No. 85535-8

J.M. JOHNSON, J. (dissenting)—The majority is able to distinguish this case from *Simonetta* and *Braaten* by subtly recasting the holdings of both cases while echoing the reasoning of the *Simonetta/Braaten* dissents. *See 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). According to the majority, "*Simonetta* and *Braaten* do not control the present case because the duty at issue is to warn of the danger of asbestos exposure inherent in the use and maintenance of the defendant manufacturers' *own* products." Majority at 2. Yet, this was *exactly* the issue we confronted in *Simonetta* and *Braaten.* In both cases, the plaintiff was brought into contact with asbestos through the necessary maintenance of the defendants' *own* products. We nevertheless held the defendant manufacturers could not be liable because they were not in the chain of distribution of the asbestos-containing products, stating that "a manufacturer has no duty . . . to warn of the dangers of

exposure to asbestos in products it did not manufacture and for which the manufacturer was not in the chain of distribution." *Braaten*, 165 Wn.2d at 398. This was so even though the danger of asbestos exposure was inherent in the use of the product at issue. *See Simonetta*, 165 Wn.2d at 350. The majority's position that "[i]t does not matter that the respirator manufacturers were not in the chain of distribution of products containing asbestos" is irreconcilable with this precedent. Majority at 14.

The majority adopts the plaintiffs' view that their claims "'rest squarely on the respirator product in and of itself . . . without reference to any other manufacturer's products.'" *Id.* at 12 (quoting II Clerk's Papers at 295). But, Leo Macias was not harmed by the respirators themselves, but by outside asbestos that came in contact with the respirators. Had asbestos from the shipyard not gathered upon the respirators Macias later cleaned, he would not have been injured at all. Thus, to state a claim of injury, Macias necessarily must reference another manufacturer's asbestos-containing product.

The majority betrays its infidelity to *Simonetta* and *Braaten* by resting its holding on a distinction that does not exist: that the products in *Simonetta* and *Braaten* were not "specifically designed to be used with asbestos." *Id.* at

13. This is doubly wrong. First, the products in *Simonetta* and *Braaten were in fact* designed to be used with asbestos. The manufacturers in those cases supplied the Navy with products that required insulation to function, and the only insulation meeting Navy specifications at that time contained asbestos. *See Simonetta,* 165 Wn.2d at 347 ("Viad was aware that exposure would occur during the use and maintenance of its product because the evaporator needed insulation to operate property, the navy used asbestos insulation, and workers would have to disturb the asbestos insulation to perform maintenance."); *see also O'Neil v. Crane Co.*, 53 Cal. 4th 335, 343, 266 P.3d 987, 135 Cal. Rptr. 3d 288 (2012) (Navy specifications required the use of asbestos in World War II warships and "there was no acceptable substitute for asbestos until at least the late 1960's."). Thus, the majority's assertion that the products in *Simonetta* and *Braaten* "only happened to be insulated by asbestos products" is inaccurate at best. Majority at 13. The products in *Simonetta* and *Braaten* required asbestos insulation and—like the respirators here—demanded regular maintenance that resulted in asbestos exposure. *See Simonetta,* 165 Wn.2d at 366 (Stephens, J., dissenting) ("Routine maintenance of the evaporator required the removal and replacement of the asbestos

insulation every three to six months.").

Second, unlike the respirators, the products in *Simonetta* and *Braaten* were *invariably used* in conjunction with asbestos. In contrast, these respirators were complete upon sale and did not require the addition of an asbestos-containing component. Moreover, these respirators were intended to protect against a number of different contaminants, including welding fumes, paint fumes, and various types of dust. The manufacturers should not be expected to warn of the dangers of every contaminant a user could conceivably encounter. Imposing such an obligation would render all the warnings given virtually meaningless: "To warn of all potential dangers would warn of nothing." *Andre v. Union Tank Car Co.*, 213 N.J. Super. 51, 67, 516 A.2d 277 (1985), *aff'd*, 216 N.J. Super. 219, 523 A.2d 278 (1987).

The majority concludes the respirator manufacturers had a duty to warn of asbestos exposure because their respirators were *intended* to protect against airborne contaminants like asbestos. Majority at 17. However, the respirator's purpose as a protective product merely made it foreseeable it would be used around potentially dangerous substances. We held in *Simonetta* and *Braaten* that a defendant's ability to foresee certain harms is

irrelevant if the defendant is outside the chain of distribution of the harmful product. These defendants have no duty to warn of the dangers of another's product, and foreseeability itself cannot give rise to a duty. *Simonetta*, 165 Wn.2d at 349 n.4.

The majority asserts we should nonetheless consider the circumstances under which the respirators would foreseeably be used to determine whether they were unreasonably dangerous. Majority at 16-17.[1] The majority is correct that the Washington Product Liability Act sets forth a risk-benefit analysis that is used to define a product as "not reasonably safe." RCW 7.72.030(1)(b). Part of this analysis focuses on the foreseeability of the harm suffered by the plaintiff. *Id.* But, it is telling that the court in *Simonetta* or *Braaten* did not see it proper to analyze foreseeability in this context. This is

[1] The majority's reasoning is reminiscent of the *Simonetta* dissent. *Compare Simonetta*, 165 Wn.2d at 366 (Stephens, J., dissenting) ("[T]he focus . . . is on dangers involved in the *use* of a product. Simply put, the duty to warn contemplates that a product will *actually be used*."), *with* majority at 17 ("*every* product will be put to use at some time in the future after its manufacture, and at that point the hazards that will predictably be involved in its use will become manifest"). *Compare Simonetta,* 165 Wn.2d at 365 n.10 (Stephens, J., dissenting) ("foreseeability of harm should not be confused with foreseeability of the use of a product"), *with* majority at 16 ("But considering foreseeability in the context of determining whether the product is unsafe . . . is a different matter from considering foreseeability of injury to establish that a duty is owed."). The similarities demonstrate that the same concerns expressed by the majority were also apparent in *Simonetta*. We nevertheless concluded the foreseeability of asbestos exposure as inherent in the use of a product that does not contain asbestos is not an appropriate consideration when determining whether a duty to warn exists. *Simonetta,* 165 Wn.2d at 349-50.

because whether the defendant is in the chain of distribution of the relevant product is a threshold matter that must be determined before considering whether the product is reasonably safe. Therefore, because the respirator manufacturers were not within the chain of distribution of the relevant product (the asbestos) that caused Macias' injury (mesothelioma), as a matter of law they had no duty to warn of the dangers of asbestos. *Simonetta*, 165 Wn.2d at 350. We should not even reach the risk-benefit level of analysis.

If anything, the safety purpose of the respirators cuts against imposing liability here. A fundamental policy underlying product liability law is the promotion of safe products. Victor E. Schwartz et al., *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer*, 33 Am. J. Trial Advoc. 13, 50-51 (2009). Safety products, such as the respirators involved in this case, are of great social value and promote this essential goal. The expansion of liability for asbestos exposure to safety product manufacturers provides a strong disincentive to continue making safety products, such as protective respirators. This could impact both the availability and affordability of respirators, frustrating the safety objective of product liability. *Id.*

The economic policies underpinning product liability law also weigh against extending liability to peripheral defendants. The manufacturer who benefits from selling a potentially dangerous product is the appropriate party to bear the risk that product will cause harm. Restatement (Second) of Torts § 402A cmt. c at 349 (1965) ("public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them"). Only the manufacturer of a product has the ability to consider its risks and determine if the product is worth distributing in spite of its hazards. *Id.* A manufacturer of safety products should not be "required to perform a watchdog function in order to rescue product users from risks it had no active part in creating and over which it cannot exert meaningful control." James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented By Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 601 (2008). As we stated in *Braaten*:

> These manufacturers, who did not manufacture, sell, or otherwise distribute the [products] containing asbestos to which [the plaintiff] was exposed, did not market the product causing the harm and could not treat the burden of accidental injury caused by asbestos . . . as a cost of production against which liability insurance could be obtained.

165 Wn.2d at 392. The same rationale counsels against extending liability here. These respirator manufacturers did not inject asbestos-containing products into the marketplace and should not be required to perform the duties of those who did.

The Supreme Court of California recently remarked upon this case in *O'Neil v. Crane Co.*, 53 Cal. 4th 335, 358, 266 P.3d 987 (2012) (citing *Macias v. Mine Safety Appliances Co.*, 158 Wn. App. 931, 244 P.3d 978 (2010)). The court recognized that Macias' theory of liability threatened to substantially expand Washington product liability law: "Reliance on the 'adjacent products' theory of liability was stretched perhaps the farthest in *Macias*." *Id.* The California high court then looked with favor on the Court of Appeals' decision below:

> [T]he Washington appellate court observed that the connection between the defendants' products and the plaintiff's asbestos exposure was "even more remote" than in *Simonetta* and *Braaten*. Because the respirator manufacturers did not manufacture, sell, or supply the asbestos that harmed Macias, and thus were not in the chain of distribution of a harmful product, the court held they had no duty to warn about the dangers of asbestos.

Id. (quoting *Macias,* 158 Wn. App. at 982). We should affirm Division Two's well-reasoned opinion and decline to extend a duty to warn of

asbestos exposure to manufacturers that do not produce or distribute asbestos-containing products.

The majority undermines *Simonetta* and *Braaten* while adopting the rationales of the *Simonetta/Braaten* dissents. After eliminating the false distinctions read into *Simonetta* and *Braaten* by the majority, there is simply no difference between the products at issue in those cases and the respirators here. Each product brought the plaintiff to asbestos he otherwise would not have encountered. And in each instance, the manufacturer knew its product would be used around asbestos. Were we to be faithful to the precedent set by *Simonetta* and *Braaten*, we would hold the respirator manufacturers had no duty to warn Macias of the dangers of asbestos because they were not in the chain of distribution of asbestos-containing products. To hold manufacturers of safety equipment liable for harm caused by other manufacturers' dangerous products is contrary to precedent and public policy. I dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:

Justice Charles W. Johnson

Justice Susan Owens

Gerry L. Alexander, Justice Pro Tem.