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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 39171-6-II)

LEO MACIAS and PATRICIA MACIAS,

Plaintiffs-Petitioners,

v.

SABERHAGEN HOLDINGS, INC., *et al.*,

Defendants-Respondents.

**PLAINTIFFS-PETITIONERS' ANSWER TO BRIEF OF THE
COALITION FOR LITIGATION JUSTICE, INC., *ET AL.***

Matthew P. Bergman
Brian F. Ladenburg
BERGMAN, DRAPER & FROCKT
614 First Avenue, Fourth Floor
Seattle, WA 98104
(206) 957-9510

John W. Phillips
Matthew Geyman
PHILLIPS LAW GROUP, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
(206) 382-6163

Attorneys for Plaintiffs-Petitioners

ORIGINAL

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I. INTRODUCTION

Plaintiffs-Petitioners Leo and Patricia Macias (“Plaintiff”) file this pointed response to the brief submitted by *amici curiae* Coalition for Litigation Justice, Inc., *et al.* (collectively the “Coalition”). The Coalition exhibits no understanding of Mr. Macias, whose job it was to sift through dirty respirators, remove their dust-clogged filters, and clean the respirators so they could be re-used, who had no idea he was exposing himself to danger by doing so, and who is now dead because of it. The Coalition has “cut and pasted” from articles¹ by its own lawyers in the same formulaic manner it has done dozens of times around the country, irrespective of the plaintiff or his plight. Every plaintiff is trying to open the floodgates; every plaintiff is a threat to

¹ As examples of the Coalition’s penchant for citing itself, on page 19 it cites an article entitled *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer*, 33 Am. J. Trial Advoc. 13 (2010). Although it identifies the author as “Victor Schwartz *et al.*,” the unidentified “*et al.*” is the Coalition’s lawyer here, Cary Silverman. Mr. Silverman has simply copied verbatim portions of his article into the Coalition’s brief. Compare *id.*, 33 Am. J. Trial Advoc. at 44-45 & 50-53 with Coalition Brief at 15 & 17-20. The Coalition relies on another article but fails to disclose that the Coalition was involved in preparing it. See James Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 622 n. a1 (2008), cited in Coalition Brief at 2 & 11-12. See also *id.* at 1, 5 & 18-19 (citing articles by Charles Bates, Charles Mullin, Mark Behrens and Paul Riehle, all paid representatives of the insurance industry or asbestos defense bar).

the American economy, and so it doesn't matter how the Respirator Manufacturers harmed Mr. Macias through inadequate warnings about how to safely clean their respirators and replace their filter cartridges filled with asbestos dust.

II. ARGUMENT

A. **The Respirator Manufacturers Have a Duty to Warn About the Products They Manufacture.**

The Coalition admits that because of their safety purpose, respirators are different from other products. *See* Coalition Brief at 16 (admitting that respirators are different because they are “designed . . . to guard against the harmful effects of prolonged exposure to airborne contaminants”). The Coalition also admits that this distinction “is significant from both a legal and public policy standpoint.” *Id.* Yet despite these admissions, the Coalition is oblivious to their significance here. Mr. Macias had the job of sifting through used respirators whose filters were clogged with asbestos dust. He removed the dirty filters, cleaned the respirators, and then placed a new filter in the cleaned respirator so the respirators could be re-used. Because the respirators were designed to collect and concentrate airborne contaminants and to be re-used, the Respirator Manufacturers had a duty to warn about how to safely clean and handle the respirators and replace the dirty filters so their products could be re-used.

The Coalition admits that imposing a duty to warn is appropriate when “the [defendant’s own] product . . . in some sense of the word, create[s] the risk.” Coalition Brief at 11 (citing James Henderson, Jr. & Aaron Twerski, *Doctrinal Collapse in Products Liability: the Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 284 (1990)). That is precisely the circumstance that the Court faces here: the respirators *did* create the risk by collecting low-levels of ambient asbestos dust and concentrating it on the respirators and in the clogged filters that Mr. Macias handled on a daily basis when he cleaned the dirty respirators and replaced the dirty filters so the product could be re-used, as designed.

The respirators themselves, through their form and function, created the danger that killed Mr. Macias. That the asbestos dust collected in the respirators derived from a product originally created as part of another manufacturing process as opposed to a naturally-occurring contaminant was purely happenstance.² Yet the Coalition seizes on this arbitrary difference to relieve the Respirator Manufacturers of their duty to warn about the safe use, cleaning and re-use of their respirators.

The Respirator Manufacturers don’t need to become experts on *other* products, as wrongly suggested by the Coalition. See Coalition

² See, e.g., <http://www.epa.gov/region8/superfund/libby/askepa.html> (describing EPA Superfund site and remediation to address health problems caused by exposure to naturally-occurring asbestos in vermiculite mines in Libby, Montana).

Brief at 12. They need to be experts on their own respirators and filters, what they do and how they perform, and how they can be safely re-used as designed.

B. The Coalition's Rhetoric Is Irresponsible.

Citing a statement made by a judge in multi-district products liability litigation that involved over 10,000 plaintiffs who alleged inchoate injury caused by silica exposure, the Coalition suggests that Mr. Macias' claim against the Respirator Manufacturers was "manufactured for money." Coalition Brief at 16 (citing *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005)). Mr. Macias is dead. His injuries were not inchoate. And he died because no one warned him that he needed to wear a respirator himself when sifting through dirty respirators, pulling off asbestos-clogged filters, cleaning the respirators and placing a new filter in each mask. The legal system is well-equipped to identify and dispose of claims that fail based on inadequate proof. Such cases fail because courts pay attention to the facts of each case in precisely the way the Coalition does not.

C. The Court Should Ignore the Coalition's Baseless Appeal to Economic Jingoism.

Finally, the Coalition claims that requiring the Respirator Manufacturers to provide adequate warnings about the safe replacement of their filters and cleaning of their respirators for re-use would cause U.S. respirator manufacturers to flee the country and harm the public by reducing the supply of respirators. *See* Coalition Brief at 19-20. This argument is malarkey.

If most respirators are now manufactured in China, Mexico, and other cheap labor markets, as the Coalition suggests, it is because respirator manufacturers chose to move their plants to places where the cost of labor and production was lower, not because they were worried they might have a duty to explain to users of their products how to safely clean and prepare them for re-use. Acknowledging such a duty adds almost nothing to the cost of the product. Indeed, one of the Respirator Manufacturers here, North Safety, warned that “*replacement of air-purifying elements must be done in a safe area containing uncontaminated, breathable air.*” CP 533 (emphasis added). The Court should compare the cost of an adequate warning (practically nothing) with the cost to society of erasing a duty by

safety product manufacturers to warn how to avoid the hazard against which their products were designed to protect.

III. CONCLUSION

The Coalition's overbroad arguments simply underscore the wisdom of requiring the Respirator Manufacturers to warn about the dangers created by their own products.

DATED this 7th day of October, 2011.

Respectfully submitted,

BERGMAN, DRAPER & FROCKT

By:  for
Matthew P. Bergman, WSBA #20894
Brian F. Ladenburg, WSBA #29531

PHILLIPS LAW GROUP, PLLC

By: 
John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544

Counsel for Plaintiffs-Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, a true and correct copy of the foregoing document was served upon the following:

Via Email & Legal Messenger:

Washington Supreme Court
supreme@courts.wa.gov

Via Legal Messenger:

Counsel for Defendant-Respondents:

Paul J. Kundtz
Wendy E. Lyon
RIDDELL WILLIAMS
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154

Randy J. Aliment
Timothy Ashcraft
WILLIAMS KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101

Kevin C. Baumgardner
CORR CRONIN, MICHELSON BAUMGARDNER & PREECE
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051

Via First-Class Mail:

Counsel for Defendant-Respondents:

Joseph Morford
TUCKER ELLIS & WEST
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115

Counsel for Defendant Saberhagen Holdings, Inc.

Timothy K. Thorson
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104

**Counsel for *Amicus Curiae* Coalition for Litigation Justice, Inc.,
National Association of Manufacturers, Chamber of Commerce of
the United States of America, Property Casualty Insurers
Association of America, American Insurance Association, and
American Chemistry Council**

Mark A. Behrens
Cary Silverman
Shook, Hardy & Bacon L.L.P.
1155 F Street, N.W., Suite 200
Washington, DC 20004

James O. Neet, Jr.
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108

Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004

Robin S. Conrad
Kate Comerford Todd
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062

Sean McMurrough
Property Casualty Insurers Association of America
2600 South River Road
Des Plaines, IL 60018

Lynda S. Mounts
American Insurance Association
2101 L Street, N.W., Suite 400
Washington, DC 20037

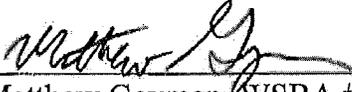
Donald D. Evans
American Chemistry Council
700 Second Street, N.E.
Washington, D.C. 20002

**Counsel for *Amicus Curiae* Washington State Association for
Justice Foundation**

Bryan P. Harnetiaux
517 E. 17th Avenue
Spokane, WA 99203

George M. Ahrend
100 E. Broadway Avenue
Moses Lake, WA 98837

DATED at Seattle, Washington this 7th day of October, 2011.


Matthew Geyman, WSBA #17544