ motions for summary judgment as consistent with these decisions.

**2. Case Law Involving Respirators and Other Similar Safety Products Based on Section 388 of the Restatement and Common Law Negligence Supports Requiring the Respirator Manufacturers to Warn Mr. Macias.**

The Washington Supreme Court has adopted Section 388 of the Restatement to define the scope of a product manufacturer’s duty under negligence law to warn about risks associated with the use of its product. *See Simonetta*, 165 Wn.2d at 348 & n.3; *see also Mele v. Turner*, 106 Wn.2d 73, 78, 720 P.2d 787 (1986). Section 388 imposes liability on manufacturers who fail to warn users about dangers arising from the intended use of their products:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel

with the consent of the other or to be endangered by its probable use for physical harm caused by the use of the chattel ***in the manner for which and by a person for whose use it is supplied***, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous ***for the use for which it is supplied***, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) ***fails to exercise reasonable care to inform them*** of its dangerous condition or ***of the facts which make it likely to be dangerous***.

*Simonetta*, 165 Wn.2d at 348 n.3; *Mele*, 106 Wn.2d at 78 (quoting Section 388; emphasis added).

In *Simonetta*, as noted above, the Supreme Court observed that “Washington cases discussing and analyzing § 388 liability ***generally*** limit the analysis of the duty to warn of the hazards of a product to those in the chain of distribution,” *Simonetta*, 165 Wn.2d at 353 (emphasis added). The Court made clear, however, that it did not reach and was expressly deferring the issue – which is very nearly the issue presented here – of whether a duty to warn may arise under Section 388 and common law negligence “with respect to the danger of exposure to asbestos-containing products specified by the manufacturer to be ***applied to, in, or connected to their products***.”

*Braaten*, 165 Wn.2d at 397 (emphasis added). Here, as explained above, the Respirator Manufacturers' respirators are fundamentally different from the evaporator, pumps and valves in *Simonetta* and *Braaten*, because the respirators were designed and intended to protect users from exposure to hazardous substances, including asbestos dust. While the Respirator Manufacturers did not specify that asbestos-containing products be "applied to, in, or connected to" their respirators, they specifically designed and intended their respirators to protect users from asbestos exposure. Under these circumstances, and again heeding the Supreme Court's repeated statements that the rule it adopted in *Simonetta* and *Braaten* was simply a "general rule" that applied under the very different facts of those cases, this Court should hold that the Respirator Manufacturers had a duty to warn under established negligence law.

The relevant cases under Section 388 and common law negligence almost exactly parallel the cases discussed above under Section 402A and strict liability, and again consistently hold that manufacturers of safety products such as respirators have a duty to warn and may be liable for failing to provide adequate warnings

about exposure to hazardous substances against which the safety products are specifically designed to prevent.

The Washington Supreme Court's decision in *Duvon v. Rockwell International*, 116 Wn.2d 749, 807 P.2d 876 (1991), is on point. The safety product in that case was an exhauster that was designed to remove ammonia gas from tanks to allow workers to safely enter the tanks and take in-tank photographs. *Id.* at 751. The plaintiff, who was an electrician, was exposed to the toxic gas and seriously injured as a result of an inlet butterfly valve that remained open, thus permitting the accumulation of gas when the ventilation/filter system failed while he was trying to repair the exhauster. *Id.* The plaintiff alleged that Rockwell, which had manufactured the exhauster, was negligent for failing to warn about how to avoid exposure to toxic gas when the ventilation/filter system was down. *Id.*

The Supreme Court analyzed Rockwell's negligence liability under Section 388. *Id.* at 758-59. Quoting the statement in Section 388, subsection (c), that one who supplies a product may be liable for "fail[ing] to exercise reasonable care to inform [the user] of its

dangerous condition or of the facts which make it likely to be dangerous,” it held that Rockwell could be liable for failing to warn the plaintiff about the steps necessary to avoid exposure to toxic gas when working on the exhauster. *Id.* at 759. The Court reached this conclusion despite the fact that the product that injured the plaintiff was the ammonia gas, and not the exhauster, and despite the fact that the worker who was injured was an electrician trying to repair the exhauster, and not someone using it when it functioned properly.

Turning to other jurisdictions, the court in *Simon v. American Optical Corp.* and *Hargis v. American Optical Corp.*, discussed above in connection with Section 402A and common law products liability, also held that the defendant respirator manufacturer could be liable for negligently failing to warn those plaintiffs about how to avoid the hazardous exposure to coal, sand and other particulates that allegedly caused the plaintiffs’ illnesses. Applying Illinois law, which follows Section 388 of the Restatement,<sup>8</sup> the courts held that the plaintiffs stated a negligence claim for failure to warn. *See*

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<sup>8</sup> *See Weiss v. Rockwell Mfg. Co.*, 9 Ill.App.3d 906, 915-16, 293 N.E.2d 375 (Ill. App. 1973) (following Section 388, subsection (c), in determining duty to warn under negligence law).

*Simon*, 2007 WL 924496 at \*2-\*3; *Hargis*, 2007 WL 924486 at \*2-\*3.

*W.G.M. Safety Corp.*, discussed above in connection with Section 402A and the defendant respirator manufacturers' liability for failure to warn under strict liability, also supports Plaintiffs' negligent failure to warn claim against the Respirator Manufacturers here. There, the plaintiff also alleged that the manufacturers were negligent in failing to warn about the hazards of exposure to the silica dust that the plaintiff encountered when using respirators. *Id.* at 547. Applying Georgia's law of negligence, which follows Section 388,<sup>9</sup> the court held that the respirator manufacturers could be liable for negligently failing to warn concerning the hazards of exposure to silica dust was a question for the jury, and it denied the respirator manufacturers' motions for summary judgment on the plaintiff's negligence claim as well. *Id.* at 548-49.

In *Yates v. Norton Co.*, 403 Mass. 70, 525 N.E.2d 1317 (Mass. 1988), the plaintiff was the administratrix of the estate of a

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<sup>9</sup> See *Greenway*, 163 Ga. App. at 702-03 (citing Section 388 and stating that "[t]he rules set forth in the Restatement . . . have become incorporated into Georgia case law").

worker who died as a result of inhaling toxic chemicals while using a respirator manufactured by the defendant. *Id.* at 71. The plaintiff alleged that the injuries were caused by inadequate warnings, and the case was tried solely on the issue of the adequacy of the warnings. *Id.* at 74. The court entered a judgment for the defendant, and the plaintiff appealed based on claimed errors in the jury instructions regarding the defense of unforeseeable misuse. *Id.* at 75-77. The court agreed with the plaintiff that the instructions were erroneous, and remanded for trial of the claim that the respirator manufacturer negligently failed to warn. *Id.* at 77.

In *Petes v. American Optical Corp.*, 664 F.2d 523 (5th Cir. 1981), the plaintiff was employed by National Gypsum Company and worked for many years as a cutter in the asbestos shingle department. *Id.* at 524. After 1960, he used respirators and filters manufactured by the defendant, American Optical. *Id.* In 1977, he developed asbestosis, and sued American Optical for “fail[ing] to warn of possible hazards concerning the use of the respirators.” *Id.* The jury returned a verdict for the defendant, and the plaintiff appealed based on claimed errors in the trial judge’s jury instructions

defining proximate cause. *Id.* at 525. The Fifth Circuit agreed with the plaintiff that the jury instructions were deficient, and reversed and remanded for trial of the plaintiff's claim that the respirator manufacturer negligently failed to warn. *Id.* at 526.

Similarly, in *Fuller v. Fend-All Co.*, 70 Ill.App.3d 634, 388 N.E.2d 964 (Ill. App. 1979), the plaintiff sued the defendant for injuries that he sustained while wearing safety glasses manufactured by the defendant. *Id.* at 635. While the plaintiff was repairing a punch press and using the safety glasses in the manner intended, a piece of metal flew into his right eye and blinded him in that eye. *Id.* The plaintiff alleged that the manufacturer of the safety glasses was negligent for failing to warn of the hazards of exposure to flying objects that could harm users if they used the safety glasses without adding side shields that were not part of the glasses. *Id.* at 638. The court held that “[a]bsent facts that plaintiff was equally aware of the danger of using the glasses without side shields while repairing the punch press . . . we cannot say that defendant had no duty to warn here.” *Id.* at 639.

In short, courts throughout the country applying Section 388 and common law negligence principles have consistently held that manufacturers of safety products such as respirators that are designed and intended to protect against exposure to hazardous products may be liable for negligently failing to provide adequate warnings about how to avoid exposure to those hazardous products. This Court should affirm the Superior Court's denial of the Respirator Manufacturers' motions for summary judgment on the negligent duty to warn claim as supported by these numerous decisions.

**E. The Respirator Manufacturers Have a Duty to Warn Under the WPLA.**

Unlike *Braaten* and *Simonetta*, which were decided under negligence and common law strict liability principles, at least some of the exposures in this case occurred after June 1981, and thus may be (and the Respirator Manufacturers claim are) covered by the WPLA.<sup>10</sup> Consistent with the above analysis and case law, imposing

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<sup>10</sup> Whether the WPLA applies to this case was not decided by the Superior Court. However, for all the reasons set forth here, even if the WPLA did apply to some portion of Plaintiffs' claims, the Superior Court's decision was correct and should be affirmed.

a duty on Respirator Manufacturers to warn of the risk of exposure to a hazardous product against which their products are specifically designed to protect is fully consistent with the “risk utility” and consumer expectations” tests codified by the WPLA statute.

The WPLA imposes strict liability for failure to adequately warn based on two independent, alternative tests, the “risk-utility test” and the “consumer expectations” test. *See Ayers*, 117 Wn.2d at 763.<sup>11</sup> Under the “risk-utility” test, there is no question that the Respirator Manufacturers were able to (indeed, they claim they did) provide warnings about use, cleaning and replacement of respirator cartridges to prevent exposure to asbestos. There also is no question that consumers expect safety equipment manufacturers to provide such warnings, and that if they had been provided to Mr. Macias, he would have avoided his lethal exposure to asbestos particles. *See also Simon v. American Optical*, 2007 WL 924496 at \*5 (holding that plaintiff stated a claim against respirator manufacturer for

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<sup>11</sup> The Respirator Manufacturers say that these two tests derive from the common law. Opening Brief at 15. While that may be so, the Respirator Manufacturers had a duty under the common law, as discussed in Sections III. C. and D., *supra*, and the WPLA tests clearly establish a duty to warn by safety equipment manufacturers.

failure to warn about hazardous exposure to coal, sand and other particulates under either risk-utility test or consumer expectation test); *Hargis v. American Optical*, 2007 WL 924486 at \*5 (same).

Under these authorities, this Court should affirm the Superior Court's denial of summary judgment on Mr. Macias' WPLA claim.

#### IV. CONCLUSION

For all of the foregoing reasons, this Court should affirm the Superior Court's denial of the Respirator Manufacturers' motions for summary judgment, and it should remand this case for trial.

DATED this 10th day of December, 2009.

Respectfully submitted,

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No. 39171-6

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**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION TWO**

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LEO MACIAS and PATRICIA MACIAS,

Respondents-Plaintiffs,

v.

SABERHAGEN HOLDINGS, INC., et al.,

Petitioners-Defendants.

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**CERTIFICATE OF SERVICE**

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I, CARRIE J. GRAY, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Pierce County, Washington, and am over the age of 18 years.

2. On the 10<sup>th</sup> day of December, 2009, I caused to be served true and correct copies, of:

- (1) Brief of Respondents; and
- (2) Certificate of Service, on the following:

**VIA LEGAL MESSENGER:**

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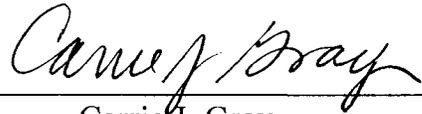
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I declare under penalty of perjury under the laws of the State  
of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 10<sup>th</sup> day of December,  
2009.

  
\_\_\_\_\_  
Carrie J. Gray