

No. 391-71-6-II

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

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LEO MACIAS and PATRICIA MACIAS,

Appellees,

v.

SABERHAGEN HOLDINGS, INC., et. al.,

Appellants.

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DIVISION TWO  
STATE OF WASHINGTON  
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**REPLY BRIEF OF APPELLANTS**

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Paul J. Kundtz, WSBA #13548  
Wendy E. Lyon, WSBA #34461  
Mindy L. DeYoung, WSBA #39424  
RIDDELL WILLIAMS P.S.  
1001 Fourth Avenue, Ste 4500  
Seattle, WA 98154-1192  
Phone: 206-624-3600  
Email: [wlyon@riddellwilliams.com](mailto:wlyon@riddellwilliams.com)

Kamela J. James, WSBA #29787  
BURGESS FITZER, P.S.  
1145 Broadway, Suite 400  
Tacoma, WA 98402  
Phone: 253-572-5324  
Email: [kamelaj@burgessfitzer.com](mailto:kamelaj@burgessfitzer.com)

Randy J. Aliment, WSBA #11440  
Timothy Ashcraft, WSBA #26196  
Joseph Sexton, WSBA #38063  
WILLIAMS, KASTNER & GIBBS  
601 Union Street, Suite 4100  
Seattle, WA 98101  
Phone: 206-628-6600  
Email: [asbestos@wkg.com](mailto:asbestos@wkg.com)

Joseph Morford, admitted Pro Hoc Vice  
TUCKER ELLIS & WEST  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, OH 44115  
Email: [Joseph.Morford@TuckerEllis.com](mailto:Joseph.Morford@TuckerEllis.com)

*Attorneys for Appellants*

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## I. INTRODUCTION

Macias concedes that under the rule articulated in *Simonetta* and *Braaten*,<sup>1</sup> the Respirator Manufacturers did not have a duty to warn of the dangers of the asbestos that came from other manufacturer's products.<sup>2</sup> Instead, he asks this Court to create a new exception to that rule by expanding the duty to warn to those outside the chain of distribution of the dangerous product when the product at issue has a "safety purpose."

However, the "safety purpose" of the respirators is irrelevant. First, Macias was not wearing the respirator and therefore, the alleged "safety purpose" is irrelevant. Second, the purpose of a product does not determine whether a duty to warn exists. Regardless of the purpose of a product, there may be a duty to warn of certain hazards inherent in a manufacturer's own product, but there is no duty to warn of the hazards from another manufacturer's product.

Macias cites no legal authority imposing a duty to warn of the hazards of another company's product because of the safety purpose of the product at issue. In all of the cases cited by Macias, the plaintiffs alleged

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

<sup>2</sup> Macias emphasizes that this is a "general," and not an "absolute" rule. However articulated, both parties agree that if *Simonetta* and *Braaten* apply, Macias' claims in this case are barred.

that defendants failed to warn of a physical defect or a limitation in the product they placed in the stream of commerce, and that the physical defect allowed exposure to hazardous substances. In those cases, the plaintiffs did not allege that the manufacturers failed to warn of the dangers of other manufacturers' products.

In contrast, here, Macias does not describe any physical defect in the respirators, but instead insists that they were "defective" because they did not come with a warning about every danger that a user could encounter from other manufacturer's products while using the respirator for its intended purpose. The Washington Supreme Court rejected such an extension of the law and limited a manufacturer's duty to warn to hazards inherent in the manufacturer's own product. This Court should follow *Simonetta* and *Braaten* and reverse the trial court's denial of the Respirator Manufacturer's motions for summary judgment.

## II. ARGUMENT

### A. **The Limited Exceptions to the Rule in *Simonetta* and *Braaten* Do Not Apply.**

In *Simonetta* and *Braaten*, the Washington Supreme Court ruled that a manufacturer of a product does not have a duty to warn of the dangers of asbestos from another manufacturer's product, even if the use and maintenance of the non-asbestos product required or necessitated

exposure to asbestos from other products. *Simonetta*, 165 Wn.2d at 355, 363; *Braaten*, 165 Wn.2d at 380, 390, 394, 396. The Court held that there is no duty to warn of the dangers of a product that the manufacturer did not place in the stream of commerce. *Id.*

The Respirator Manufacturers never argued that this rule of law was absolute. However, this general rule is very broad.

Washington cases discussing and analyzing § 388 liability generally limit the analysis of the duty to warn of the hazards of the product to those in the chain of distribution of the product, such as manufacturers, suppliers, or sellers. Therefore, we find little or no support under our case law for extending the duty to warn to another manufacturer's product.

Case law from other jurisdictions similarly limits duty to warn in negligence cases to those in the chain of distribution of the hazardous product.

*Simonetta*, 165 Wn.2d at 353 (emphasis added).

Under the language of § 388 and our precedent applying § 388, we hold the duty to warn is limited to those in the chain of distribution of the hazardous product.

*Id.* at 354 (emphasis added).

We held in *Simonetta* that a manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its product if it did not manufacture the insulation and was not in the chain of distribution of the insulation. It makes no difference whether the manufacturer knew its products would be used in conjunction with asbestos insulation.

Our decision in *Simonetta* is in accord with the majority

rule nationwide: a “manufacturer’s duty to warn is restricted to warnings based on the characteristics of the manufacturer’s own products”.

*Braaten*, 165 Wn.2d at 385 (internal citation omitted; emphasis added).

Under *Simonetta*, as a matter of law the manufacturers here are not liable under § 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.

*Id.* at 389-90.

Macias identifies three limited exceptions to this rule of law, none of which apply to the present case. First, Macias references the exception for a manufacturer who incorporates a defective component into its finished product. Brief of Resp. at 10-11; citing *Braaten*, 165 Wn.2d at 385 n.7. There is no allegation or evidence that the respirators contained asbestos as a component. Second, Macias references the rare exception where the combination of two sound products creates a dangerous condition. Brief of Resp. at 11. This exception is inapplicable here because the asbestos containing products were not “sound” (*i.e.*, safe); they were dangerous before they contacted the respirators. Macias does not even argue that the first two exceptions apply to this case.

Third, in *Braaten* the Court left open the possibility for an exception when the product manufacturer specifies that asbestos-containing products be “applied to, in, or connected to their product, or

required because of a peculiar, unusual, or unique design.” *Braaten*, 165 Wn.2d at 397. But the Supreme Court did not reach this issue and this exception has not been recognized in Washington. *Id.* Even if this exception was recognized, it would not apply to this case. There is no evidence that the Respirator Manufacturers specified that an asbestos-containing product be applied or connected, or placed inside the respirators. Nor is there an allegation that asbestos was required because of a peculiar, unusual or unique design of the respirators.

In his briefing, Macias stretches the words “applied to, in, or connected to” to imply, but not explicitly argue, that this case could fall within the exception because one of the three Respirator Manufacturers instruction books stated that the product could be used around asbestos. Brief of Resp. at 11, 4. The Court in *Simonetta* and *Braaten* rejected such a broad application of this exception when it ruled that there was no duty to warn even when the products at issue *required* exposure to asbestos containing products as part of routine and necessary maintenance. *Simonetta*, 165 Wn.2d at 350; *Braaten*, 165 Wn.2d at 389-90. Thus, the exception, if ultimately adopted in Washington, would be limited to construction or operational specifications that require the use of the dangerous product for effective operation of the product.

Macias presents no other exceptions. Therefore, the broad general rule applies. The Respirator Manufacturers have no duty to warn under the current law of Washington and summary judgment should be granted.

**B. Macias Presents the Same Claims as Plaintiffs Did in *Simonetta* and *Braaten*.**

As in *Simonetta* and *Braaten*, it is undisputed that the proximate cause of Macias's alleged harm is asbestos from other manufacturers' products. Brief of Resp. at 22; *Simonetta*, 165 Wn.2d at 358; *Braaten*, 165 Wn.2d at 381. There is no allegation that the respirators themselves contained an unsafe physical design or construction feature that would create a duty to warn. Yet Macias argues that *Simonetta* and *Braaten* are not controlling because in *Simonetta*, there was "no claim that the evaporator itself contained an unsafe design feature," whereas here, the respirators contained an "unsafe design feature" in the form of inadequate warnings. Brief of Resp. at 14.<sup>3</sup> The flaw in Macias' 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

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<sup>3</sup> Macias takes this phrase from *Simonetta* completely out of context. *Simonetta*, 165 Wn.2d at 361. In making this statement, the Court was distinguishing the facts from those in *Stapleton v. Kawasaki Heavy Industries*, 608 F.2d 571 (5th Cir. 1979), where Kawasaki was liable for failure to warn of the unsafe design feature on its motorcycle, which caused gas to leak and consequent fire damage.

warning. 165 Wn.2d at 356. Macias' argument here is based upon that same inaccuracy.

The claims here are the same claims made in *Simonetta* and *Braaten*: the hazard was asbestos, the plaintiff came into contact with the asbestos while maintaining the defendants' products, the defendants' products did not contain asbestos and were otherwise not defective, the defendants' products were allegedly designed for or required the use of an asbestos-containing product, and the defendants knew that their products would be used with the asbestos-containing product. *Simonetta*, 165 Wn.2d at 345, 349; *Braaten*, 165 Wn.2d at 381-82, 388-91. As in *Simonetta* and *Braaten*, Macias' claims must be dismissed because they are based on a failure to warn of the dangers of another manufacturer's product, rather than on a defect in the product at issue.

**C. The Safety Purpose of Respirators Does Not Create a Basis for an Exception to the Rule in *Simonetta* and *Braaten*.**

**1. The Operational Purpose of the Respirator is Irrelevant.**

Macias attempts to distinguish *Simonetta* and *Braaten* by the fact that the purpose of wearing a respirator is to protect the user, and argues that the Court should create a new exception to the rule based solely on the

safety purpose of respirators.<sup>4</sup> However, Macias did not wear the respirators at issue. Thus, the operational purpose of respirators is irrelevant to this case. In this respect, Macias' handling of the respirators is no different than the handling of many other tools and safety equipment used in the shipyard and exposed to asbestos dust. Identifying the "purpose" of the respirators is nothing more than stating that exposure to asbestos was foreseeable from the known, intended, and expected use of the respirators. The Court in *Simonetta* and *Braaten* rejected the invitation to extend the duty to warn based upon the fact that exposure was known, intended, and expected as part of the routine and necessary maintenance of the product at issue. *Simonetta*, 165 Wn.2d at 350; *Braaten*, 165 Wn.2d at 389-90. Macias now admits that foreseeability of a danger associated with the use of a product does not create a duty to warn for the manufacturer. Brief of Resp. at 13.<sup>5</sup>

Macias also argues, "there is no distinction in the law between a wearer and cleaner of a product. ... Both are 'uses' ... ." Brief of Resp. at

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<sup>4</sup> As discussed in the Brief of Appellants at 18-20, this is a distinction without a difference.

<sup>5</sup> Macias points to the fact that one of the three Respirator Manufacturers provided instructions regarding maintenance of the respirators. Of course manufacturers can provide warnings when no duty to warn exists and indeed should be applauded for being more cautious than the law requires. They certainly should not be penalized for providing a warning despite there being no duty to warn, as this would be contrary to good public policy.

20. This argument is premised upon an imprecise application of the word “use” and is an attempt to focus the Court on the wrong question. It is also a distinction that the Respirator Manufacturers are not making.

A manufacturer may have a duty to warn about a danger inherent in its own product to which the plaintiff is exposed during “use,” whether that use is operating, cleaning or maintaining that product. However, as the Court held in *Simonetta* and *Braaten*, a manufacturer does not have a duty to warn about hazards of another manufacturer’s products which arise from the use, maintenance or cleaning of the non-asbestos containing product. *Simonetta*, 165 Wn.2d at 354, 363; *Braaten*, 165 Wn.2d at 389-90, 398.

Macias incorrectly reasons that if there is a duty to warn the wearer of a defect inherent in the respirator itself, which allows exposure to hazardous substances, there must be a duty to warn the cleaner of a respirator of the dangers of hazardous substances. *See* Brief of Resp. at 19-20. Macias conflates failure to warn of physical defects in a product with failure to warn of hazards of other manufacturers’ products. The relevant distinction is not between wearing/using a product and cleaning/maintaining it. The relevant distinction is between a defect in the

defendant's product versus a danger that originates from another manufacturer's product.

*Simonetta* and *Braaten* did not hold, nor do the Respirator Manufacturers argue, that a manufacturer may escape liability for a physical defect in its own product, such as a broken valve or an exploding evaporator, or for a failure to warn about such a defect. Like other product manufacturers, the Respirator Manufacturers may have a duty regarding a physical defect in their own products, such as a leak which allows hazardous substance to be inhaled while wearing the respirator. However, they do not have a general duty to warn about the hazards of another company's product.

This analysis is consistent with the analyses in *Simonetta* and *Braaten*. In the first instance, the manufacturer has a duty to make a product that is reasonably safe and free of design and construction defects, or to warn about those dangers in the product. The manufacturer is "in the chain of distribution" of the physically dangerous product, and therefore has a duty to warn about the product's physical dangers. *Simonetta*, 165 Wn.2d at 353-54. In the second instance, the manufacturer is not "in the chain of distribution" of the physically dangerous product and therefore has no duty to warn. *Id.* at 354, 363; *Braaten*, 165 Wn.2d at 390-91. This

is precisely the rule articulated in *Simonetta* and *Braaten* that applies to the present case.

**2. Macias Cannot Cite to Any Case Where a Manufacturer Had a Duty to Warn of the Dangers of Another Manufacturer's Product.**

Macias claims that case law outside of Washington supports his theory that the safety purpose of a product creates a duty. Brief of Resp. at 26. Macias' citations are misleading and inapplicable. In each case, a dangerous physical design feature inherent in the defendant manufacturer's product was the proximate cause of the plaintiff's injury. Thus, the manufacturer was charged with failure to warn of the dangerous physical design feature of its own product.

For example, Macias cites to *Duvon v. Rockwell International*, 116 Wn.2d 749, 807 P.2d 876 (1991), where a worker asserted failure to warn against the designer/constructor of a portable exhauster. The worker's claim was premised on a physical design feature in the exhauster, which allegedly permitted exhausting of gasses and caused the worker's injuries. *Id.* at 751; accord *Miller v. Anetsberger Bros., Inc.*, 508 N.Y.S.2d 954, 956 (N.Y. App. Div. 1986) (manufacturer of pizza dough roller machine had duty to warn of "danger of cleaning the machine while the rollers [of the machine, which caused Plaintiff's injury] were operating"); *Hertzfeld*

*v. Hayward Pool Products, Inc.*, 2007 WL 4563446, \*1 (Ohio App. 2007) (manufacturer of swimming pool chlorine feeder may have had duty to warn of unsafe design feature in feeder, which caused high pressure explosion that injured plaintiff). These cases do not support Macias' theory that a manufacturer has a duty to warn of dangers outside of the manufacturer's product.

Similarly, in the respirator cases Macias cites, each plaintiff claimed failure to warn because *a design defect in the respirator itself* failed to block hazardous particles while the plaintiff was wearing the respirator. In *Young v. Logue*, plaintiff sandblaster sued multiple manufacturers of ventilation hoods that he wore while engaged in sandblasting. 660 So.2d 32, 45 (La. Ct. App. 1995). The court focused on failure to warn of physical limitations in the hoods themselves, namely, that the hoods failed to provide respiratory protection during heavy sandblasting. The court concluded that such physical limitation in the hoods was a proximate cause of plaintiff's injuries. *Id.* at 45, 55; *see also Petes v. Hayes*, 664 F.2d 523, 524 (5th Cir. 1981) (plaintiff worked as cutter in asbestos shingle department and wore defendant-manufactured respirators and filters that allegedly "were defective and failed to prevent the inhalation of unsafe amounts of asbestos dust"; such defects caused his

debilitating lung condition); *W.G.M. Safety Corp. v. Montgomery Sand Co.*, 707 F. Supp. 544, 545 (S.D. Ga. 1988) (plaintiff worked as sandblaster and wore defendant-manufactured protective equipment while sandblasting that he alleged were negligently designed and defective and that such design defects caused his silicosis); *W. Yates v. Norton Co.*, 403 Mass. 70, 72, 74, 525 N.E.2d 1317 (1988) (claim based on decedent's exposure to hazardous materials while wearing defendant-manufactured respirator where cartridge had not been replaced; existence of duty not at issue as claim centered on adequacy of warning and the implied warranty of merchantability); *Simon v. American Optical Corp.*, 2007 WL 924496, \*1, \*5 (S.D. Ill. 2007) & *Hargis v. American Optical Corporation*, 2007 WL 924486, \*1 (S.D. Ill. 2007) (in companion cases, plaintiff coal miners wore defendants' respiratory protection products, which allegedly failed to prevent exposure to particulate dust; court did not address duty to warn, but merely held plaintiffs had stated claims for relief under negligence and strict liability standards).

Macias also cites to cases from other jurisdictions involving safety glasses. As with the respirator cases, each claim was for failure to warn of physical design defects in the glasses themselves—such defect being the proximate cause of the plaintiff's injury. *Fuller v. Fend-All Co.*, 70

Ill. App.3d 634, 635 (1979) (plaintiff claimed blindness and related losses as “direct and proximate results of the unreasonably dangerous condition in [defendant-manufacturer’s] glasses.”); *Light v. Weldarc Co., Inc.*, 569 So.2d 1302, 1303 (Fla. Dist. Ct. App. 1990) (same); *Jackson v. H.L. Bouton Co., Inc.*, 630 So.2d 1173, 1174-75 (Fla. Dist. Ct. App. 1994) (same).

The claims in these out-of-state cases were based on deficiencies in the design of the product itself. Here, there is no allegation that the respirators failed to perform as designed and constructed. Despite Macias’ attempt to imply otherwise, those jurisdictions have not been confronted with a question analogous to that presented in *Simonetta* and *Braaten*. Macias fails to cite a single case that states that the “safety purpose” of a product creates a duty to warn of the hazards associated with another manufacturer’s product.

**D. There is No Policy Reason for Creating an Exception to the Rule in *Simonetta* and *Braaten* for Respirators.**

Macias asks this Court to review the question of duty using “mixed considerations of logic, common sense, justice, policy and precedent.” Brief of Resp. at 22; *Simonetta*, 165 Wn.2d at 349. Macias argues that *Simonetta* and *Braaten* “enunciated” policies underlying common law strict liability and negligence that “strongly support” a duty to warn for the

Respirator Manufacturers. Brief of Resp. at 14, 22-23. However, he fails to cite any language in those cases to support this proposition.<sup>6</sup> Moreover, the Supreme Court has already considered logic, common sense, justice, policy and precedent in factually analogous circumstances to conclude that there is “little or no support under our case law for extending the duty to warn to another manufacturer’s product.” *Simonetta*, 165 Wn.2d at 353.<sup>7</sup>

**1. The Respirator Manufacturers Were Not in the Best Position to Warn.**

Macias argues that under *Simonetta* and *Braaten* the Respirator Manufacturers were in the best position to warn against the dangers of asbestos. Brief of Resp. at 2, 18. *Simonetta* and *Braaten* made no such finding. To the contrary, the Court in those cases found that as a matter of policy, it is the party *in the chain of distribution of the injury-causing 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

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<sup>6</sup> Macias cites only to vague policy considerations listed in *Wells v. Vancouver*, 77 Wn.2d 800, 810 n.3, 467 P.2d 292 (1970) (citing *Raymond v. Paradise Unified School Dist.*, 218 Cal. App. 2d 1, 31 Cal. Rptr. 847 (1963) (“relative ability to adopt practical means of preventing injury”)) and *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976) (citing W. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 15 (1953) (“our social ideas as to where the loss should fall”)). These broad policy statements do not support imposing a duty to warn under Washington law in the present case where no duty has ever existed.

<sup>7</sup> The Respirator Manufacturers do not argue that *Simonetta* and *Braaten* “overruled” existing law. To the contrary, the Respirator Manufacturers argue *Simonetta* and *Braaten* examined common law negligence and strict liability law and confirmed that there has been no such duty in the past in the state of Washington.

translate that knowledge into a cost of production against which liability insurance can be obtained.” *Simonetta*, 165 Wn.2d at 355; *Braaten*, 165 Wn.2d at 392. In the present case, it is undisputed that the Respirator Manufacturers “did not manufacture the asbestos that has harmed Mr. Macias.” Brief of Resp. at 22. As in *Simonetta* and *Braaten*, instead of the Respirator Manufacturers, the manufacturers of the asbestos-containing products, which caused Mr. Macias’s alleged harm, are in the best position to know of and warn against the dangers of asbestos.<sup>8</sup>

**2. The Intrinsic Nature of the Respirator Does Not Create a Duty to Warn.**

Macias claims that the intrinsic nature of the respirator justifies imposing a duty on the Respirator Manufacturers to warn of dangers in other manufacturers’ products . Brief of Resp. 15. The cases cited by Macias do not support this proposition. At most, these cases state that the

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<sup>8</sup> As Commissioner Schmidt explained:

Macias argues that if *Simonetta* and *Braaten* did apply, the trial court did not err because it followed *Simonetta* and *Braaten* by placing the “duty on the manufacturer in the best position to warn against the risk.” Resp. to Mot. for Disc. Rev. at 7. This argument omits an important aspect of the Court’s holding. *Simonetta* held that strict liability attaches to the “defendant who *by manufacturing, selling, or marketing a product*, is in the best position to know of the dangerous aspects of the product.” *Simonetta*, 165 Wn.2d at 355 (emphasis added). North Safety did not manufacture, sell, or market the asbestos that likely caused Macias’s mesothelioma, therefore they are not in the best position to know and warn of the dangers of asbestos.

Ruling at 9-10.

nature of the product is a general consideration for the jury in determining the scope and extent of the duty, *if a duty exists*, but does not create a duty in the first place.

For example, in *Little v. PPG Indus., Inc.*, 92 Wn.2d 118, 594 P.2d 911 (1979), cited by Macias for this proposition, the issue was the adequacy of a solvent manufacturer's warning about its own product, not whether it had a duty to warn in the first place. *Id.* at 120. This case does not address the issue of whether a duty exists, but only the scope of a duty already shown to exist.

Likewise, *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 818 P.2d 1337 (1991), concerned Johnson & Johnson's failure to warn of hazards of its own product—baby oil—which was the proximate cause of the harm. The court did not discuss whether Johnson & Johnson had a duty, but rather the scope of that duty given the intrinsic nature of the product. In contrast, here, Plaintiffs' claim is based on the alleged failure to warn of the hazards of another manufacturer's product—*asbestos*. It is undisputed that Macias' harm was caused by *asbestos* that the Respirator Manufacturers did not place in the stream of commerce. Therefore, the intrinsic nature of the respirators is irrelevant.

The Commissioner addressed *Ayers* in his ruling and concluded: “This case does not support the holding that a party can be liable for the failure to warn of dangers associated with products outside its chain of distribution.” Ruling at 13. Macias presents no compelling reason to treat respirators any differently than other products and hold the Respirator Manufacturers liable for hazards outside of the design and construction of their own products.

**E. The Respirator Manufacturers Had No Duty to Warn and Have No Liability Under the WPLA.**

Macias fails to cite a single case under the Washington Product Liability Act (WPLA), Chapter 7.72 RCW, where a duty to warn has been imposed on a manufacturer outside the chain of distribution of the hazardous product. In the one case Macias does cite, the failure to warn claim was asserted against the manufacturer of the injury-causing product. *See Ayers*, 117 Wn.2d 747, *supra*.

Macias’ assertion that the risk utility and consumer expectation tests impose a duty on the Respirator Manufacturers is erroneous. First, these tests derive from the common law. These tests do not impose a duty to warn under the WPLA because they did not impose a duty to warn under the common law, as determined in *Simonetta* and *Braaten*. Second, these tests do not create a legal duty where none exists. As Commissioner

Schmidt ruled, “the risk-utility test determines if a party breached its duty to warn, not the existence of a duty.” Ruling at 12 (citing RCW 7.72.030(1)(b)). The Commissioner noted that “Macias did not produce any case law showing that under WPLA, a manufacturer must warn of dangers associated with products outside its chain of distribution.” *Id.*

Furthermore, “even assuming a duty [under the WPLA], Macias could not show breach.” Ruling at 12.<sup>9</sup> Macias fails to respond to this argument and ruling. Because Macias fails to prove duty under the WPLA, and breach, even if duty was assumed, any potential claim under the WPLA should be dismissed.

### III. CONCLUSION

It is undisputed that the Respirator Manufacturers did not manufacture, distribute or otherwise sell or supply any asbestos-containing

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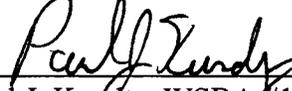
<sup>9</sup> As Commissioner Schmidt ruled:

[To prove breach,] Macias had to show that (1) at the time North Safety manufactured its product (2) the likelihood that it would cause mesothelioma (3) rendered any warnings or instructions inadequate, and (4) North Safety could have provided these warnings or instructions. RCW 7.72.030(1)(b). Macias cannot meet the first three elements. Macias does not claim that the product North Safety manufactured caused him harm. See RCW 7.72.010(3). He does not allege that the respirator caused his mesothelioma, but rather that asbestos did so. There is no indication that North Safety manufactured the asbestos that gave rise to Macias’s claim. Macias therefore cannot demonstrate that North Safety manufactured a product that was likely to cause his harm and failed to provide adequate warnings. Accordingly, this court cannot say that North Safety is liable under the WPLA for a harm caused by a product it did not manufacture.

Ruling at 12-13.

product to which Macias was exposed. It is undisputed that Macias' claims arise solely out of exposure to asbestos that originated from other manufacturers' products. Because the issue of duty is a matter of law<sup>10</sup>, and because the Washington Supreme Court has already decided that the duty to warn is limited to those in the chain of distribution of the hazardous product, this Court should follow *Simonetta* and *Braaten*, reverse the Superior Court, affirm the Court Commissioner's Opinion, and grant the Respirator Manufacturers' motions for summary judgment.

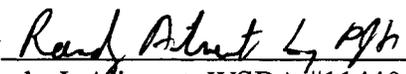
RIDDELL WILLIAMS P.S.

By   
Paul J. Kuntz, WSBA #13548  
Wendy E. Lyon, WSBA #34461  
Mindy L. DeYoung, WSBA #39424  
*Attorneys for Defendants*  
*Mine Safety Appliances Company*  
1001 Fourth Avenue, Ste 4500  
Seattle, WA 98154-1192  
Phone: 206-624-3600  
Email: [wlyon@riddellwilliams.com](mailto:wlyon@riddellwilliams.com)

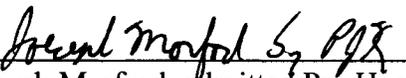
BURGESS FITZER, PS

By   
Kamela J. James, WSBA #29787  
*Attorney for American Optical Corp.*  
1145 Broadway, Suite 400  
Tacoma, WA 98402  
Phone: 253-572-5324  
Email: [kamelaj@burgessfitzer.com](mailto:kamelaj@burgessfitzer.com)

WILLIAMS, KASTNER & GIBBS

By   
Randy J. Aliment, WSBA #11440  
Timothy Ashcraft, WSBA #26196  
Joseph Sexton, WSBA #38063  
*Attorneys for North Safety Products*  
601 Union Street, Suite 4100  
Seattle, WA 98101  
Phone: 206-628-6600  
Email: [asbestos@wkg.com](mailto:asbestos@wkg.com)

TUCKER ELLIS & WEST

By   
Joseph Morford, admitted Pro Hoc Vice  
*Attorneys for American Optical Corp.*  
1150 Huntington Building  
925 Euclid Avenue  
Cleveland, OH 44115  
Email: [Joseph.Morford@TuckerEllis.com](mailto:Joseph.Morford@TuckerEllis.com)  
*Attorneys for Appellants*

<sup>10</sup> *Simonetta*, 165 Wn.2d at 349; Restatement (Second) of Torts § 328B, cmt. e.

WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO

LEO MACIAS and PATRICIA MACIAS,

NO. 39171-6-II

Appellees,

(Pierce County Superior Court  
Case No. 08-2-09564-4)

v.

**PROOF OF SERVICE OF FILING  
REPLY BRIEF OF  
APPELLANTS**

SABERHAGEN HOLDINGS, INC., et  
al.,

Appellants.

I, Lisa Werner, certify that I am over 18 years of age and a U.S. citizen. I am employed as an executive assistant by the law firm of Riddell Williams P.S. On January 11, 2010, I caused to be served a true and correct copy of REPLY BRIEF OF APPELLANTS to counsel of record as indicated below:

*Plaintiff's Counsel – Hand Delivery*  
Glenn S. Draper  
Benjamin R. Couture  
BERGMAN DRAPER & FROCKT  
614 First Avenue, Third Floor  
Seattle, WA 98104

John W. Phillips  
Matthew Geyman  
PHILLIPS LAW GROUP, LLC  
315 Fifth Avenue South, Suite 1000  
Seattle, WA 98104

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DIVISION TWO  
10 JUN 11 PM 3:57  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

*Counsel for North Safety Products USA – Via Email*

Randy Aliment  
Williams, Kastner & Gibbs  
601 Union Street, Suite 4100  
Seattle, WA 98101  
Email: [asebstos@wkg.com](mailto:asebstos@wkg.com)

Timothy Ashcraft  
Robert Joseph Sexton  
Williams, Kastner & Gibbs  
1301 A Street, Suite 900  
Tacoma, WA 98402-4299  
Email: [asbestos@wkg.com](mailto:asbestos@wkg.com)

*Counsel for Saberhagen Holdings – Via Email*

Timothy K. Thorson  
Carney Badley Spellman, PS  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104  
Email: [thorson@carneylaw.com](mailto:thorson@carneylaw.com)

*Counsel for American Optical Corporation – Via Email*

Kamela J. James  
Burgess Fitzer, P.S.  
1145 Broadway, Suite 400  
Tacoma, WA 98402  
Email: [kamelaj@burgessfitzer.com](mailto:kamelaj@burgessfitzer.com)

Joseph Morford, admitted Pro Hoc Vice  
Tucker Ellis & West  
1150 Huntington Building  
925 Euclid Ave.  
Cleveland, OH 44115  
Email: [Joseph.Morford@TuckerEllis.com](mailto:Joseph.Morford@TuckerEllis.com)

EXECUTED this 11<sup>TH</sup> day of January, 2010 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 solid horizontal line.

Lisa Werner  
Executive Assistant