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No. 64312-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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Sandra Yankee, Personal Representative for the Estate of Dennis Yankee, Respondent,

v.

APV North America, Inc., Petitioner,

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**APPELLANT'S OPENING BRIEF**

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## INTRODUCTION

Plaintiff's decedent Dennis Yankee was a millwright at an aluminum mill. Part of Mr. Yankee's work involved replacing asbestos-containing insulation, gaskets, and packing installed on carbon mixers sold by a predecessor of Defendant APV North America. Many years later, Mr. Yankee contracted an asbestos-related disease, and sued APV, along with several other defendants.

APV filed a motion for summary judgment because APV did not manufacture or sell any of the asbestos-containing insulation, gaskets, or packing Mr. Yankee was exposed to. Under *Simonetta v. Viad* and *Braaten v. Saberhagen Holdings*, an equipment manufacturer such as APV cannot be liable for asbestos-containing products used with APV's equipment if other companies manufactured or sold those products.<sup>1</sup> Plaintiff opposed summary judgment by suggesting that the trial court create a new exception to *Simonetta* and *Braaten*. That new exception would impose liability for the insulation, gaskets, and packing sold by other companies, if the product manufacturer "specified" those parts with its equipment.

The trial court accepted Plaintiff's argument, and denied APV's motion. APV filed a Motion for Discretionary Review, arguing that Plaintiff's claim failed because: (1) *Simonetta* and *Braaten* did not recognize a "specification" exception; (2) The APV documents Plaintiff

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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).

offered do not constitute “specifications”; and (3) Mr. Yankee did not use as replacements the components that APV allegedly specified. Commissioner Ellis granted discretionary review, finding that the trial court had committed obvious error in denying APV’s Motion for Summary Judgment.

### **ASSIGNMENTS OF ERROR**

The trial court erred in denying APV’s Motion for Summary Judgment.

Issue 1: Mr. Yankee was not exposed to any asbestos-containing gaskets, packing, or insulation sold by APV. As such, any replacement asbestos-containing gaskets, packing, or insulation were not in APV’s chain of commerce or distribution. Under *Simonetta* and *Braaten*, APV is not liable for these products.<sup>2</sup> Furthermore, no reported Washington decision has held that a product manufacturer can be liable if it specifies asbestos-containing parts with its products. The trial court erred in concluding otherwise.

Issue 2: APV did not specify any replacement products, much less any asbestos-containing products, with its carbon mixers.

Issue 3: APV is not liable because Mr. Yankee did not use the replacement products APV supposedly specified.

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<sup>2</sup> *Simonetta*, 165 Wn.2d 341 (2008); *Braaten*, 165 Wn.2d 373 (2008).

## STATEMENT OF THE CASE

Sandra Yankee and Dennis Yankee brought this claim for personal injuries and loss of consortium arising out of Mr. Yankee's alleged exposure to asbestos.<sup>3</sup> Mr. Yankee died while this action was pending, and Plaintiff amended her complaint to pursue wrongful death and survival claims.<sup>4</sup>

Plaintiff claims that Mr. Yankee was exposed to asbestos while working at an Alcoa aluminum mill in Vancouver, Washington.<sup>5</sup> Baker Perkins, a predecessor-in-interest to APV, sold five carbon mixers to the Alcoa mill in 1940 and 1941.<sup>6</sup> A carbon mixer is a large piece of equipment made of cast iron and steel.<sup>7</sup> It is used to make carbon, which is then used to melt aluminum.<sup>8</sup> APV concedes that it is the successor-in-interest to Baker Perkins pursuant to asset purchase and sale agreements. For ease of reference, APV will refer to these carbon mixers as the "APV Mixers."

### A. Mr. Yankee's Work at the Alcoa Mill

Mr. Yankee started working at the Alcoa mill in 1969.<sup>9</sup> He began as a production laborer, picking up garbage, sweeping the floor, and doing

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<sup>3</sup> CP 26-29 (Amended Complaint for Wrongful Death and Survivorship).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> CP 82-83 (Yankee pp. 934:23 – 935:1); CP 143 – 145 (APV's Responses to Interrogatories and Request for Production)

<sup>7</sup> CP 90-91 (Yankee pp. 193:22-194:4).

<sup>8</sup> CP 90 (Yankee p. 193:9-11); CP 75 – 76 (Yankee pp. 118:25 – 119:4).

<sup>9</sup> CP 63 (Yankee p. 29:13-17).

general labor in the wire mill and the extrusion mill.<sup>10</sup> In 1973, Alcoa promoted Mr. Yankee to millwright apprentice.<sup>11</sup> As a millwright, Mr. Yankee worked on a six-man team, maintaining Alcoa's equipment.<sup>12</sup> The first time Mr. Yankee worked on the APV Mixers was after he became a millwright apprentice in 1973, 32 years after the APV Mixers arrived at Alcoa.<sup>13</sup>

#### **B. Mr. Yankee's Work on the APV Mixers**

"A couple" days out of each week, Alcoa would assign Mr. Yankee to the mixer floor.<sup>14</sup> During the evening, Mr. Yankee would perform regular maintenance on the APV Mixers.<sup>15</sup> That work included repacking the swing joints on the paddles, fixing the air cylinders on the doors, and repairing the interior lining of the mixers and paddles.<sup>16</sup> Every three to four years, Alcoa would completely overhaul a mixer.<sup>17</sup> Mr. Yankee referred to this as a "teardown."<sup>18</sup>

Mr. Yankee testified that his regular maintenance and teardown work exposed him to asbestos from the insulation, gaskets, and packing used with the APV Mixers.<sup>19</sup> Plaintiff concedes that APV did not

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<sup>10</sup> CP 63-64 (Yankee pp. 29:25-30:4), CP 67 (Yankee p. 39:8-20).

<sup>11</sup> CP 67 (Yankee p. 39:19-25).

<sup>12</sup> CP 68 (Yankee p. 40:1-25); CP 69 (Yankee p. 42:2-15).

<sup>13</sup> CP 80 (Yankee p. 123:4-6).

<sup>14</sup> CP 408-409 (Yankee pp. 933:11-934:12)

<sup>15</sup> *Id.*

<sup>16</sup> CP 408 (Yankee p. 932:8-12).

<sup>17</sup> CP 79 (Yankee p. 122:7-19).

<sup>18</sup> CP 79 – 80 (Yankee pp. 122:22 – 123:3).

<sup>19</sup> CP 404 (p. 194:5-11).

manufacture or sell any of the insulation, gaskets, or packing that Mr. Yankee worked with or replaced.<sup>20</sup>

### **1. Insulation**

APV did not insulate the APV Mixers before shipping them to Alcoa.<sup>21</sup> After the APV Mixers arrived at Alcoa, Alcoa workers—not APV—covered the exterior of the APV Mixers with a blanket insulation material.<sup>22</sup> Those Alcoa workers then applied mud over the blanket material, and installed a 1/16<sup>th</sup> inch metal covering to protect the insulation.<sup>23</sup> APV did not manufacture, sell, or install the blanket insulation, mud insulation, or 1/16<sup>th</sup> inch metal covering.<sup>24</sup> This external insulation applied by Alcoa was the only insulation installed on a carbon mixer worked on by Mr. Yankee.<sup>25</sup>

### **2. Gaskets and Packing**

Mr. Yankee removed and reinstalled gaskets and packing on the APV Mixers during the teardown and rebuilding process.<sup>26</sup> The gaskets were located on the “end caps” and on “various ports.”<sup>27</sup> Mr. Yankee testified that the packing was located on each end of the mixer paddles, in each of the four swing joints, and in two air cylinders.<sup>28</sup>

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<sup>20</sup> CP 409 (Yankee pp.935:2 – 23; 936:22 – 937:13); CP 75 (Yankee 118:8 – 18).

<sup>21</sup> CP 511-12 (Kress p. 15:4 -16:25).

<sup>22</sup> CP 77-78 (Yankee pp. 120:10 – 121:2); CP 511 – 512 (Kress pp. 15:4 – 16:13).

<sup>23</sup> *Id.*

<sup>24</sup> CP 511-12 (Kress p. 15:4 -16:25).

<sup>25</sup> CP 91 (Yankee p. 194:13-19).

<sup>26</sup> CP 101 – 102 (Yankee pp. 204:25-205:3).

<sup>27</sup> CP 98 (Yankee p. 201:18-23).

<sup>28</sup> CP 102 (Yankee p. 205:2-14).

The APV Mixers contained gaskets and packing when APV shipped them to Alcoa.<sup>29</sup> But Mr. Yankee was not exposed to these original gaskets and packing.<sup>30</sup> Mr. Yankee testified that the APV mixers did not contain any of the original gaskets or packing when he worked on them.<sup>31</sup> Alcoa completely tore down and rebuilt the mixers every three to four years, and Mr. Yankee did not begin to work on them until 1973.<sup>32</sup> Because Alcoa installed APV Mixers in the early 1940's, other Alcoa workers had replaced the gaskets and packing many times over by the time Mr. Yankee worked on them beginning in 1973.<sup>33</sup>

Garlock manufactured every gasket and piece of packing that Mr. Yankee either removed or installed.<sup>34</sup> Mr. Yankee obtained the Garlock gaskets and packing from the "stores" at the Alcoa mill, not from APV.<sup>35</sup> Garlock was the only brand of gasket that Alcoa used at the mill.<sup>36</sup>

### **C. Plaintiff's Theory of Liability: APV's Alleged Specification of Asbestos-Containing Components**

Plaintiff does not claim that Mr. Yankee was exposed to any asbestos-containing product that APV manufactured or sold. Instead, Plaintiff argues that APV is liable for the insulation that Alcoa bought and applied to the exterior of the APV Mixers, and for the replacement

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<sup>29</sup> CP 82 – 83 (Yankee pp. 934 – 935).

<sup>30</sup> CP 82 – 83 (Yankee pp. 934:23 – 935:22).

<sup>31</sup> *Id.*

<sup>32</sup> CP 79 (Yankee p. 122:7 – 16); CP 67 – 68 (Yankee pp. 39:19 – 40:5).

<sup>33</sup> CP 82 – 83 (Yankee pp. 934:23 – 935:22).

<sup>34</sup> CP 70 – 73 (Yankee pp. 68 – 71); CP 82 – 85 (Yankee pp. 934 – 937).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Garlock gaskets and packing Alcoa used, because APV allegedly “specified” asbestos-containing materials with its mixers. APV discusses Plaintiff’s evidence below.

**1. First Alleged Specification: Superex insulation**

Plaintiff relies upon APV drawing No. 83-703,<sup>37</sup> which describes the use of “Superex” insulation used inside trough extension covers.<sup>38</sup> Those extensions are capped with a steel cover.<sup>39</sup> APV placed Superex insulation between the steel plates before welding it closed.<sup>40</sup> Superex was an asbestos-containing insulation manufactured by Johns Manville.<sup>41</sup> Plaintiff argues that APV’s use of Superex insulation inside these trough extension covers constitutes a specification, or requirement, that Alcoa use asbestos-containing insulation on the outside of the APV Mixers.

However, the APV Mixers sold to Alcoa in 1940 and 1941 did not have these trough extension covers, and thus, did not contain any Superex insulation.<sup>42</sup> APV created drawing No. 83-703 on November 1, 1941, *after* APV manufactured the five carbon mixers sold to Alcoa.<sup>43</sup> Drawing No. 83-703 is for carbon mixers sold to a different customer in Texas, not Alcoa.<sup>44</sup> The drawings for the carbon mixers APV sold to Alcoa do not

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<sup>37</sup> CP 355 (APV drawing No. 83-703, Bates No. BP000280)

<sup>38</sup> CP 111(Page 3 from Plaintiff’s Response to Motion for Summary Judgment).

<sup>39</sup> CP 577 (Kress pp. 100:10-101:6).

<sup>40</sup> *Id.*

<sup>41</sup> CP 411 – 416 (Manville Corporation Asbestos Disease Compensation Fund’s Answers to First Amended Standard Set of Liability Interrogatories).

<sup>42</sup> CP 501 (Kress p. 104:19-23).

<sup>43</sup> CP 498 (Kress p. 101:16 – 21).

<sup>44</sup> CP 583 (Kress p 116:2-6)

show these trough extensions.<sup>45</sup>

Plaintiff has not offered any evidence that Alcoa ever used Superex insulation, or that Mr. Yankee ever worked with trough extension covers. The only insulation that Mr. Yankee removed from the APV Mixers was blanket and mud insulation placed around the exterior of the APV Mixers.<sup>46</sup> Yankee specifically described where the insulation was located, and it was not inside trough extension covers: “The insulation was on the outside of the mixer on the mixer body, and on the end caps of the mixer.”<sup>47</sup> The uncontradicted evidence is that APV did not specify Superex insulation, or insulation in general, for its APV Mixers sold to Alcoa.

## **2. Second Alleged Specification: Gaskets**

The APV Mixers contained gaskets when APV shipped them to Alcoa.<sup>48</sup> One of the brands of gaskets that the APV Mixers used was Durabla.<sup>49</sup> Durabla manufactured an asbestos-containing gasket.<sup>50</sup> Plaintiff argues that because APV used Durabla gaskets with its mixers, APV was therefore specifying that Alcoa use asbestos-containing replacement gaskets.

Plaintiff offered two APV documents to support her conclusion that APV specified asbestos gaskets for its mixers. The first, titled Repair

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<sup>45</sup> CP 501 (Kress p. 104:19-105:1); CP 502 (Kress p. 114 – 121); CP 523 (drawing 1-703); CP 524 (drawing 48-703).

<sup>46</sup> CP 91 – 96 (Yankee pp. 194 – 199).

<sup>47</sup> CP 91 (Yankee p. 194:18-19).

<sup>48</sup> CP 82 – 83 (Yankee pp. 934 – 935).

<sup>49</sup> CP 104 (Repair Order Dispatch List, Bates No. BP000228).

<sup>50</sup> CP 419 – 438 (1997 Durabla Gasket Materials Catalog)

Order Dispatch List (CP 104, Bates No. BP 000228), is a March 25, 1943 inventory packing sheet showing materials sent to the Alcoa mill.<sup>51</sup> That document lists two Durabla gaskets.<sup>52</sup> The packing sheet never mentions that Alcoa must use Durabla—or any other type of gasket—in the future.<sup>53</sup> Nor does it mention the word “asbestos.”<sup>54</sup>

The second document, a parts list (CP 318, Bates No. BP 000243), is an October 28, 1955 inventory list that references gaskets supplied by U.S. Rubber Co.<sup>55</sup> The document does not mention asbestos, and does not specify Alcoa what type of gaskets Alcoa should use.<sup>56</sup>

Furthermore, Alcoa did not use Durabla or U.S. Rubber gaskets.<sup>57</sup> The only gaskets that Mr. Yankee used were made by Garlock.<sup>58</sup>

### **3. Third Alleged Specification: Packing**

The APV Mixers contained Palmetto packing when APV shipped them to Alcoa.<sup>59</sup> At the time, Palmetto manufactured an asbestos-containing packing. But, Mr. Yankee never worked with the original Palmetto packing.<sup>60</sup> Instead, Mr. Yankee only worked with the Garlock packing that Alcoa purchased from someone other than APV.<sup>61</sup> Alcoa did

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<sup>51</sup> CP 104 (Repair Order Dispatch List, Bates No. BP 000228).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> CP 318 (parts list, Bates No. BP 000243).

<sup>56</sup> *Id.*

<sup>57</sup> CP 83 (Yankee p. 935:2 – 11).

<sup>58</sup> *Id.*

<sup>59</sup> CP 186 (Operating Instructions, Bates No. BP 000112).

<sup>60</sup> CP 83 – 85 (Yankee pp. 935 – 937).

<sup>61</sup> *Id.*

not use any other brand of packing.<sup>62</sup>

Plaintiff claims that APV should be legally responsible for this Garlock packing because it specified asbestos-containing packing for its mixers. The first document Plaintiff relied on as evidence of this specification is BP 000112, entitled “Operating Instructions.”<sup>63</sup> Item 16 in that document states, “Use Packing Palmetto 1x1.”<sup>64</sup> This document does not specify what type of replacement packing Alcoa should use; it simply states that Alcoa should install the Palmetto packing provided with the mixer when initially installing the mixer.<sup>65</sup>

The second document Plaintiff relies on, Maintenance of Glands with Soft Packing (CP 366, Bates No. BP 000291), provides instructions for replacement packing.<sup>66</sup> But this instruction sheet does not specify the use of Palmetto packing, or any other brand, and does not mention the word “asbestos.”<sup>67</sup> Instead, it merely states that Alcoa should use a “square braided packing,” which can be purchased “from large hardware stores, millwright supply houses, or direct from Baker Perkins.”<sup>68</sup>

#### **D. The Trial Court’s Ruling**

APV argued in its Motion for Summary Judgment that Plaintiff could not sustain her burden required by *Simonetta* and *Braaten* to prove that Mr. Yankee was exposed to an asbestos-containing product APV

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<sup>62</sup> *Id.*

<sup>63</sup> CP 186 (Operating Instructions, Bates No. BP 000112).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> CP 366 (Maintenance of Glands with Soft Packing, Bates No. BP 000291).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

manufactured or sold, *i.e.*, a product in APV's chain of distribution.<sup>69</sup> In response, Plaintiff raised three legal arguments. First, Plaintiff argued that APV was liable for the insulation, gaskets and packing that Mr. Yankee was exposed to, even though APV did not manufacture or sell those products, because APV had used a defective design for its carbon mixers that incorporated asbestos-containing components.<sup>70</sup> Plaintiff argued that *Simonetta* and *Braaten* were limited to failure to warn claims, and that APV could remain liable for another manufacturer's product under design defect.<sup>71</sup> Second, plaintiff argued that APV had voluntarily assumed a duty to warn Mr. Yankee of asbestos-related hazards because APV had conducted post-sale inspections of APV's mixers.<sup>72</sup> Third, Plaintiff argued that APV was liable because it specified asbestos-containing components for its mixers.<sup>73</sup>

The Honorable Michael Trickey ("trial court") rejected Plaintiff's first and second arguments on design defect and voluntary assumption of a duty to warn.<sup>74</sup> But the trial court accepted Plaintiff's third argument—specification of asbestos components—and denied APV's motion.<sup>75</sup> The trial court's September 18, 2009 order states that APV's motion was

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<sup>69</sup> *Braaten*, 165 Wn.2d 373 (2008); *Simonetta*, 165 Wn.2d 341 (2008).

<sup>70</sup> CP 109 – 119 (Plaintiff's Response to Motion for Summary Judgment of Defendant APV North America, Inc.).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> CP 637 – 638 (Order Denying In Part Motion for Summary Judgment of Defendant APV North America, Inc.).

<sup>75</sup> *Id.*

denied, “as to defendant’s specification of asbestos-containing components, but granted as to plaintiff’s claims based on defendant’s inspections of the mixers or design defect.”<sup>76</sup>

APV filed a Motion for Discretionary Review of the portion of the trial court’s ruling denying APV’s Motion for Summary Judgment.<sup>77</sup> Commissioner Ellis granted APV’s motion.<sup>78</sup> The Commissioner concluded that none of the recent cases addressing liability for asbestos-containing products, including *Simonetta, Braaten*, and the California cases *Merrill v. Leslie Controls, Inc.*, and *Taylor v. Elliott Turbomachinery Co., Inc.* recognized the theory of liability Plaintiff was pursuing:

In none of these cases is there any recognized exception for the sort of relationship that is alleged in this case, the supposed specification of products containing asbestos and the use of products of a similar nature.<sup>79</sup>

This appeal followed. Plaintiff has not cross-appealed the trial court’s order granting summary judgment on Plaintiff’s claims based on design defect and voluntary assumption of a duty.

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<sup>76</sup> *Id.*

<sup>77</sup> App. 1.

<sup>78</sup> App. 1, p. 1.

<sup>79</sup> App. 1, p. 5.

## ARGUMENT

An appellate court reviews summary judgment rulings *de novo*, performing the same inquiry as the trial court.<sup>80</sup> Summary judgment should be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>81</sup> A fact is “material” when the outcome of the litigation depends on it.<sup>82</sup> The Court should construe the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party.<sup>83</sup>

### I

#### **The Trial Court’s Ruling Conflicts with Controlling Precedent from the Washington Supreme Court.**

The trial court’s decision to deny APV’s Motion for Summary Judgment directly conflicts with the Washington Supreme Court’s decisions in *Simonetta* and *Braaten*. *Simonetta* and *Braaten* held that an equipment manufacturer is not liable for asbestos-containing products it did not manufacture or sell.<sup>84</sup> *Braaten* found that a product manufacturer is only responsible for its own products; it need not become an expert in another manufacturer’s products.<sup>85</sup> *Braaten* specifically held that a product manufacturer is not liable for replacement gaskets, even if the original product contained gaskets, and even if the replacement gasket is

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<sup>80</sup> *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

<sup>81</sup> CR 56(c); *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

<sup>82</sup> *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

<sup>83</sup> *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

<sup>84</sup> *Simonetta*, 165 Wn.2d at 363; *Braaten*, 165 Wn.2d at 398.

<sup>85</sup> *Braaten*, 165 Wn.2d at 385-86.

“virtually the same as the original part.”<sup>86</sup> Both *Braaten* and *Simonetta* held that, “it makes no difference” whether the manufacturer knew that asbestos-containing products would be used with the manufacturer’s product.<sup>87</sup>

The facts presented in *Braaten* are very similar to those presented here. Vernon Braaten claimed that he developed mesothelioma from asbestos exposure.<sup>88</sup> Mr. Braaten had worked as a pipefitter for the Navy, and had worked on external insulation that was applied over equipment such as pumps and valves.<sup>89</sup> Mr. Braaten also claimed exposure from gaskets and packing that were installed inside the equipment.<sup>90</sup> Mr. Braaten was unable to present any evidence that any of the defendant product manufacturers ever manufactured the external insulation applied to the equipment.<sup>91</sup> Nor could Mr. Braaten present evidence that any of the gaskets or packing he worked with or around were the original gaskets or packing sold with the equipment.<sup>92</sup>

The Washington Supreme Court held that the defendant equipment manufacturers were not responsible for products they did not manufacture or sell.<sup>93</sup> Because these defendants did not manufacture or sell the insulation, gaskets, or packing that Mr. Braaten was exposed to, they

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<sup>86</sup> *Id.* at 392.

<sup>87</sup> *Simonetta*, 165 Wn.2d at 363; *Braaten*, 165 Wn.2d at 385.

<sup>88</sup> *Braaten*, 165 Wn.2d at 381-82.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 398.

could not be held liable under products liability or negligence theories.<sup>94</sup>

Plaintiff has conceded that Mr. Yankee was not exposed to any asbestos-containing product that APV manufactured or sold.<sup>95</sup> Under *Simonetta* and *Braaten*, the trial court should have granted summary judgment.

## II

### ***Braaten* Did Not Create an Exception for “Specifying” Asbestos-Containing Products.**

In this case, APV is in exactly the same position as the equipment manufacturer defendants that *Simonetta* and *Braaten* found not liable. Just like those defendants, APV is not liable for the insulation, gaskets, and packing that APV neither manufactured nor sold. But the trial court did not follow *Simonetta* and *Braaten*, and instead accepted Plaintiff’s invitation to create a new legal theory. Plaintiff’s proposed new exception to *Simonetta* and *Braaten* would impose liability for asbestos insulation, gaskets, and packing sold by other companies, if the product manufacturer “specified” those asbestos-containing replacement parts with its equipment.

Plaintiff relies entirely on the following *dicta* from *Braaten* to support her new “specification” exception:

In light of the facts here, we need not and do not reach the issue of whether a duty to warn might arise with respect to the danger of exposure to asbestos-containing products

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<sup>94</sup> *Id.*

<sup>95</sup> CP 409 (Yankee pp.935:2 – 23; 936:22 – 937:13); CP 75 (Yankee 118:8 – 18).

specified by the manufacturer to be applied to, in, or connected to their products, or required because of a peculiar, unusual, or unique design.<sup>96</sup>

No reported Washington case has interpreted this language from *Braaten*. Plaintiff reads this passage to mean that if a defendant specifies asbestos-containing gaskets or packing, that defendant is liable even if it did not manufacture or sell the gaskets or packing.

The problem with Plaintiff's argument is that *Braaten* never held that a product manufacturer is liable for specifying certain products, or even that a manufacturer might be liable. The court merely noted, in *dicta*, that it did not reach the issue.<sup>97</sup> Plaintiff cannot rely on the absence of a holding as support for her argument. Instead, the trial court should have followed the express holdings of *Simonetta* and *Braaten*, which prevent Plaintiff from recovering from APV for other companies' products.

*Braaten* supports this interpretation. In *Braaten*, the plaintiff presented evidence that defendant Crane Company actually advertised asbestos-containing packing and gaskets for use with Crane's equipment.<sup>98</sup> Despite Crane's suggestion that its customers use asbestos-containing components with its equipment, *Braaten* did not hold that Crane should be liable for any asbestos-containing gaskets or packing that a third-party may install on Crane's equipment.<sup>99</sup>

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<sup>96</sup> *Braaten*, 165 Wash.2d at 397.

<sup>97</sup> *Braaten*, 165 Wash.2d at 397.

<sup>98</sup> *Braaten*, 165 Wash.2d at 389.

<sup>99</sup> *Id.*

APV is no different than defendant Crane, or any of the other defendants that *Simonetta* and *Braaten* found not liable. The *Braaten* Court did not create a “specification” exception to hold Crane liable, and the trial court should not have created such an exception to hold APV liable.

Moreover, the trial court’s ruling is internally inconsistent. In one part of the trial court’s order, the trial court correctly concluded that APV could not be liable under a design defect theory for products APV did not manufacture or sell. But the trial court later reached the opposite conclusion when it decided that APV could be liable for “specifying” asbestos-containing products. There is no material difference between designing a product to use asbestos containing components, and “specifying” that a product use asbestos-containing components. In either case, Plaintiff must prove that APV manufactured or sold the asbestos-containing component Mr. Yankee was exposed to.

If APV cannot be liable for designing a product with asbestos-containing insulation, gaskets, or packing sold by other companies, then it also cannot be liable for allegedly specifying that its products incorporate asbestos-containing parts sold by other companies. In either case, the responsibility for asbestos exposure alleged lies with the manufacturer supplying the asbestos-containing replacement insulation, gasket, or packing, not with APV.

### III

#### **APV Did Not Specify Any Asbestos-Containing Parts With Its Carbon Mixers.**

*Braaten* did not create a “specification” exception. But there is a second reason why plaintiff’s theory is not applicable. The record shows that APV did not specify any asbestos-containing products with its mixers.

##### **A. Insulation**

APV did not provide exterior insulation for any part of the carbon mixers sold to Alcoa. Plaintiff’s suggestion otherwise simply reads more into the record than the documents support. The lone document Plaintiff relies on is drawing No. 83-703, which describes the use of “Superex” insulation used inside trough extension covers.<sup>100</sup> But drawing No. 83-703 refers to different carbon mixers sent to a different customer in Texas.<sup>101</sup> The APV Mixers sold to Alcoa did not have these trough extension covers, and did not contain Superex insulation.<sup>102</sup>

APV never told Alcoa to insulate the exterior of the APV Mixers, much less insulate them with asbestos. Without a single statement from APV to Alcoa about whether to insulate the APV Mixers, or what to insulate them with, Plaintiff’s claim that APV somehow specified asbestos insulation with its mixers must fail.

##### **B. Gaskets and Packing**

Plaintiff’s allegation that APV specified asbestos gaskets and

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<sup>100</sup> CP 355 (APV drawing No. 83-703, Bates No. BP000280)

<sup>101</sup> CP 583 (Kress p 116:2-6)

<sup>102</sup> CP 501 (Kress p. 104:19-23).

packing with its carbon mixers fails as well. Most of the APV documents that Plaintiff relies on are inventory sheets that simply tell Alcoa what parts APV is providing.<sup>103</sup> Not a single one of these documents tells Alcoa what kind of gaskets or packing Alcoa should use, and none use the word, “asbestos.”<sup>104</sup> These documents do not constitute a “specification” such that APV should assume the liability for any Garlock replacement gasket Alcoa decided to use.

The document marked in the Clerk’s Papers as 366 (“Maintenance of Glands with Soft Packing”) is slightly different in that it provides instructions to Alcoa for replacing packing. But APV does not command Alcoa to use asbestos packing; the only instruction that APV gives is for Alcoa to use a “square braided packing,” which can be purchased “from large hardware stores, millwright supply houses, or direct from Baker Perkins.”<sup>105</sup> APV did not specify Palmetto packing. Alcoa was free to choose any replacement packing and did so with Garlock packing.

APV is even further removed than defendant Crane in *Braaten*, who supplied asbestos-containing gaskets with its equipment, and actually advertised, if not recommended or specified, asbestos-containing replacement gaskets.<sup>106</sup> If the *Braaten* court did not find that Crane’s advertisement of asbestos-containing replacement gaskets constitute specification, the trial court should not have concluded that the APV

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<sup>103</sup> CP 186, 366, 524, 523, 303

<sup>104</sup> *Id.*

<sup>105</sup> CP 366 (Maintenance of Glands with Soft Packing, Bates No. BP 000291).

<sup>106</sup> *Braaten*, 165 Wash.2d at 394-97.

documents were specifications.

#### IV

##### **Alcoa Did Not Follow APV's Alleged Specifications.**

Plaintiff's "specifications" argument fails for a third reason. Alcoa did not follow what plaintiff claims are APV's specifications. APV's bill of materials, or inventory sheets, mention Durabla and U.S. Rubber gaskets, and Palmetto packing.<sup>107</sup> Mr. Yankee used only Garlock gaskets and packing.<sup>108</sup> APV cannot be liable for a Garlock product that it never specified.

Plaintiff will respond that it does not matter that Alcoa used a different brand of gasket and packing; what is important is that Alcoa used gaskets and packing that contained asbestos. Stated another way, APV should be liable because it specified asbestos, generally. But APV never specified asbestos. None of the APV documents Plaintiff relies on to support her argument state that asbestos is a necessary ingredient for insulation, gaskets, or packing. As previously stated, APV's documents never mention the word "asbestos." APV cannot be liable for specifying as a replacement an ingredient (asbestos) that it never mentioned.

#### CONCLUSION

Under *Simonetta* and *Braaten*, APV's liability to Mr. Yankee is limited to those asbestos-containing products that are within APV's chain

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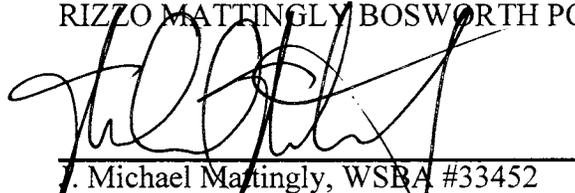
<sup>107</sup> CP 104 (Repair Order Dispatch List, Bates No. BP000228); CP 186 (Operating Instructions, Bates No. BP 000112)

<sup>108</sup> CP 83 – 85 (Yankee pp. 935 – 937).

of commerce. None of the asbestos products that Mr. Yankee was exposed to were within APV's chain of commerce. Thus, APV is not liable to Plaintiff. In an effort to salvage her claim, Plaintiff has seized upon *dicta* in *Braaten* and is trying to re-cast APV's packing sheets and inventory lists as "specifications." In doing so, Plaintiff has distorted the meaning of these documents from what they are—lists of material—into what Plaintiff wants them to be—commands to Alcoa to use asbestos. The trial court's acceptance of Plaintiff's creative reading of *Braaten* should be reversed.

Respectfully submitted this 29<sup>th</sup> day of July, 2010.

RIZZO MATTINGLY BOSWORTH PC



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Attorneys for Defendant-Appellant  
APV, LLC

**APPENDIX**

RICHARD D. JOHNSON,  
Court Administrator/Clerk

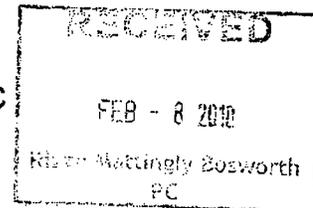
*The Court of Appeals  
of the  
State of Washington*

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February 5, 2010

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CASE #: 64312-6-I  
Sandra Yankee, Respondent v. APV North America, Inc. Petitioner

Counsel:

Enclosed is the ruling of the Commissioner entered today in the above case.

In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,

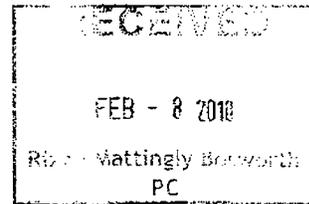
A handwritten signature in black ink, appearing to read "R.D. Johnson".

Richard D. Johnson  
Court Administrator/Clerk

hek

c: Hon. Michael J. Trickey

enclosure



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

SANDRA YANKEE, individually and )  
as Personal Representative of the )  
Estate of Dennis Yankee, deceased, )  
a minor, )  
 )  
Respondent, )  
 )  
v. )  
 )  
APV NORTH AMERICA, INC., )  
 )  
Petitioner. )

No. 64312-6-1

COMMISSIONER'S RULING  
GRANTING DISCRETIONARY  
REVIEW

APV North America, Inc. (APV) seeks discretionary review of a trial court order denying its motion for summary judgment. Review is granted.

FACTS

Dennis Yankee developed mesothelioma which he alleged resulted from his exposure to asbestos in the 1960s, 70s, and 80s in a variety of circumstances. He filed suit against 47 defendants, one of whom is APV.

APV is the successor to Baker Perkins, Inc. In 1940 and 1941, Baker Perkins manufactured and sold to Alcoa, Inc. five carbon mixers for use in Alcoa's Vancouver, Washington facility. The mixers are large devices in which materials used to make aluminum are mixed. The mixers are steam heated, insulated, and require gaskets and packing. The mixers themselves do not contain any asbestos. However, for many years the insulation, gaskets and packing necessary to use the mixers for Alcoa's

purposes did contain asbestos. The mixers were completely rebuilt every three or four years and Baker Perkins did not manufacture or supply the insulation, gaskets, or packing used in the rebuild. Dennis Yankee worked at the Alcoa plant from 1969 through 1997, long after the mixers were sold to Alcoa. He was regularly involved in tasks that required the removal and replacement of insulation, gaskets and packing associated with the mixers.

After Dennis Yankee died, Sandra Yankee, his personal representative, filed an amended complaint for wrongful death and survivorship. The complaint alleges that APV violated its duty to warn those who worked on the mixers of the danger of inhaling asbestos. APV moved for summary judgment, arguing that it cannot be liable for a failure to warn of possible exposure caused by products it neither manufactured nor supplied. The trial court denied the motion. Trial is set for March 2010. APV seeks discretionary review.

#### DISCRETIONARY REVIEW CRITERIA

Discretionary review of an interlocutory decision may be accepted under RAP 2.3(b) only in the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

### DECISION

Baker Perkins did not manufacture or supply the insulation, gaskets or packing used with the mixers when Dennis Yankee worked on them. The cause of action is based on the allegation that Baker Perkins specified the use of certain brands of insulation, gaskets and packing, thus specifying that asbestos-containing parts be used. While the evidence is that none of the brands actually mentioned in any of the materials associated with the mixers was actually used when Dennis Yankee worked on them, the theory is that specification of these brands is the same as specifying that asbestos-containing materials be used. The trial court apparently concluded that there was an issue of fact as to whether APV did specify the use of certain products and that it could be liable for a failure to warn if those or equivalent products contained asbestos.

APV argues that it did not specify the use of any particular product. But the evidence on this issue, while decidedly thin, is subject to differing interpretations. There is not obvious or probable error in the trial court's denial of summary judgment on the issue of whether Baker Perkins recommended or specified that certain brands of insulation, gaskets or packing be used with the mixers.

The legal issue thus presented is whether APV may be liable under a failure to warn theory if it did recommend or specify certain brands of parts, which it neither

Commissioner's Ruling  
No. 64312-6/4

manufactured nor sold, and equivalent parts contained asbestos to which Dennis Yankee was exposed.<sup>1</sup>

Two recent Supreme Court cases appear to resolve this question in APV's favor. 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).

As to the insulation used on the mixers, this case is nearly identical to Simonetta. The duty to warn is limited to those in the chain of distribution of the hazardous product. Simonetta, 165 Wn.2d at 353. Because Baker Perkins was not in the chain of distribution for the insulation, APV is not liable for any failure to warn of the dangers associated with the insulation.

As to gaskets and packing, Braaten presents similar facts. Braaten worked as a civilian pipefitter on U.S. Navy ships. He developed mesothelioma and sued five manufacturers, claiming they should have warned him about the danger of asbestos inhalation involved in using their products. Regular maintenance of these products required the removal of exterior asbestos insulation and the replacement of interior asbestos gaskets and packing. All five manufacturers either sold products containing asbestos gaskets and packing, or were aware that asbestos insulation was used around the products. One of the manufacturers, Crane, advertised asbestos packing for use with its product. Braaten, 165 Wn.2d at 395. The court nevertheless held that the manufacturers could not be liable for a failure to warn of the dangers associated with

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<sup>1</sup> APV maintains that another King County Superior Court judge, faced with the same issue, has ruled differently. While conflicting rulings would indicate the need for appellate court resolution of the conflict, there is not sufficient information regarding the other case to decide there is actually a conflict.

Commissioner's Ruling  
No. 64312-6/5

products they neither made nor supplied. Braaten, 165 Wn.2d at 394. Whether the manufacturers knew replacement parts would or might contain asbestos did not affect their lack of liability. Braaten, 165 Wn.2d at 391. However, Yankee's argument rests on the following passage from Braaten:

In light of the facts here, we need not and do not reach the issue of whether 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. Yankee contends that because the issue is undecided, the trial court's conclusion that APV may be liable for specifying asbestos-containing components for use with its mixers does not rise to the level of obvious or probable error.

The view that a manufacturer is not liable for a failure to warn of the dangers associated with components it neither manufactures or supplies is supported by Merrill v. Leslie Controls, Inc., 179 Cal. App.4th 262, 101 Cal. Rptr. 3d 614 (2009) and Taylor v. Elliott Turbomachinery Co., Inc., 171 Cal. App. 4th 564, 90 Cal. Rptr. 3d 414 (2009). Merrill and Taylor rely on Simonetta and Braaten. These cases involve a number of defendants, whose relationship to the products that eventually caused the plaintiffs' damages varied. In none of the cases is there any recognized exception for the sort of relationship that is alleged in this case, the supposed specification of products containing asbestos and the use of other products of a similar nature. While the court's language in Braaten may leave the question of liability open under some other unique fact pattern, the court's rationale cannot reasonably be interpreted to impose liability

Commissioner's Ruling  
No. 64312-6/6

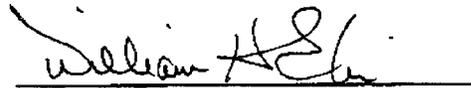
under the facts alleged in this case. The trial court's denial of summary judgment seems clearly contrary to the holdings of Simonetta and Braaten.

There appears to be obvious error which renders further proceedings useless. Review shall accordingly be granted.

Now, therefore, it is hereby

ORDERED that APV's motion for discretionary review is granted.

Done this 5<sup>th</sup> day of February, 2010.



Court Commissioner

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 FEB - 5 PM 12: 59

1  
2 CERTIFICATE OF SERVICE  
3 *(Yankee v. APV North America, Inc.)*

4 I HEREBY CERTIFY that on the 29<sup>th</sup> day of July, 2010, a true and correct copy of the  
5 foregoing **APPELLANT'S OPENING BRIEF** was served upon the following parties in the  
6 manner indicated:

7 I am employed by the law firm of Rizzo Mattingly Bosworth PC in Portland, Oregon. I  
8 am over the age of eighteen years and not a party to the subject cause. My business address is  
9 411 S.W. Second Avenue, Suite 200, Portland, OR 97204.

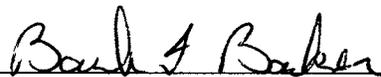
10 VIA E-MAIL AND US MAIL:

11 Thomas J. Owens  
12 The Law Office of Thomas J. Owens  
13 1001 Fourth Avenue, Suite 4400  
14 Seattle, WA 98154  
15 **Attorneys for Plaintiffs**  
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**Attorneys for Plaintiffs**  
rgreen@seglaw.com

17 I declare under penalty of perjury and under the laws of the State of Washington (RCW  
18 9A.72.085) that the foregoing is true and correct.

19 Executed at Portland, Oregon, this 29<sup>th</sup> day of July, 2010

20   
21 \_\_\_\_\_  
22 Barbra A. Baker, Paralegal