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No. _____

**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.

PETITION FOR REVIEW

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PETITION FOR REVIEW

This case involves a manufacturer's duty to warn of dangers posed by a safety product that is intended to protect against another hazardous product, where the interaction of the safety product and the other hazardous product creates a new hazard for the user.

The Court of Appeals held that under a strict reading of this Court's decisions in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008), the manufacturers of safety respirators had no duty to warn of the hazard created by the airborne asbestos captured and concentrated by their respirators, to which the plaintiff-decedent was exposed.

This Court should accept review under RAP 13.4(b)(1) and 13.4(b)(4) because the Court of Appeals' decision reads this Court's decisions in *Simonetta* and *Braaten* too narrowly and thus conflicts with those decisions and other decisions of this Court, and because the issues presented here are issues of substantial public interest that should be determined by this Court.

A. Identity of Petitioners.

Plaintiffs-Petitioners Leo and Patricia Macias ("Plaintiffs" or "Mr. and Mrs. Macias") request that this Court accept review of the

published decision of the Court of Appeals, Division II, terminating review in this case.

B. Court of Appeals' Decision.

The Court of Appeals reversed a trial court order denying summary judgment to Defendants-Respondents Mine Safety Appliances Company, American Optical Corporation and North Safety Products (collectively the "Respirator Manufacturers"). It held that under *Simonetta* and *Braaten*, the Respirator Manufacturers had no duty to warn how to clean the asbestos fibers collected by the respirators and filters because the Respirator Manufacturers were not "within the chain of distribution" of the asbestos gathered by their mask filters, even though the intended purpose of those respirators was to capture hazardous substances and thus protect the user, and the respirators created a new hazard by capturing and concentrating the airborne asbestos to which Mr. Macias was exposed. A copy of the Court of Appeals' decision is attached as Appendix A.

C. Issues Presented for Review.

This case presents the following specific questions demanding Supreme Court review:

1. Did the Court of Appeals err by mechanically applying *Simonetta* and *Braaten* as establishing an absolute rule that a product

manufacturer never has a duty to warn of hazards of another product, with no exceptions except as specifically delineated in *Simonetta* and *Braaten*, such that the safety purpose of a product must be ignored in determining if a duty to warn exists?

2. In light of this Court's statement in *Braaten* that a duty to warn may exist when two products combine to create a new hazard, did the Court of Appeals err in holding that the manufacturer of a safety product that is intended to capture another hazardous product, thus creating a new hazard for persons cleaning and maintaining the safety product, has no duty to warn?

3. Did the Court of Appeals err in holding that because this Court held in *Simonetta* and *Braaten* that the foreseeability of a product's use in conjunction with a hazardous product does not by itself create a duty to warn, a safety product's intended purpose of protecting users from a hazardous product, and its function of capturing and concentrating the hazardous product, thus creating a new hazard, are irrelevant to determining if the manufacturer of the safety product has a duty to warn?

D. Statement of the Case.

From 1978 to 2004, Mr. Macias worked as a tool keeper at Todd Shipyards where his daily duties included cleaning respirators

and replacing respirator filter cartridges. CP 228-240. As part of his work he cleaned and handled thousands of respirators and filters that were covered with asbestos dust captured and concentrated by the respirators in the workplace. CP 320-322, 329. These respirators were made by the Respirator Manufacturers. CP 228 & 406.

Mr. Macias was diagnosed with mesothelioma in May 2008, CP 394. Mesothelioma is a cancer of the lining of the lungs or stomach that invariably is fatal. It is a signature disease of asbestos exposure. Mr. and Mrs. Macias filed this lawsuit in June 2008. CP 1-4. Mr. Macias died from mesothelioma in June 2010, while this appeal was pending, at the age of 64.

Mr. Macias testified that he believed his asbestos exposure came “mostly” from his cleaning and handling of used respirators and filters 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 filters 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.*

Mr. Macias did not know he was at risk from the asbestos dust coating on the used respirators and filters, 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 that was captured and concentrated by the respirators and filters, the Respirator Manufacturers knew "that inhalation of asbestos dust was potentially harmful to human health." CP 533. Defendant-Respondent North Safety admits, for example, that its respirator "was *designed* to help protect users against asbestos." CP 532 (emphasis added). North Safety also admits that it "*intended* users to periodically clean the . . . respirators" and it "*intended* users to periodically replace the cartridges." CP 532-533 (emphasis added). And North Safety admits that in its instruction manual, it warned users that the "*replacement of air-purifying elements must be done in a safe*

area containing uncontaminated, breathable air.” CP 533

(emphasis added).

On this record, the Respirator Manufacturers asked the trial court to enter summary judgment dismissing Plaintiffs’ claims on the grounds that the Respirator Manufacturers did not manufacture the asbestos dust gathered by their respirators and filters, and thus, they contended, under the rule stated in *Simonetta* and *Braaten*, they had no duty to warn of the hazards of the asbestos dust collected and concentrated on the respirators and filters that Mr. Macias handled and cleaned. *See* CP 202-210 (North Safety motion), CP 189-199 (Mine Safety motion); CP 276-278 (American Optical joinder).

In response, Plaintiffs argued that the general rule and specific holdings of *Simonetta* and *Braaten* do not apply under the materially different facts presented here, and that the Respirator Manufacturers had a duty to warn under established common law negligence and common law strict liability principles. *See* CP 289-313 (Plaintiffs’ response). The trial court agreed with Plaintiffs, and denied the Respirator Manufacturers’ summary judgment motions. CP 496-501.

On discretionary review, the Court of Appeals reversed and held that under its reading of *Simonetta* and *Braaten*, the Respirator

Manufacturers had no common law duty to warn Mr. Macias about the hazards of the airborne asbestos gathered and concentrated by the respirators and filters because the Respirator Manufacturers were not “in the chain of distribution” of the asbestos. Decision (Appendix A) at 8 & 16. The Court of Appeals also held, as a matter of first impression, that to the extent that Mr. Macias’ claim arose on or after July 26, 1981, the effective date of the Washington Products Liability Act, RCW 7.72 *et seq.* (“WPLA”), the Respirator Manufacturers also had no duty to warn under WPLA. *Id.* at 17.

E. Argument Why Review Should Be Accepted.

This Court should accept review in order to elucidate and refine this Court’s decisions in *Simonetta* and *Braaten* and to correct the Court of Appeals’ decision which is contrary to the spirit and letter of *Simonetta*, *Braaten* and other decisions by this Court. As Chief Judge Penoyar of the Court of Appeals stated in a separate opinion explicitly inviting review by this Court:

[T]he facts here are quite different than those in *Simonetta* . . . and *Braaten* . . . In those cases, a third party added the hazardous product to the defendant manufacturer's product after the original sale. Here, the respirators' intended purpose was to capture hazardous substances and thus protect the user. For the respirators to function properly, as intended by the user and the manufacturer, the user or a co-worker needed to clean the respirators' surfaces and the filters containing concentrated hazardous products. Under these facts, *Macias strongly argues that the respirator manufacturers owed a justiciable duty* to the person cleaning the respirators under both common law negligence and strict liability, as well as under chapter 7.72 RCW. . . . *Whether the Supreme Court may choose in the future to paint with a narrower brush in cases such as this remains to be seen.*

Decision at 19 (emphasis added).

In particular, as demonstrated below, review is appropriate and should be granted under RAP 13.4(b)(1) and (4) because the Court of Appeals' decision conflicts with *Simonetta*, *Braaten* and other decisions of this Court, and because this appeal presents issues of substantial public interest affecting the products liability and tort law of this State that should be determined by this Court.

1. The Court of Appeals Erred by Mechanically Applying *Simonetta* and *Braaten* as an Absolute Rule that Allows Only Exceptions Specifically Delineated in *Simonetta* and *Braaten* and Without Regard to the Safety Purpose of the Respirators.

Because the Respirator Manufacturers are not "in the chain of distribution" of any asbestos products, the Court of Appeals held that under *Simonetta* and *Braaten*, they had no duty to warn of the new

hazard created by the asbestos that was collected and concentrated by their respirators. *See* Decision at 8 & 16-17. The Court of Appeals held that the safety purpose of the respirators was irrelevant in determining the existence of a duty to warn, and it declined to consider any other exceptions to the general rule except as expressly delineated in *Simonetta* and *Braaten*. *Id.* at 10.

Discussing those exceptions, the Court of Appeals said that Mr. Macias' claim does not "fit into an established exception" because he "does not allege, for example, that the respirator manufacturers incorporated a defective component part into their respirators such that they had a duty to warn under the theory known as 'assembler's liability,'" and he "has not presented evidence that the respirator manufacturers here specified that asbestos should be 'applied to, in, or connected to' their respirators." Decision at 10 (citing *Braaten*, 165 Wn.2d at 388 & 397).¹

The Court of Appeals thus erred by treating the *general rule* announced in *Simonetta* and *Braaten* as an *absolute rule with absolutely delineated exceptions*, contrary to this Court's statements

¹ The Court of Appeals failed to consider the exception that may arise where, as here, the "*combination*" of a manufacturer's product and another product creates a "*dangerous condition*." *Braaten*, 165 Wn.2d at 385 n.7. *See* Section E.2., *infra*.

that it was establishing a *general rule* as to which there are and will be exceptions as developed and articulated through case law. *See, e.g., Simonetta*, 165 Wn.2d at 353 (stating that Washington cases “*generally*” do not extend a duty to warn beyond the manufacturer’s own product) (emphasis added); *Braaten*, 165 Wn.2d at 380 (stating that the “*general rule*” applies to asbestos in replacement packing and gaskets).

Consistent with this Court’s announcement of a *general rule*, as opposed to an *absolute rule*, it described its holdings in *Simonetta* and *Braaten* narrowly based on the facts of each case. *See Braaten*, 165 Wn.2d at 380 (“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.”) (emphasis added); *id.* (“[I]n . . . *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.”).

In stating this “general rule,” this Court did not reach or address the separate question of whether a manufacturer of a safety

product may have a duty to warn of the hazards of another hazardous product when the purpose of the safety product is to protect against that other product, and where, as here, the combination of the safety product and other product creates a new hazard for the user.

The Court of Appeals ignored these material differences in mechanically applying the “general rule” that this Court articulated in *Simonetta* and *Braaten* as if it were absolute rule with no exceptions except as delineated in those decisions. As this Court stated in *Braaten*, 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 may impose such a duty under appropriate circumstances – such as here, where the product is a safety product whose intended purpose is to prevent exposure to another product, and where the combination of the safety product and the other product creates a new hazardous condition.

Under the Court of Appeals’ rigid reading of *Simonetta* and *Braaten*, the flexibility of Washington courts to apply the traditional factors that Washington courts weigh in determining if a duty to warn exists would be hamstrung, and *Simonetta* and *Braaten* would become “printed fiats” that could not be applied flexibly to new

circumstances bearing in mind the fundamental factors that affect a court's legal judgment that a duty exists. See *Senear v. Daily Journal-American*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982) (“The common law ‘owes its glory to its ability to cope with new situations. Its principles are not mere printed fiats, but are living tools to be used in solving emergent problems’”) (quoting *Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 819, 355 P.2d 781 (1960)).

This Court should accept review to clarify that *Simonetta* and *Braaten* state a general rule, rather than an absolute rule, and allow an exception to be recognized consistent with the traditional factors governing whether a duty exists – such as who is in the best position to warn about proper handling of a product – in the case of parties such as the Respirator Manufacturers who, while outside the chain of distribution of asbestos, design and manufacture products whose purpose is to protect against exposure to that hazardous product and which in doing so collect and concentrate that hazardous product to create a new hazard.

2. **The Court of Appeals Erred in Failing to Recognize or Apply the Exception that Respirator Manufacturers Have a Duty to Warn Because Their Respirators Combine with a Hazardous Substance to Create a New Hazard**

In *Braaten*, this Court discussed the exception to the “general rule” in cases where, as here, the “*combination*” of a manufacturer’s product and another product creates a “*dangerous condition.*”

Braaten, 165 Wn.2d at 385 n.7 (citing *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 226 (N.Y. App. 1992)). As this Court noted in *Braaten*, even the manufacturer defendants conceded that a duty to warn may properly be imposed where, as in this case (and unlike in *Simonetta* and *Braaten*), the manufacturer’s product “when used with another product, *synergistically* creates a hazardous condition.” *Braaten*, 165 Wn.2d at 383 (emphasis added).

This Court should accept review and conclude that this exception applies squarely to this case where the specific purpose of the respirators was to capture hazardous products and thus protect the user, and the respirators created a new hazard by capturing and concentrating the airborne asbestos to which Mr. Macias was then exposed. The Court of Appeals thus erred by failing to recognize this exception as a basis for concluding that the Respirator Manufacturers had a duty to warn Mr. Macias.

This Court's decision in *Duvon v. Rockwell International*, 116 Wn.2d 749, 807 P.2d 876 (1991), is instructive. The 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, 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.*

This Court analyzed Rockwell's negligence liability under Section 388 of the Restatement (2d) of Torts. *Duvon*, 116 Wn.2d 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," this Court 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. This Court reached that conclusion despite the

fact that the product that injured the plaintiff was the ammonia gas, and not the exhauster, in light of the new hazard created by the **combination** of the exhauster and the ammonia gas against which it was intended to protect.

The Court of Appeals tried to distinguish *Duvon* by describing it as a case in which “the manufacturer’s own product malfunctioned due to an alleged manufacturing or design defect.” Decision at 10-11. However, the failure to warn in *Duvon* was the manufacturer’s “failure to provide adequate procedure guidance to shut the inlet butterfly valve when the ventilation/filter system was down,” *Duvon*, 116 Wn.2d at 751, and there was no evidence of a defect in the inlet butterfly valve, which was simply left open. *Id.* at 750-51. The hazard that created the duty to warn was the **dangerous combination** – when the non-defective butterfly valve was left open – of the exhauster and the ammonia gas fumes that the exhauster was intended to remove from the buried tanks. *Id.* *Duvon* and the exception expressly noted in *Braaten* establish that the Court of Appeals erred in failing to hold that the Respirator Manufacturers had a duty to warn because the “**combination**” of the respirators and the hazardous products or substances that they captured and

concentrated created a “*dangerous condition.*” *Braaten*, 165 Wn.2d at 385 n.7.

Imposing a duty to warn on the Respirator Manufacturers, following *Braaten* and *Duvon*, is also consistent with the policy underlying the common law duty to warn, because the Respirator Manufacturers were and are in the best position to know and warn users such as Mr. Macias, who clean and maintain the respirators, about the hazardous condition created by the combination of their respirators with the hazardous substances against which their respirators are intended to protect. *See, e.g., Simonetta*, 165 Wn.2d at 355 (“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.”).

This Court should thus accept review and make it clear that under this exception enunciated in *Braaten*, and consistent with this Court’s holding in *Duvon*, the manufacturer of a safety product has a duty to warn of new hazards created by the combination of its safety product and the other product or substance against which the safety product is designed to protect. Otherwise, a manufacturer 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 to warn of steps necessary to avoid exposures to the hazardous substances against which they are designed to protect, even where the combination of the safety product and the other hazardous product creates a dangerous new hazard. Under this exception to the “general rule” of *Simonetta* and *Braaten*, this Court should hold that the Respirator Defendants had a duty to warn concerning the safe cleaning and maintenance of their respirators and filters.

3. The Court of Appeals Erred in Concluding that under *Simonetta* and *Braaten*, the Respirators’ Safety Purpose and Function of Protecting Against Another Hazardous Product Are Irrelevant to Whether a Duty Exists.

Finally, and relatedly, the Court of Appeals when it held that under *Simonetta* and *Braaten*, a product’s intended safety purpose and protective function are never relevant in determining whether the manufacturer of the product has a duty to warn. *See* Decision at 9 (stating that “*Simonetta* and *Braaten* make clear . . . [that] it is not a product’s purpose that determines whether a duty exists . . .”); *id.* at 17 (“[O]ur Supreme Court has made clear that the purpose of the product is not what gives rise to the duty to warn”).

In so ruling, the Court of Appeals erroneously confused this Court's direction that the "foreseeability" of injury is not a sufficient basis to establish the existence of a duty, *see Simonetta*, 165 Wn.2d at 349 n.4 & 357; *Braaten*, 165 Wn.2d at 388 n.8, and turned that direction into the untenable proposition that if a product's purpose makes an injury "foreseeable," that disqualifies consideration of a product's purpose in determining if a duty exists.

The fact that the respirators at issue here are designed to prevent human exposure to hazardous substances means not only that they will foreseeably work in an environment where hazardous products are present, but also that the Respirator Manufacturers specifically developed and designed the respirators, and consumers use and reasonably rely on them, to prevent exposure to those other hazardous products. Unlike the products at issue in *Simonetta* and *Braaten*, the respirators were specifically *intended* and *designed* to protect against the hazardous products to which Mr. Macias was in fact exposed.

The Court of Appeals erred in failing to appreciate this fundamental distinction. Plaintiffs' warning claims focus strictly on the intent and design characteristics of the respirators, which were specifically intended to protect against hazardous products such as

the asbestos dust to which Mr. Macias was exposed. This distinction is emphasized by this 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 *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. See *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 757-59, 818 P.2d 1337 (1992) (holding that baby oil manufacturer had a duty to warn based on the intended use and intrinsic nature of the product, noting that "baby oil is *distinguishable from other products*" and that "[w]hat makes baby oil unique, and what is the *sine qua non* of our decision, is that baby oil is *intended for use on babies*") (emphasis added).

The policies underlying the common law duty to warn as enunciated in *Braaten*, *Simonetta* and other Washington cases strongly support finding that the Respirator Manufacturers had a duty to warn of the dangers of the new hazards created by use of

their respirators, whose *intended purpose and function* was to protect against such exposure.

There is no more suitable entity upon which to impose a duty to warn than the manufacturers of these respirators whose purpose was to prevent the hazardous exposure that harmed Mr. Macias. *See Simonetta*, 165 Wn.2d at 355 (discussing policy for placing duty to warn on entity in “best position to know of the dangerous aspects of the product”); *Braaten*, 165 Wn.2d at 392 (same); *see also Ayers*, 117 Wn.2d at 757-59 (discussing policy supporting duty to warn based on intrinsic nature of product); *Little v. PPG Industries, Inc.*, 92 Wn.2d 118, 122-23, 594 P.2d 911 (1979) (same).

F. Conclusion.

Plaintiffs-Petitioners request that this Court accept review, reverse the Court of Appeals, affirm the trial court’s denial of the Respirator Manufacturers’ summary judgment motions, and remand for trial.

DATED this 13th day of January, 2011.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LEO MACIAS and PATRICIA
MACIAS, husband and wife,

Respondents,

v.

MINE SAFETY APPLIANCES CO. et al.,

Appellants.

No. 39171-6-II

PUBLISHED OPINION

WORSWICK, J. — American Optical Corporation, Mine Safety Appliances Company, and North Safety Products USA (collectively, respirator manufacturers) appeal the superior court's denial of their summary judgment motion, arguing that they had no duty to warn Leo Macias, a retired tool worker, that he could be exposed to harmful asbestos dust while cleaning their respirators at a Seattle shipyard. We hold that the respirator manufacturers owed no duty to Macias, reverse the superior court's denial of their motion, and remand for entry of an order granting summary judgment to the respirator manufacturers.

FACTS

Macias worked as a tool keeper at Todd Shipyards in Seattle from 1978 to 2004. As a tool keeper, Macias supplied shipyard workers with tools and equipment, including respirators manufactured by the respirator manufacturers. These respirators were manufactured to protect against a variety of contaminants. Different filter cartridges could be inserted into the respirators to protect the workers against specific contaminants, including welding fumes, paint fumes, asbestos particles, and dust.

After their shifts, shipyard workers returned “filmy” and “dusty” respirators to the tool room. II Clerk’s Papers (CP) at 230. Macias threw these respirators into a nearby basket, sometimes bouncing them off an adjacent window, creating “little poofs of dust.” II CP at 233. When the basket was full, Macias disassembled the respirators, causing “dust, sand, [and] dirt” to “fly out.” II CP at 234-37. Macias then scrubbed the respirators with a nylon brush, rinsed them in the sink, and stacked them in a drying oven. During a busy work shift, Macias handled hundreds of dirty respirators.

In May 2008, a physician diagnosed Macias with mesothelioma. The following month, Macias filed a complaint for personal injuries against several defendants, including the respirator manufacturers. He asserted, in part, that the respirator manufacturers were negligent and strictly liable for failing to warn him of the dangers of asbestos exposure.

In January 2009, the respirator manufacturers moved for summary judgment. The respirator manufacturers argued that, under our Supreme Court’s recent decisions in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008), they had no duty to warn Macias of the dangers associated with asbestos in another company’s product. The trial court denied the motion, stating, without further comment, that *Simonetta* and *Braaten* were distinguishable. Our commissioner granted discretionary review after concluding that the trial court had committed “obvious error.”¹ See Ruling Granting Discretionary Review.

¹ We may accept discretionary review of a superior court’s decision when the superior court “has committed an obvious error which would render further proceedings useless.” RAP 2.3(b)(1).

ANALYSIS

This case turns on the applicability of *Simonetta* and *Braaten* to Macias's duty to warn claims. The respirator manufacturers argue that *Simonetta* and *Braaten* preclude Macias's duty to warn claims because those cases hold that "the duty to warn is limited to those in the chain of distribution of the hazardous product." Br. of Appellant at 6. Macias acknowledges that *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[.]" but he argues that "[t]he specific safety purpose of respirators distinguishes them from the equipment at issue" in those cases. Br. of Resp't at 1-2. We agree with the respirator manufacturers. We review a trial court's denial of summary judgment de novo. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 230, 119 P.3d 325 (2005). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "If . . . the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion" because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)).

I. NEGLIGENCE

The respirator manufacturers argue that, as part of their duty to exercise ordinary care, they had no duty to warn Macias of the dangers of asbestos exposure that could result from cleaning their products. We agree.

A. Standard of Review

Under the law of negligence, “[a] manufacturer’s duty of ordinary care includes a duty to warn of hazards involved in the use of a product, which are or should be known to the manufacturer.” *Simonetta*, 165 Wn.2d at 348 (citing RESTATEMENT (SECOND) OF TORTS § 388 (1965)). Whether a manufacturer owes a duty to warn of hazards involved in the use of its product is a question of law that “generally depends on mixed considerations of logic, common sense, justice, policy, and precedent.” *Simonetta*, 165 Wn.2d at 349. We review questions of law de novo. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009).

Section 388 of the RESTATEMENT, *supra*, which governs a manufacturer’s duty to warn in the negligence context, states:

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.

See *Simonetta*, 165 Wn.2d at 348 n.3 (citing *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 467-68, 423 P.2d 926 (1967)). A plaintiff must satisfy each of section 388's three subsections in order to assert a viable negligence claim. *Simonetta*, 165 Wn.2d at 349 n.3.

B. Negligence Analysis in *Simonetta* and *Braaten*

In *Simonetta*, a navy machinist performed maintenance work on an evaporator, a machine that converts seawater to freshwater. *Simonetta*, 165 Wn.2d at 346. To service the evaporator, Simonetta had to use a hammer to "pry or hack away" asbestos-containing insulation that enveloped the evaporator. *Simonetta*, 165 Wn.2d at 346. The evaporator's manufacturer, Viad,² did not manufacture the asbestos-containing insulation or insulate the evaporator; rather, Viad shipped the evaporator to the navy without insulation. *Simonetta*, 165 Wn.2d at 346. An unidentified company manufactured the insulation, and the navy or an unidentified company installed the evaporator. *Simonetta*, 165 Wn.2d at 346.

Simonetta developed lung cancer and sued Viad for failing to warn him of the hazard of asbestos exposure. *Simonetta*, 165 Wn.2d at 346. Our Supreme Court rejected Simonetta's negligence claim, stating that the duty to warn under section 388 "is limited to those in the chain of distribution of the hazardous product." *Simonetta*, 165 Wn.2d at 354. Accordingly, the court stated, "[b]ecause Viad did not manufacture, sell, or supply the asbestos insulation, we hold that as a matter of law it had no duty to warn under section 388." *Simonetta*, 165 Wn.2d at 354.

² The *Simonetta* court assumed that Viad was successor in interest to the evaporator's original manufacturer. *Simonetta*, 165 Wn.2d at 345. Therefore, we refer to Viad as the evaporator's manufacturer.

The *Simonetta* court observed that the court of appeals had concluded that the danger of asbestos exposure was inherent in the evaporator's use "because the evaporator was built with the knowledge that insulation was required for proper operation and that workers would need to invade the insulation for maintenance."³ *Simonetta*, 165 Wn.2d at 350. Our Supreme Court, however, rejected the argument that the manufacturer's knowledge about the necessity of asbestos use gave rise to a duty to warn. *Simonetta*, 165 Wn.2d at 350. The *Simonetta* court observed that the Washington cases that had interpreted a manufacturer's duty to warn under section 388 involved claims against the product's manufacturer, supplier, or seller, all of whom are parties in the product's chain of distribution. *Simonetta*, 165 Wn.2d at 350-52 (citing numerous cases). Because those cases "generally limit the analysis of the duty to warn of the hazards of a product to those in the chain of distribution of the product," the *Simonetta* court found "little to no support under our case law for extending the duty to warn to another manufacturer's product." *Simonetta*, 165 Wn.2d at 353. The court also concluded that case law from other jurisdictions "similarly limits the duty to warn in negligence cases to those in the chain of distribution of the hazardous product." *Simonetta*, 165 Wn.2d at 353-54 (citing numerous cases).

The court also disagreed that the language of section 388 supported *Simonetta*'s argument. *Simonetta*, 165 Wn.2d at 352-54. According to the court, section 388 "discusses the supplier's responsibility to warn of the dangers of a product" and "limit[s]" liability to "any person, who for any purpose or in any manner gives possession of a chattel for another's use . . .

³ Viad's expert testified that "the evaporator required insulation to function properly, that such insulation contained asbestos, that the company knew or should have known of the use, and that

without disclosing his knowledge that the chattel is dangerous for the use for which it is supplied or for which it is permitted to be used.” *Simonetta*, 165 Wn.2d at 352 (quoting the definition of “supplier” from RESTATEMENT (SECOND) OF TORTS § 388 cmt. c (1965)). The *Simonetta* court noted that Washington case law was “consistent with the limitation established under the RESTATEMENT.” *Simonetta*, 165 Wn.2d at 352.

Braaten, a companion case to *Simonetta*, involved several pump and valve manufacturers that supplied products to the navy. *Braaten*, 165 Wn.2d at 381. The navy subsequently added to the pumps and valves asbestos-containing insulation, which was not manufactured by the pump and valve manufacturers. *Braaten*, 165 Wn.2d at 381. Braaten, a pipefitter, removed and replaced packing and insulation on the pumps and valves. *Braaten*, 165 Wn.2d at 381. To complete his work, Braaten “ground, scraped, [and] chipped” asbestos gaskets, packing, and insulation from the pumps and valves. *Braaten*, 165 Wn.2d at 381. He then installed replacement packing and insulation. *Braaten*, 165 Wn.2d at 381. Braaten’s labors released respirable asbestos. *Braaten*, 165 Wn.2d at 381.

Braaten developed mesothelioma and sued the pump and valve manufacturers. *Braaten*, 165 Wn.2d at 379. Our Supreme Court relied on its analysis in *Simonetta* to reject Braaten’s contention that the pump and valve manufacturers had a duty to warn him about the dangers of asbestos exposure in the course of his work:

Because “the duty to warn is limited to those in the chain of distribution of the hazardous product,” the defendants here had no duty to warn of the danger of exposure to asbestos in the insulation applied to their products. None of the defendants were in the chain of distribution of the exterior insulation applied to their products, and under our analysis in *Simonetta*, the plaintiff’s negligence

the insulation would be disturbed during normal maintenance.” *Simonetta*, 165 Wn.2d at 349.

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claims based upon exposure to the insulation applied to the defendants' products were properly dismissed on summary judgment.

Braaten, 165 Wn.2d at 390-91 (quoting *Simonetta*, 165 Wn.2d at 354).

There is no evidence that the defendants are in the chain of distribution of replacement packing and gaskets. They did not manufacture, sell, or supply the replacement packing and gaskets, within the meaning of section 388.

Braaten, 165 Wn.2d at 397.

C. Negligence Analysis

Under *Simonetta* and *Braaten*, the respirator manufacturers had no duty to warn Macias of the dangers of asbestos exposure here. The connection between the manufacturers' product and the asbestos here is even more remote than the connection in *Simonetta* and *Braaten*. Here, the respirators were manufactured to protect against a variety of contaminants, not just asbestos. The respirator manufacturers did not manufacture, sell, or supply the asbestos that harmed Macias.⁴ Therefore, because respirator manufacturers were not in the chain of distribution of the harmful product, the ordinary duty of care that they owed to Macias under section 388 did not include a duty to warn Macias of the dangers associated with asbestos, a hazardous product that another company manufactured.

Macias argues that the purpose of a manufacturer's product is relevant to the question of whether the manufacturer owes a duty to warn of the dangers of another manufacturer's hazardous product. In his view, [r]espirators are "different from products such as hammers and

⁴ As part of our Supreme Court's strict liability discussions in *Simonetta* and *Braaten*, the court characterized asbestos—and not the products that required asbestos—as the harmful products. *Simonetta*, 165 Wn.2d at 363 ("the unreasonably dangerous product in this case was the asbestos insulation"); *Braaten*, 165 Wn.2d at 396 ("[h]ere, the injury-causing products were the products containing asbestos.").

wrenches, because respirators belong to a category of products whose specific design and purpose is to prevent exposure to hazardous substances.” Br. of Resp’t at 2. Accordingly, he argues, the respirator manufacturers here and the product manufacturers in *Simonetta* and *Braaten* “stand in very different positions with respect to such considerations of logic, common sense, justice, policy, [or] social ideas of where loss should fall.” Br. of Resp’t at 23.

As *Simonetta* and *Braaten* make clear, however, it is not a product’s purpose that determines whether a duty exists but, rather, whether the manufacturer is “in the chain of distribution of the hazardous product.” *Simonetta*, 165 Wn.2d at 354; *Braaten*, 165 Wn.2d at 390. The *Simonetta* court rejected the argument that the manufacturer’s knowledge that its evaporator would be used in conjunction with asbestos-containing insulation created a duty to warn under section 388. *Simonetta*, 165 Wn.2d at 349-50. Here, the respirator manufacturers knew that their products would be used to filter hazardous substances, including not only asbestos particles, but also dust and fumes from painting and welding. The respirator manufacturers’ ability to foresee that their products would be used in tandem with hazardous substances like asbestos, and that cleaning and maintaining their respirators might expose workers to asbestos, does not give rise to a duty to warn under section 388 where the respirator manufacturers were not involved in manufacturing, supplying, or distributing the asbestos. As the *Simonetta* court noted, “Foreseeability does not create a duty but sets limits once a duty is established.” *Simonetta*, 165 Wn.2d at 349 (quoting *Simonetta*, 137 Wn. App. at 23), *overruled on other grounds by Simonetta*, 165 Wn.2d at 341.

Macias also emphasizes that *Simonetta* and *Braaten*’s “general rule that manufacturers have no duty to warn of dangers of a product that the manufacturer did not make” is subject to

“numerous potential exceptions.” Br. of Resp’t at 10 (emphasis omitted). Macias’s claim against the respirator manufacturers, however, does not fit into an established exception. Macias does not allege, for example, that the respirator manufacturers incorporated a defective component into their respirators such that they had a duty to warn under the theory known as “assembler’s liability.” See *Braaten*, 165 Wn.2d at 388. Additionally, the *Braaten* court left open the possibility that “a duty to warn might arise 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, or required because of a peculiar, unusual, or unique design.” *Braaten*, 165 Wn.2d at 397. But Macias has not presented evidence that the respirator manufacturers here specified that asbestos should be “applied to, in, or connected to” their respirators due to the respirators’ peculiar or unique design.

The single Washington case and numerous out-of-state cases that Macias cites do not support his claim that case law interpreting section 388 “consistently hold[s] 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.” Br. of Resp’t at 32-33. These cases are either not directly on point or involve situations where the manufacturer’s own product malfunctioned due to an alleged manufacturing or design defect. See *White v. W.G.M. Safety Corp.*, 707 F. Supp. 544, 545-48, (S.D. Ga. 1988) (concluding that an employer’s independent duty under federal regulations and industry standards to warn its employee of the dangers of sandblasting—which caused the employee’s silicosis after exposure to silica dust—did not relieve the manufacturers and sellers of sandblasting equipment of their duty to warn the employee of the dangers arising

from the use of their respiratory equipment); *Fuller v. Fend-All Co.*, 70 Ill. App. 3d 634, 388 N.E.2d 964, 965, (1979) (reversing trial court's summary judgment order on behalf of a safety glasses manufacturer where a worker who was injured while wearing the glasses claimed that the glasses were unreasonably dangerous because they lacked a "safety side shield" design feature); *Duvon v. Rockwell Int'l.*, 116 Wn.2d 749, 751-61, 807 P.2d 876 (1991) (affirming trial court's denial of portable exhauster manufacturer's summary judgment motion where exhauster's ventilation/filter system failed, exposing the plaintiff to toxic levels of ammonia gas).

Two other cases that Macias cites revolve around the inadequacy of jury instructions, not a manufacturer's duty to warn. See *Petes v. Hayes*, 664 F.2d 523, 524 (5th Cir. 1981) (reversing jury verdict for respirator manufacturer where trial court's special interrogatories were inconsistent with the jury instructions and therefore likely to mislead the jury); *Yates v. Norton Co.*, 403 Mass. 70, 525 N.E.2d 1317, 1318-21 (1988) (reversing jury verdict for respirator manufacturer due to deficient jury instructions on the manufacturer's implied warranty of merchantability). Finally, Macias cites two unpublished federal district court decisions, which are distinguishable because they involve coal miners' claims against respirator manufacturers that the respirators which the miners wore during their labors did not adequately protect them from harmful coal dust.⁵

Essentially, Macias urges us to adopt a new exception to what he characterizes as *Simonetta* and *Braaten*'s "general rule." Macias asks us to adopt a rule which no other court has

⁵ Mem. & Order of U.S. District Court, *Hargis v. Am. Optical Corp.*, No. 06-CV-862-JPG, 2007 WL 924486 (S.D. Ill. Mar. 27, 2007); Mem. & Order of U.S. District Court, *Simon v. Optical Corp.*, No. 06-CV-861-JPG, 2007 WL 924496 (S.D. Ill. Mar. 27, 2007).

adopted. Specifically, Macias urges us to conclude that under section 388, a product manufacturer has a duty to warn of a hazardous substance's dangers where the product's purpose is to protect users from exposure to the hazardous substance.⁶ Macias's proposed exception undermines *Simonetta* and *Braaten*'s rationale for imposing a duty to warn under section 388 and we reject it.

II. COMMON LAW STRICT LIABILITY

The respirator manufacturers also argue that they did not have a duty to warn Macias about the dangers of asbestos exposure under the theory of common law strict liability.⁷ We agree.

A. Standard of Review

Whether a manufacturer owes a duty to warn is a question of law that we review de novo. *Lunsford*, 166 Wn.2d at 270; *See Simonetta*, 165 Wn.2d at 349; We apply the RESTATEMENT (SECOND) OF TORTS § 402A (1965) to determine whether a manufacturer is strictly liable for its "unreasonably dangerous" products. *Simonetta*, 165 Wn.2d at 354. Section 402A states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and

⁶ In oral argument before us, Macias agreed this new rule would apply to a manufacturer of rubber gloves.

⁷ In *Simonetta*, our Supreme Court acknowledged that "[w]e have not . . . consistently maintained a clear distinction between strict liability and negligence theories in the failure to warn context." *Simonetta*, 165 Wn.2d at 356. The court noted that "in a negligence action, the focus is on the conduct of the defendant; in a strict liability action, the focus is on the product itself and the reasonable expectations of the user." *Simonetta*, 165 Wn.2d at 356-57.

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Thus, under section 402A, “a product, though faultlessly manufactured and designed, may 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.” *Simonetta*, 165 Wn.2d at 355. A necessarily dangerous product with an inadequate warning is “unreasonably dangerous” under section 402A. *Simonetta*, 165 Wn.2d at 355.

Common law strict liability for unreasonably dangerous products is limited to the parties in the chain of distribution, including sellers, wholesale or retail dealers or distributors, and manufacturers. *Simonetta*, 165 Wn.2d at 355; *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. f. Under the common law, “a manufacturer does not have an obligation to warn of the dangers of another manufacturer’s product.” *Braaten*, 165 Wn.2d at 391. Rather, “[w]e justify imposing liability on the defendant who, by manufacturing, selling, or marketing a product, 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.

B. Strict Liability Analysis in *Simonetta* and *Braaten*

In *Simonetta*, our Supreme Court concluded that Viad was not strictly liable under section 402A for its failure to warn because (1) Viad did not manufacture or market the asbestos insulation, (2) Viad did not have control over the type of insulation that the navy selected to

insulate Viad's product, and (3) Viad's evaporator functioned as intended. 165 Wn.2d at 355-57. The court observed that the "unreasonably dangerous product in this case was the asbestos insulation" whereas Viad's completed product was "the evaporator as delivered by Viad to the [N]avy, sans asbestos insulation." *Simonetta*, 165 Wn.2d at 362-63. The policy justifications underlying strict products liability did not justify imposing liability because Viad had no control over the type of insulation that the navy selected and earned no revenue from the sales of asbestos-containing products. *Simonetta*, 165 Wn.2d at 363.

The *Braaten* court followed *Simonetta*, holding that Braaten had not presented sufficient evidence that the pump and valve manufacturers had "manufactured, sold, or were otherwise in the chain of distribution of the asbestos-containing insulation applied to their products." *Braaten*, 165 Wn.2d at 389. Thus, the manufacturers were "not liable under section 402A for failure to warn of the danger of exposure during maintenance of their products to asbestos-containing insulation that was manufactured and supplied by third parties." *Braaten*, 165 Wn.2d at 389-90. The *Braaten* court observed that "the injury-causing products were the products containing asbestos" and that Braaten had "not established a connection between the injury and the manufacturers' products themselves, as is required." *Braaten*, 165 Wn.2d at 396.

C. Strict Liability Analysis

As was the case in *Simonetta* and *Braaten*, section 402A does not impose a duty to warn on the respirator manufacturers here. The respirator manufacturers did not manufacture or supply the asbestos that injured Macias and did not control the type of contaminants used at the shipyard. Moreover, there is no indication that the respirators malfunctioned in any way; rather, Macias's claim is based on the fact that workers turned in dusty respirators, which he then

cleaned. Under similar facts, the *Simonetta* court concluded that the product manufacturer had no duty to warn the worker who maintained its products that asbestos exposure was dangerous. *Simonetta*, 165 Wn.2d at 355-60.

Macias argues that the respirator manufacturers were “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.” Br. of Resp’t at 3 (quoting *Simonetta*, 165 Wn.2d at 355). Macias’s quotation of *Simonetta* is selective; he omits the language that immediately precedes this statement, which justifies imposing liability “on the defendant who, by *manufacturing, selling, or marketing a product*” is in the best position to know of a product’s dangerousness. *Simonetta*, 165 Wn.2d at 355 (emphasis added). Here, because the respirator manufacturers played no role in the manufacture, sale, or marketing of asbestos materials, imposing liability is not justified.

III. WASHINGTON PRODUCTS LIABILITY ACT

The respirator manufacturers argue that, to the extent that the Washington Products Liability Act (WPLA) applies to Macias’s products liability claim,⁸ the WPLA does not require them to warn of the dangers of another manufacturer’s product. Macias counters that imposing a duty on the respirator manufacturers to “warn of the risk of exposure to a hazardous product against which their products are specifically designed to protect” is consistent with the WPLA’s “risk utility” and “consumer expectations” tests. Br. of Resp’t at 39. We conclude that the

⁸ WPLA applies to all products liability claims “arising on or after July 26, 1981.” RCW 4.22.920(1); *see also* Laws of 1981, ch. 27. Macias’s tenure as a tool keeper from 1978 to 2004 involved work both before and after the WPLA’s enactment.

WPLA did not require the respirator manufacturers to warn Macias of the dangers of another company's product.

Under the WPLA, a manufacturer is subject to liability for a claimant's harm if its product is "not reasonably safe because adequate warnings or instructions were not provided." RCW 7.72.030(1). A "manufacturer" includes "a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer." RCW 7.72.010(2). The "relevant product" under the WPLA is the product or its component that gave rise to the product liability claim. RCW 7.72.010(3).

The definition of "not reasonably safe" for purposes of a suit alleging failure to warn of dangers existing at the time of manufacture⁹ incorporates the "risk-utility test":

A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

RCW 7.72.030(1)(b); *see also Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 759, 818 P.2d 1337 (1991). The "consumer expectation test" is also relevant to determining whether a product is "not reasonably safe." *Ayers*, 117 Wn.2d at 759. *See* RCW 7.72.030(3) ("In determining whether a product was not reasonably safe under this section, the trier of fact

⁹ Macias does not specify whether his theory is that the respirators were not reasonably safe because "adequate warnings or instructions were not provided *with the product*" or because "adequate warnings or instructions were not provided *after the product was manufactured*." *See* RCW 7.72.030(1)(b),(c) (emphasis added).

shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.”)

As we discussed in the preceding section, our Supreme Court has concluded—under pre-WPLA products liability principles—that product manufacturers outside of the chain of distribution of an unreasonably dangerous product do not have a duty to warn users of the dangers of another manufacturer’s unreasonably dangerous product. *Simonetta*, 165 Wn.2d at 355; *Braaten*, 165 Wn.2d at 391. The WPLA states that “previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.” RCW 7.72.020(1). In Macias’s brief discussion of the WPLA, he cites no language in the WPLA that would modify *Simonetta* and *Braaten*’s holdings, rooted in pre-WPLA law, that manufacturers outside of a dangerous product’s chain of distribution have a duty to warn. Furthermore, Macias’s focus on the “risk utility” and “consumer expectation” tests is misplaced. These tests are relevant for determining whether a product is “not reasonably safe,” but they do not establish that a manufacturer outside of a dangerous product’s chain of distribution has a duty to warn about the product’s hazards. Therefore, Macias’s WPLA claim fails.

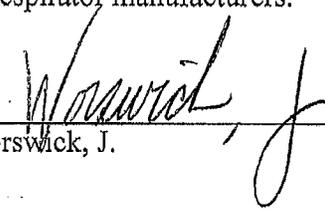
The concurrence invites the Supreme Court to “paint with a narrower brush” in cases such as this because “the purpose of the product was to capture hazardous substances and protect the user” and because the respirator needed to be cleaned in order to function properly. But our Supreme Court has made clear that the purpose of the product is not what gives rise to the duty to warn. And creating liability for this class of product described in the concurrence would impose a duty upon manufacturers and sellers of all types of filters, not just respirators. Indeed, such a duty to warn could well be impossible to fulfill, as filters concentrate any number of

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contaminants. Warnings are required to be sufficient "to catch the attention of persons who could be expected to use the product; to apprise them of its dangers and to advise them of the measures to take to avoid those dangers." *Little v. PPG Industries, Inc.* 92 Wn.2d 118, 122, 594 P.2d 911 (1979). Imposing such a duty to warn would put manufacturers in the impossible position of warning of unknowable dangers posed by unknown contaminants.

The respirator manufacturers had no duty to warn Macias about the dangers of asbestos, a product that the respirator manufacturers did not manufacture, supply, or sell. Because the trial court erred by failing to grant summary judgment to the respirator manufacturers, we remand for entry of an order granting summary judgment.

The trial court's denial of summary judgment is reversed, and the case is remanded for entry of an order granting summary judgment to the respirator manufacturers.



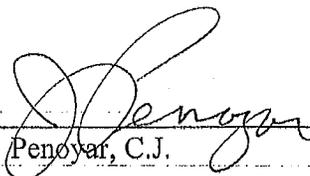
Worswick, J.

I concur:



Brosey, J.

PENoyer, C.J. (conurrence) — In my view, the facts here are quite different than those in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008). In those cases, a third party added the hazardous product to the defendant manufacturer's product after the original sale. Here, the respirators' intended purpose was to capture hazardous substances and thus protect the user. For the respirators to function properly, as intended by the user and the manufacturer, the user or a co-worker needed to clean the respirators' surfaces and the filters containing concentrated hazardous products. Under these facts, Macias strongly argues that the respirator manufacturers owed a justiciable duty to the person cleaning the respirators under both common law negligence and strict liability, as well as under chapter 7.72 RCW. However, under the broad language of *Simonetta* and *Braaten*, Macias's claims must fail. Whether the Supreme Court may choose in the future to paint with a narrower brush in cases such as this remains to be seen.



Penoyer, C.J.