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No. 85535-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

**F I L E D**  
FEB 17 2011  
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STATE OF WASHINGTON

LEO MACIAS and PATRICIA MACIAS,  
Macias-Petitioners,

v.

SABERHAGEN HOLDINGS, INC., et al.,  
Defendants-Respondents.

**ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

The Court of Appeals correctly applied this Court's recent decisions, *Simonetta* and *Braaten*,<sup>1</sup> and held that Mine Safety Appliances Company, American Optical Corporation and North Safety Products USA ("Respirator Manufacturers") had no duty to warn of the dangers of asbestos—a product that they did not manufacture, distribute, sell, or otherwise place into the stream of commerce.

Macias fails to justify his request that this Court review that decision. Although Macias premises his request for review on RAP 13.4(b)(1) and 13.4(b)(4), there is neither a conflict between the Court of Appeals decision and *Simonetta* or *Braaten*, nor is the issue one of "substantial public interest." See RAP 13.4(b)(1) and (b)(4). Instead, the Court of Appeals followed the clear "chain of distribution" rule articulated just two years ago by this Court. After an extensive review of product liability cases and an examination of the policy considerations governing those cases, this Court recognized that only those who are in the chain of distribution of a product—those who manufacture, sell, or supply the product—have a duty to warn about the dangers associated with that product.

Nor is there any issue of substantial public interest at stake.

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<sup>1</sup> *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).

Macias urges this Court to accept review and create a “safety product” exception to the clear chain-of-distribution rule enunciated in *Simonetta* and *Braaten*. There is no reason to do so. The chain-of-distribution rule already adopted incorporates important policy considerations and provides clear analysis for courts and parties alike. There is no greater public interest in this case than there would be in any other case involving products that neither contain asbestos nor come within a manufacturer’s chain of distribution. Regardless, there is no basis in this case to request for an exception for “safety products” because Macias was not using the respirators as “safety products.” Macias did not wear the respirators at issue; instead, he simply cleaned respirators that may have been worn by others around asbestos. The respirators here are no different than the products at issue in *Simonetta* and *Braaten*. Moreover, this case has little public import considering that over the decades of asbestos litigation in this state, there has never been a claim by someone for cleaning a non-asbestos containing product such as a respirator or any other “safety-product.” Macias’s Petition for Review should be denied.

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

This case arises out of Macias’s handling and cleaning of half-mask respirators, which cover the user’s mouth and nose, and full-faced respirators, which also cover the eyes. CP at 125, 148-149. Todd Shipyard, Macias’s employer, provided these

respirators to its employees for use in a variety of settings, including painting, welding, and carpentry work. CP at 124. The respirators did not contain asbestos and did not require the use of asbestos.

Macias's claims are **not** based on his wearing a respirator. He did not allege that the respirators failed to protect him from inhaling asbestos while using a respirator or that the respirators malfunctioned in any way. Instead, his claims are based solely on the fact that the respirators—like any other tool, piece of equipment, or safety gear used around the shipyard—may have been used around asbestos-containing products and then returned dusty to the tool room for cleaning. When Todd employees returned their respirators to the tool room, they set them and other equipment on a counter, and a tool room employee, such as Macias, checked them into the computer. CP at 126. Next, Macias and his coworkers threw the respirators into large baskets, occasionally bouncing them off a window or other respirators, which he claims caused dust to be released. CP at 127. He would then disassemble the respirators, throw away the filter/cartridge, wash the respirators in a sink, rinse them in another sink, and then place them in an oven for drying. CP at 128.

Macias nonetheless claims that the Respirator Manufacturers had a duty to warn him of the dangers of asbestos. The Court of Appeals disagreed. Relying on *Simonetta* and

*Braaten*, the court held that the Respirator Manufacturers were entitled to summary judgment because 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.” Macias Opinion, Appendix to Petition at 18.

In his Petition, Macias claims for the first time that the respirators and filters “collected and concentrated” asbestos, and therefore “combined” with the asbestos to create a new hazard. This argument is prevalent throughout the brief, as there are at least 15 references to a “combination” argument. But this desperate attempt to create a new reason why review should be accepted fails. Not only did he not raise this below, but in fact argued below that this was not a case involving a combination of products. Moreover, this argument fails because it only applies where two “sound” products combine to create a new hazard. Macias does not allege that asbestos is a sound product. On the contrary, he alleges that the Respirator Manufacturers failed to warn him of the ***dangers of asbestos***. Thus, this argument should be dismissed not only because it is untimely, but also because there is no legal or factual basis to support it.

### III. ARGUMENT

#### A. *Simonetta* and *Braaten* Were Applied Correctly

Just two years ago, in *Simonetta* and *Braaten*, this Court examined the long history of product liability law in Washington and other jurisdictions. See *Simonetta*, 165 Wn.2d at 350-54. Based on that careful analysis, the Court concluded that, in Washington and across the nation, the duty to warn of the dangers of a product rest with those who manufacture or are otherwise in the chain of distribution of that particular product. *Id.* at 353–54, 363; *Braaten*, 165 Wn.2d at 385, 390, 394.<sup>2</sup>

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<sup>2</sup> In an attempt to create a basis for review, Macias also makes passing reference to what he characterizes as “a matter of first impression.” See Petition at 7. He claims that the Court of Appeals “held, as a matter of first impression, that to the extent that Macias’s 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 the WPLA.” *Id.* Referenced only in his Statement of the Case, Macias thereafter presents no argument on this issue that would justify review. But even if he did, merely claiming that the holding was a matter of first impression does not justify review. *In re Interest of J.R.*, 156 Wn. App. 9, 15, 230 P.3d 1087, rev. denied, 2010 Wash. LEXIS 993 (Nov. 3, 2010); *State v. Collins*, 152 Wn. App. 429, 434-35, 216 P.3d 463 (2009), rev. denied, 168 Wn.2d 1020 (2010); *State v. Torres*, 151 Wn. App. 378, 384, 212 P.3d 573 (2009), rev. denied, 167 Wn.2d 1019 (2010) (denying review where the Court of Appeals, in published decisions, had characterized issues decided on appeal as ones of first impression.). Moreover, it is irrelevant whether Macias’s claims arose before or after the enactment of the WPLA. The WPLA only modified the common law to the “extent set forth in this chapter.” RCW 7.72.020(1). As recognized by the Court of Appeals, “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 manufactures outside of the dangerous product’s chain of distribution have a duty to warn.” *Macias Opinion*, Appendix A to Petition at 17. Thus, under both the WPLA and common law, only manufacturers and

Macias asserts that this holding was a *general rule* and claims that this Court “described its holdings in *Simonetta* and *Braaten* narrowly based on the facts of each case.” (Petition at 10) In fact, in those cases the Court articulated a broad chain of distribution rule that applies to any product liability case. The rule imposes a duty to warn only on “those in the chain of distribution of the hazardous product.” *Simonetta*, 165 Wn.2d at 354.

Here, as in *Simonetta* and *Braaten*, the hazardous product is asbestos. The Respirator Manufacturers—like the evaporator, valve, and pump manufacturers in *Simonetta* and *Braaten*—did not manufacture or otherwise participate in the chain of distribution of that hazardous product.<sup>3</sup> Therefore, the Court of Appeals correctly applied this Court’s holdings and reasoning in *Simonetta* and *Braaten* and affirmed that a manufacturer of a product that does

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those in the chain of distribution of the not reasonably safe product owe a duty to warn. RCW 7.72.030.

<sup>3</sup> If anything, this case presents an even more compelling circumstance than *Simonetta* and *Braaten* for not expanding a manufacturer’s duty to warn. There is even less of a connection between the respirators and asbestos than between the products at issue in *Simonetta* and *Braaten* and asbestos. The respirators, unlike the valves and pumps in *Braaten*, did not originally come with asbestos-containing components. As manufactured, the respirators were complete products that were asbestos-free when sold. In addition, in *Simonetta* and *Braaten* the Court acknowledged that the evaporators, pumps, and valves required insulation to function properly and that the insulation had to be disturbed during routine maintenance of the equipment. *Simonetta*, 165 Wn.2d at 349; *Braaten*, 165 Wn.2d at 383. Here, the respirators did not require the use of any other product, much less an asbestos-containing product, to function properly.

not contain asbestos, such as the Respirator Manufacturers, has no duty to warn of the dangers of asbestos.

In short, the decision of the Court of Appeals follows precisely the holding and reasoning of *Simonetta* and *Braaten*. The Court should decline to revise the holdings of those cases.

**B. The Purpose of a Product Is Irrelevant**

Macias urges the Court to accept review, create a “safety purpose” exception, and hold the Respirator Manufacturers liable for failing to warn of the dangers of another's product because their products have a safety purpose. The Court should reject that request for multiple reasons.

*First*, this Court has already considered and determined that a product's purpose does not affect whether a duty exists. *Simonetta*, 165 Wn.2d at 349; *Braaten*, 165 Wn.2d at 385. Although Macias claims that *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 818 P.2d 1337 (1991), supports his argument that the intended purpose of a product is material to the question whether a duty exists, that reliance is misplaced. At issue in *Ayers* was whether Johnson & Johnson failed to warn of hazards associated with its own product—baby oil—which was the product Johnson & Johnson placed in the stream of commerce and thus was within its chain of distribution. The Court did not discuss whether Johnson & Johnson had a duty, but instead focused on

the scope of that duty given the intrinsic nature of the product. In contrast, Macias's claim here is based on the alleged failure to warn of the hazards of another manufacturer's product—*asbestos*. It is undisputed that the Respirator Manufacturers here did not place that product in the stream of commerce and thus were not within the *asbestos* products' "chain of distribution." Given that distinction, *Ayers* is irrelevant and does not aid Macias's argument.

*Second*, by arguing that courts should examine the purpose of a product in order to determine whether a duty exists, Macias is arguing, in essence, that court should determine whether a duty exists based on the foreseeability of injury. But it is well established that "[f]oreseeability does not create a duty but sets limits once a duty is established." *Simonetta*, 165 Wn.2d at 349. Macias complains that foreseeability thus shields a product manufacturer from liability. (Petition at 18) He is wrong. Foreseeability and purpose are merely irrelevant and should not be considered either in finding a duty or in determining that one does not exist.

*Third*, *Simonetta* and *Braaten* thoroughly considered and addressed why a product's purpose does not figure in the chain-of-distribution analysis. Noting that *Simonetta* and the majority rule nationwide restricts a "manufacturer's duty to warn . . . to warnings based on the characteristics of the manufacturer's own products," the *Braaten* court acknowledged that this is so because 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 (citations omitted).

Yet this is what Macias asks this Court to do if it accepts review and creates a “safety product” exception. If a manufacturer of any product that could be labeled a "safety product" had a duty to warn of the dangers of all other products that it might foreseeably be used with, "such a duty to warn could well be impossible to fulfill." Macias Opinion, Appendix to Petition at 18. For example, as the Court of Appeals recognized, the respirators have various filters/cartridges designed to protect wearers against numerous contaminants, including welding fumes, paint fumes, and dust. The Respirator Manufacturers have no control over where their respirators are used, nor the contaminants that might be in any particular area. Under Macias's theory, the Respirator Manufacturers would be charged with becoming experts in not only their own products, but in any product that might produce fumes or dust.

As recognized in *Simonetta* and *Braaten*, that is not good policy. The duty to warn about the dangers of a product should be borne by the manufacturer of that product "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." See *Simonetta*, 165 Wn.2d at 355. As one court has noted, imposing a duty on "safety products" or other products used with asbestos-containing products would lead to the imposition of liability on every tool, equipment, and clothing manufacturer whose products could be used around a hazardous substance:

The social consequences of a rule imposing a duty in these circumstances would be to widen the scope of potential liability for failure to warn far beyond persons in the distribution chain of the defective product to whole new classes of defendants whose safety products happen to be used in conjunction with a defective product made or sold by others. Manufacturers, distributors, and retailers would incur potential liabilities not only for the products they make and sell, ***but also for every other product with which their product might be used.***

*Cullen v. Industrial Holdings Corp.*, No. A097105, 2002 WL 31630885 at \*7 (Cal. App. Nov. 21, 2002) (emphasis added) (holding that grinding wheel manufacturer had no duty to warn of dangers of asbestos released when plaintiff sheet metal worker used grinding wheel to cut asbestos-containing transite pipe).

*Fourth*, a focus on the purpose of a product is particularly inappropriate here where the respirators' safety purpose had nothing to do with the mechanism of injury. Macias's claims are *not based on his wearing the respirator manufacturers' equipment.* In fact, Macias did not wear the respirators. He does not claim that the respirators failed to protect him from the dangers that they were

allegedly designed to prevent.<sup>4</sup> While 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.

Because Macias did not wear the respirators, the “safety purpose” of the respirators is simply not implicated in this case. Instead, the respirators in this case were like the hammers, saws, clothing, tarps, and hundreds of other tools and equipment used around the shipyard and returned to the tool room carrying dust. The respirators, like any other tool or piece of equipment, were merely objects upon which the dust fell. The injury-causing products were the products containing asbestos, for which the Respirator Manufactures cannot be held liable.

C. **The Respirators Did not Combine with Asbestos and Create a New Hazard**

Knowing that his arguments have been soundly rejected,

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<sup>4</sup> Macias attempts to distinguish *Simonetta* and *Braaten*, insisting that while in those cases there was no claim that the equipment itself contained a defect, here the respirators were defective because they had inadequate warnings about every danger that a user could encounter from other manufacturer's products while using the respirator for its intended purpose. (Petition at 19) The flaw in Macias's reasoning arises from misuse of the term “unsafe design feature” to include an absence of warnings. The Court in *Simonetta* “found it inaccurate to speak of a properly manufactured” product as “defective” because it lacked a warning. 165 Wn.2d at 356. Macias's argument here is based upon that same inaccuracy. As in *Simonetta* and *Braaten*, the alleged “defect” is inadequate warnings. Macias does not claim that the respirators had any physical defect such as a leak.

Macias makes a new argument and in doing so, he mischaracterizes the Court of Appeal's holding. Macias asserts that the court held that the Respirator Manufacturers "had no duty to warn of the new hazard created by the asbestos that was collected and concentrated by their respirators." (Petition at 8-9) While Macias's new and primary argument in his Petition is that the respirators "collected and concentrated" the asbestos and therefore "combined" with the asbestos to create a "new hazard," the Court of Appeals did not address this argument because he did not make it below and there is no evidence in the record to support such an argument. Because it was not raised below, the Court of Appeals could not have "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.'" (as alleged in the Petition at 15-16).

In addition, because it was not raised below either with the trial court or Court of Appeals, this new "combination" argument should not be considered by this Court. RAP 2.5(a); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("Failure to raise an issue before the trial court generally precludes a party from raising it on appeal."); see also *State v. Scott*, 48 Wn. App. 561,

568, 739 P.2d 742 (1987).<sup>5</sup>

Macias actually argued the opposite in the courts below. There he asserted that this was **not** a combination case and attempted to distinguish *Simonetta* and *Braaten* by insisting that the claims in those cases “were necessarily dependent on a **combination** of the party-defendants’ products with asbestos manufactured by other, non-party manufacturers” but that Macias claims this case “[c]onversely . . . focus[ed] strictly on the defective design characteristics of the” respirators. (CP 295-296, emphasis added.) Indeed, Macias concluded by stating:

In the Macias case, the claim is that the respirator *itself* contained an unsafe design feature (that is, inadequate warnings and instructions). Thus, ***instead of focusing on the use of the respirators in conjunction with another product***, the relevant inquiry in this case is whether Defendants had a duty to provide adequate warnings regarding the safe use, handling, cleaning, and maintenance of their respirator products.

(CP 296 (first emphasis in original; second emphasis added.))

Macias similarly crafted his arguments at the Court of Appeals, ***never arguing that the combination of the respirators with asbestos created a new hazard***. Therefore, the Respirator Manufacturers did not respond, and the trial court and Court of Appeals did not examine whether the “combination” of the

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<sup>5</sup> The limited exceptions to this general rule are inapplicable here. See RAP 2.5(a)(1)-(3).

respirators with asbestos created a “new hazard” that the Respirator Manufacturers had a duty to warn against. Thus, this argument should not be considered as a basis upon which to grant review. See *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992).

But even if Macias had raised this argument in the courts below, it is still wrong. Macias relies on a portion of footnote seven in the *Braaten* opinion that states: “In addition, there are some cases where the combination of two **sound** products creates a dangerous condition, and both manufacturers have a duty to warn.” *Braaten*, 165 Wn.2d at n.7 (emphasis added). This theory of liability, however, does not apply to this case because Macias does not allege that asbestos is a “**sound**” product. To the contrary, he claims that asbestos is an unsafe product to which he was exposed. This Court specifically recognized the importance of this distinction in footnote seven of the *Braaten* opinion, by citing to *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992), where the court discussed and analyzed it.

In *Rastelli*, the plaintiff’s decedent was killed when, while inflating a tire manufactured by Goodyear, the multipiece tire rim, which was not manufactured by Goodyear, exploded. *Id.* at 223. Much like Macias, the plaintiff contended that Goodyear had a duty to warn against its non-defective tire being used with an allegedly defective tire rim manufactured by another company. *Id.* The court

rejected this argument:

Under the circumstances of this case, we decline to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer. . . . This is not a case where the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn[.]

*Id.* at 225-26.

Where, as in this case and in *Rastelli*, it is alleged that a "sound" product (like the respirators) combines with an allegedly "unsound" product (like asbestos), courts will not impose a duty on the manufacturers of the "sound" product to warn of a dangerous condition created by the "unsound" product. As the *Rastelli* court noted, this rule is justified because the manufacturer of the "sound" product did not have any control over the production of the "unsound" product, did not place that product into the stream of commerce, and did not derive any benefit from its sale. *Id.* at 226. The court in *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. App. 1998), also cited in footnote seven of *Braaten*, agrees: "[The plaintiff's] phrasing of the issue, that Ford had a duty to warn of the dangers associated with the foreseeable use of its vehicles, obscures the fact that she really is attempting to hold Ford liable for unreasonably dangerous replacement component parts that it

neither manufactured nor placed into the stream of commerce.”

*Braaten*, 165 Wn.2d at 34.

Macias also mistakenly relies on this Court’s opinion in *Duvon v. Rockwell International*, 116 Wn.2d 749, 807 P.2d 876 (1991), to support his “combination” argument. First, *Duvon* was primarily about immunity under RCW 51, and any discussion regarding duty was expressly stated by the court not to be precedent. Second, *Duvon* did not involve the combination of two sound products creating a new hazard, but rather involved an exhauster manufacturer’s failure to warn about the dangers allegedly created by the design of its own product. The plaintiff’s claim was premised on a physical design feature in the exhauster, which allegedly permitted exhausting of gasses and caused the his injuries.

Moreover, Macias’s reliance on the Court’s analysis of the Restatement (Second) of Torts § 388 is misplaced. (Petition at 14) Macias ignores or deliberately omits the fact that that portion of the *Duvon* opinion does not have any precedential authority:

As previously noted, this case is before us on denial of summary judgment. It is not clear from the summary judgment order whether the trial judge actually passed on the duty issue or limited itself to the immunity issue. . . . [W]e assume the trial court found that petitioner *could* owe a duty to respondent. In determining whether the trial court was correct, we need only find that a duty could be owed. ***The following discussion is not, therefore, conclusive***

***or binding in further proceedings, but is merely illustrative of the fact that a duty could be owed and that the denial of summary judgment was therefore proper.***

*Duvon*, 116 Wn.2d at 755-56 (first emphasis in original; second emphasis added). *Duvon* does not have any application to this case.

The respirators did not combine with any sound product to create a new hazard. Therefore, Macias's new theory fails.

#### **IV. CONCLUSION**

There is no conflict for the Court to resolve. Holding that the Respirator Manufacturers had no duty to warn of the dangers of asbestos, a product that they did not manufacture or sell or otherwise place into the stream of commerce, is completely consistent with the chain-of-distribution analysis adopted by this Court in *Simonetta* and *Braaten*.

Nor is there any issue of substantial public interest that should be considered by this Court. A product's purpose and the foreseeability of injury have already been addressed and rejected by this Court as a basis to create a duty. There is no justification for asking this Court to undertake the same review that it did just two years ago. RAP 13.4(b). Macias's petition should be denied.

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DATED this 11<sup>th</sup> day of February, 2011.

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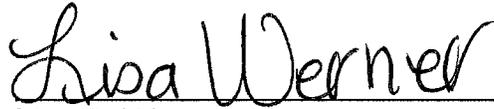
**PROOF OF SERVICE**

I certify that I am a secretary at the law firm of Riddell Williams P.S. in Seattle, Washington. I am a U.S. citizen over the age of eighteen and not a party to the within action. On the date shown below; a true and correct copy of the foregoing was served on counsel of record for Petitioners and Defendant Saberhagen Holdings, Inc. as indicated below:

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<p>Timothy K. Thorson          CARNEY BADLEY SPELLMAN, PS          701 Fifth Avenue, Suite 3600          Seattle, WA 98104  <a href="mailto:thorson@carneylaw.com">thorson@carneylaw.com</a></p> <p><i>Attorneys for Defendant          Saberhagen Holdings, Inc.</i></p>	<p><input type="checkbox"/> Hand Delivery  <input checked="" type="checkbox"/> E-mail  <input type="checkbox"/> U.S. Mail  <input type="checkbox"/> Facsimile</p>

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

DATED this 11<sup>th</sup> day of February, 2011 at Seattle,  
Washington.

A handwritten signature in cursive script that reads "Lisa Werner". The signature is written in black ink and is positioned above a horizontal line.

Lisa R. Werner  
Legal Secretary