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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GERRI S. COOGAN, the spouse of JERRY D. COOGAN, deceased, and
JAMES P. SPURGETIS, solely in his capacity as the personal
representative of the Estate of JERRY D. COOGAN, deceased,

Respondents,

vs.

GENUINE PARTS COMPANY and NATIONAL AUTOMOTIVE
PARTS ASSOCIATION a.k.a. NAPA,

Appellants, and

BORG-WARNER MORSE TEC., INC. (sued individually and as
successor-in-interest to BORG-WARNER CORPORATION), et al.,

Defendants.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Stanley J. Rumbaugh

RESPONDENTS' BRIEF AGAINST NAPA

Lisa W. Shirley
(admitted *Pro Hac Vice*)
Jessica M. Dean
(admitted *Pro Hac Vice*)
Dean Omar & Branham, LLP
302 N. Market St., Suite 300
Dallas, TX 75202
214-722-5990

William Rutzick, WSBA #11533
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 622-8000

Benjamin R. Couture, WSBA #39304
Brian D. Weinstein, WSBA #24497
Alexandra Caggiano, WSBA #47862
Weinstein Couture PLLC
601 Union Street, Suite 2420
Seattle, Washington 98101

Attorneys for Plaintiffs/Respondents

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INTRODUCTION

A unanimous jury verdict was returned against Appellant National Automotive Parts Association (NAPA) on claims of negligence and strict products liability brought by the family of decedent Jerry “Doy” Coogan (“Mr. Coogan”). The Coogan family (also “Plaintiffs”) presented evidence that Mr. Coogan purchased asbestos-containing brakes, clutches, and automotive gaskets from NAPA auto parts stores throughout his life and that he developed malignant mesothelioma, an asbestos-related cancer, as a result of those exposures.

NAPA asks this Court to hold that it is entitled to judgment as a matter of law under CR 50 based on its contention that it was not in the chain of distribution for the products at issue. When viewed in the light most favorable to Plaintiffs, as it must be, there is substantial evidence supporting the jury’s findings that NAPA was a product seller, distributor, or manufacturer under both Washington common law and the Washington Product Liability Act (WPLA). The NAPA Distribution Center distributed the products to NAPA-affiliated retail stores where Mr. Coogan shopped, NAPA put its name on the product catalogs for the brakes at issue, and NAPA called itself the “world’s largest remanufacturer” of the Rayloc brakes purchased by Mr. Coogan.

As an alternative grounds for affirmance, the Court should find that NAPA was an apparent manufacturer under the doctrine recently adopted by the Supreme Court in *Rublee v. Carrier Corp.*, 428 P.3d 1207, 1219 (2018), for claims based on injuries caused before the effective date of the WPLA.

RE-STATEMENT OF ISSUES

1. Viewed in the light most favorable to the Coogan family, was there substantial evidence or reasonable inferences to support the jury's finding that NAPA was in the chain of distribution for asbestos products purchased by Mr. Coogan?
2. Does the evidence support affirmance on the alternative ground that NAPA was an apparent manufacturer?

COUNTER-STATEMENT OF THE CASE

I. Mr. Coogan's most significant asbestos exposures occurred primarily in the 1960s and 1970s.

Mr. Coogan lived and worked in the small town of Kettle Falls, Washington. 13 RP 33, 44-45, 50-51. Throughout his life, Mr. Coogan performed maintenance and repairs on cars and on the heavy equipment used in his excavating business. 13 RP 38-39, 51-53. His work included removing and replacing asbestos brakes, clutches, and engine gaskets. 13 RP 39, 72, 89-90, 98-102, 129-34, 140. Among other work practices that exposed him to asbestos, he would use compressed air to blow out brake

dust from the drum brake assembly. 13 RP 129-131. Plaintiffs' causation expert, Dr. Carl Brodtkin, testified that Mr. Coogan's exposures to asbestos brakes, clutches, and gaskets purchased from NAPA were a substantial factor in causing his mesothelioma. 9 RP 156-57, 159, 188; 10 RP 53.

Mr. Coogan's exposures started when he was only a child, in 1956, learning car and equipment repair from his grandfather, who owned an excavation business. Ex. 68, ¶ 12; 13 RP 35-42, 72-73; 44 RP 122-24. Mr. Coogan and his brother, Jay Coogan, frequently stayed with their grandfather and spent time with him in his garage. 13 RP 37-38.

Mr. Coogan was also in a car club in high school in the 1960s. 13 RP 38-39. He and his brother and their friends, got together every week to work on each others' cars, including on brakes, clutches, and gaskets. *Id.*

Expert testimony established that childhood exposures to asbestos are particularly significant in causing disease. Plaintiffs' expert Dr. Arnold Brody testified that people are more vulnerable to developing diseases from asbestos exposure when they are exposed as children because there is more cell division occurring in children. 8 RP 86-87. The way tumors develop is through repeated genetic errors during cell division. 8 RP 69-70, 80-81. Defense expert Dr. Coreen Robbins agreed that "[e]arlier asbestos exposures create a greater risk than asbestos exposures later in life." 44 RP 92. This is "because the longer asbestos stays in the body, the

greater the risk it can cause.” *Id.* Mesothelioma can, in fact, occur in the children of brake workers. 11 RP 37; Ex. 50, p. 2.

In the 1970s, Mr. Coogan took over his grandfather’s excavation business and maintained all the heavy equipment himself. 13 RP 44-45, 50-52. This is a time period when his heaviest asbestos exposures occurred, as he had operational exposures from the asbestos brake on his Bantam crane that engaged constantly during operation of the crane arm. 14 RP 55-57. Even if this was the only exposure he ever had, it would alone be sufficient to cause his mesothelioma. 9 RP 181, 186. The brake on the crane required a large bulk brake lining material that had to be beveled and riveted. 13 RP 150-51, 158, 161; 9 RP 186; Ex. 109.

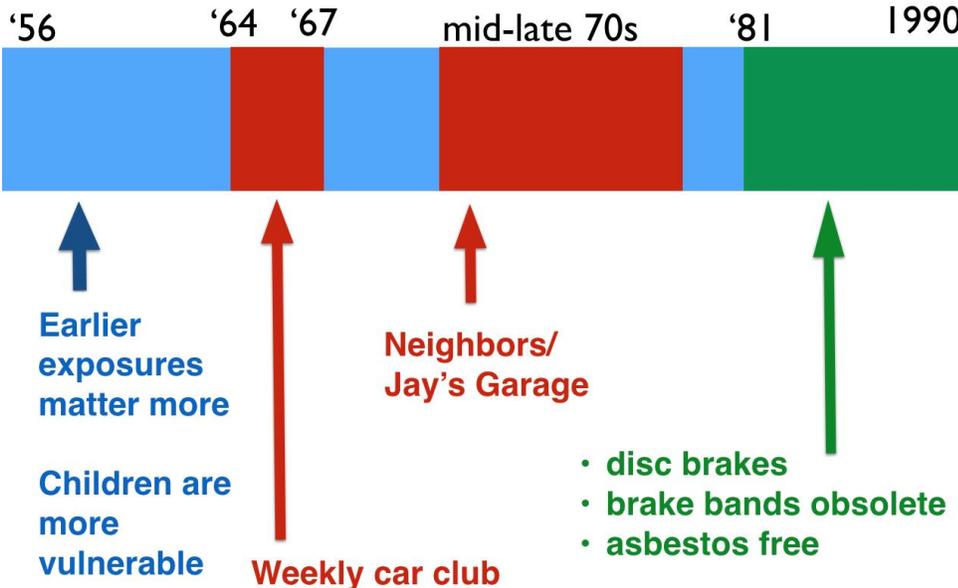
He also lived next door to his brother, Jay Coogan, who was running an auto repair shop out of his house. 13 RP 45-46, 70. Mr. Coogan spent a lot of time with Jay in his repair shop when he was doing brake, clutch, and gasket work. *Id.* Mr. Coogan also continued doing his own car repair work as a hobby. 13 RP 52-53. During winters especially, he spent a lot of time in his own repair shop. 13 RP 52.

There were several factors that reduced Mr. Coogan’s asbestos exposures in later years. In the 1980s, most cars switched over to disc brakes, which involved less exposures than working on drum brakes. 16 RP 34-35; 44 RP 130. By the 1990s, he was using excavation equipment

that used hydraulic mechanisms to operate the equipment rather than brake bands. 15 RP 37; 44 RP 127. And he did less repair work when he started spending his winters in Lake Havasu, Arizona. 44 RP 126.

Perhaps most significantly, manufacturers were phasing out the use of asbestos in the 1980s. Victor gaskets started to utilize asbestos-free alternatives in the late 1970s. 23 RP 83, 91. They stopped using asbestos entirely in 1988. 24 RP 113, 122. Abex, the manufacturer of American Brakeblok brakes, went asbestos-free in 1987. Ex. 125; 14 RP 72, 74.

This timeline demonstrates that although the exposures occurred over decades, Mr. Coogan's most significant exposures were prior to 1981:



II. NAPA distributed the automotive parts to the NAPA-branded stores where Mr. Coogan purchased repair parts.

Mr. Coogan purchased almost all of his brakes, clutches, and gaskets from the NAPA auto parts stores in Kettle Falls and in Colville, a small town about 8 miles from Kettle Falls. Ex. 68, ¶ 7; 13 RP 69-71, 73, 78-79, 140. In an affidavit he signed prior to his death from mesothelioma, Mr. Coogan attested:

7. In owning, operating, and servicing the equipment described in Exhibit A and that described in Exhibit B I purchased replacement parts, including but not limited to gaskets and friction components, from the Napa Stores depicted in Exhibit C. One store was located in Kettle Falls. The other in Colville. I obtained parts from both of these stores starting in the 1970s and continuing until I was diagnosed. Those parts included friction parts and gaskets.

Ex. 68, ¶ 7.

GPC does not dispute that Mr. Coogan worked with brakes and clutches purchased at NAPA stores. 14 RP 26-27. Not only did Mr. Coogan purchase his auto parts from NAPA, so did his grandfather and his brother. 13 RP 71-72, 78, 81, 86, 121, 127, 140-42, 163.

Jay Coogan worked at the Kettle Falls NAPA store from about 1974 to about 1978. 13 RP 68-70.¹ He also worked at the Colville NAPA store in the 1970s and 1980s and eventually owned the store from 1992 to

¹ Their grandfather bought his auto parts at the Colville NAPA store because there was not a NAPA store in Kettle Falls until 1974. 13 RP 78.

2015. 13 RP 71, 81. The jury saw photos of the NAPA stores in Kettle Falls and Colville, respectively:



Ex. 210.² The arrows point to the NAPA logo that is prominently displayed on the outside of each building. The individual store owners are referred to as NAPA “jobbers.”

Jay Coogan testified that the inventory sold at his NAPA-branded store came from the NAPA Distribution Center in Spokane. 13 RP 127, 141-42, 169, 172-73. A corporate representative for Genuine Parts Company (GPC), Liane Brewer, is a long-time employee of the NAPA

² NAPA attempts to create confusion by citing Jay Coogan’s deposition testimony about Colville Auto Parts that was only used at the summary judgment stage. NAPA Br. 5. Similar testimony was not elicited at trial. For clarity, however, when Jay Coogan testified that by NAPA he meant the Colville Auto Parts store, he was referring to the store depicted on the right that bears a large NAPA logo and a sign reading “NAPA Auto Parts.”

Distribution Center in Spokane and she confirmed that that Distribution Center serviced the NAPA stores in Kettle Falls and Colville. 21 RP 153-54. The Spokane NAPA Distribution Center was the main supplier for retail stores in the area. 21 RP 200. Records show that at the Colville NAPA-branded store at least three-quarters of the products sold to Mr. Coogan from 2001-2015 came from NAPA. 22 RP 70. More broadly, inventory for NAPA-branded stores was almost exclusively, with rare exceptions, from the NAPA Distribution Centers. 21 RP 198, 200; 22 RP 69.

Ms. Brewer agreed that there were NAPA Distribution Centers and that NAPA was part of the chain of distribution:

Q. [GPC] sent products from NAPA distribution centers which are located throughout the country, and one of them is in Spokane?

A. Yes, there is 58, I believe, across the country.

Q. And then part of that chain of distribution is they send parts to different NAPA stores throughout whatever region they are in?

A. Yes, ma'am.

21 RP 174; *see also* 21 RP 155. The jury saw this illustration of the relationship between GPC, NAPA Distribution Centers, and individual NAPA-branded stores:

Chain of distribution



Napa distribution centers:



NAPA provided various discount programs to its jobbers, and NAPA’s involvement included submitting bids for business. 22 RP 43, 104-05. NAPA executives were also involved in setting the vision for NAPA Distribution Centers. 22 RP 46. They visited the Spokane NAPA Distribution Center, met with Ms. Brewer and other employees, and implemented their feedback in making policies for the NAPA Distribution Center. 22 RP 46-48.

Company contracts and correspondence with Jay Coogan, the owner of the NAPA auto parts store in Colville, consistently refer to the distribution center as the “NAPA Distribution Center.” Ex. 238. For example, the “NAPA Jobber Outdoor Sign Identification Program”

provides that “NAPA will furnish the NAPA Jobber an outdoor sign to display” and that the sign will be on “loan from the NAPA Distribution Center.” Ex. 238 at bates no. GPC_Coogan_000001. Further, “[t]he sign shall remain the property of the NAPA Distribution Center at all times and upon request to the NAPA Jobber, shall be returned to it.” *Id.*

Correspondence between Jay Coogan and NAPA bore this logo:



Ex. 238 at bates no. GPC_Coogan_000007; *see also id.* at bates no. GPC_Coogan_000012 and GPC_Coogan_000015 (titled “NAPA Distribution Center Reference Sheets”).

The parts supplied by the NAPA Distribution Center to the NAPA-branded stores at issue included brakes, clutches, and gaskets. 21 RP 213; 22 RP 31. The manufacturer of the gaskets used by the Coogans³ confirmed that its products were sold to and shipped to NAPA Distribution Centers, which would in turn supply the parts to individual NAPA-branded stores. 23 RP 122.

³ The gaskets sold at NAPA were Victor gaskets manufactured by Dana Corporation. 10 RP 54. 13 RP 86, 121, 127; Ex. 97.

According to its website, “NAPA has been around a long time” and “has over 17,000 employees.” Ex. 236 at p. 5. Ms. Brewer testified that this is “confusing” because she believes NAPA to be a marketing arm of GPC with only about 15 employees. 22 RP 28, 79-81. She even went to her human resources department because after being shown the website at trial she was not sure if she was employed by GPC or NAPA. 22 RP 28, 80. She could not answer what the public is to think if even the company employees are confused by the publicly available information about NAPA. 22 RP 79-80.

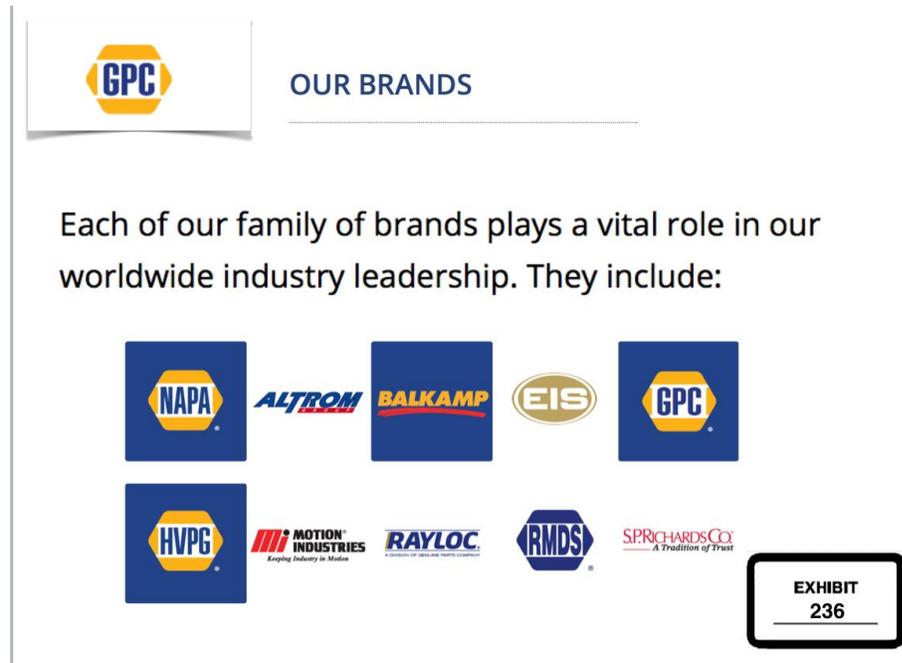
III. NAPA puts its name on the parts and catalogs that it distributed through NAPA Distribution Centers.

The parts distributed through NAPA Distribution Centers were branded with the NAPA name. Ms. Brewer explained that “that’s what NAPA is, it’s a brand.” 21 RP 172. As part of its branding, NAPA jobbers were eligible to receive a Five Star sales award if they had a certain level of sales of “NAPA auto parts” from the Distribution Center and did other things like “make sure that the outside of the store is painted in the brand paint” colors. 21 RP 172-73. Jay Coogan received the Five Star award from NAPA five times. 13 RP 184-85.

The brakes sold at NAPA stores were Rayloc and American Brakeblok. 13 RP 140-41, 163-64. The clutches sold at NAPA were

Rayloc. 13 RP 163-64; Ex. 98.

GPC, the manufacturer of Rayloc brakes and clutches, distributed Rayloc brakes under the “NAPA brand name.” Ex. 236 at p. 8 (“Rayloc By the Numbers”). The website lists NAPA as one of the GPC “brands”:

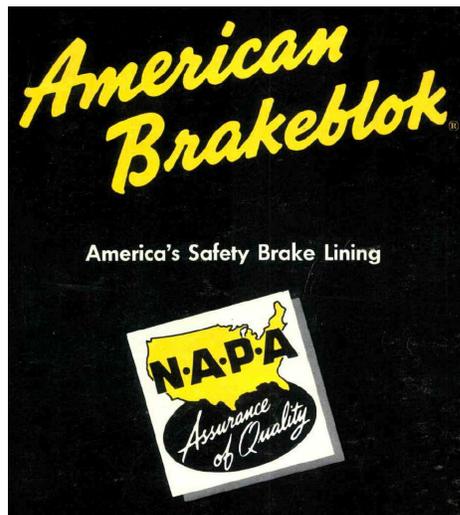


Jay Coogan kept many of the NAPA catalogs he had from his days as a NAPA jobber. 13 RP 80-81, 84-85; Exs. 97-103. Catalogs and correspondence repeatedly pair the NAPA name with the brakes and clutches sold at NAPA stores:⁴

⁴ The NAPA name appears on the American Brakeblok bulk lining catalog. 14 RP 171; Ex. 101. The bulk brake lining material came on a fifteen-foot roll and had to be cut with a hacksaw by the employee at the store. 13 RP 158, 161.



The NAPA logo was not only used on the parts sold at NAPA-branded stores, NAPA also gave an “assurance of quality” to those parts:



Ex. 103; 14 RP 170-71.

In promoting Rayloc and American Brakeblok brakes, NAPA claimed that “[f]or over 50 years, NAPA has set the standard in developing braking systems to meet vehicle needs.” Ex. 113 at bates no. NOVO30371; 14 RP 60-61, 65-66. The materials invite customers to “meet NAPA American Brakeblok and NAPA Rayloc.” *Id.*

NAPA even called itself a “remanufacturer”:



Ex. 98.

Mr. Frantz testified that the NAPA logo was used to provide certification and quality assurance for the products sold in NAPA stores. 14 RP 67-68. “The intent was for people to have confidence in the products that GPC distributed that were NAPA branded.” 14 RP 68. They “market the NAPA name from a quality perspective.” 14 RP 51. Ms. Brewer agreed that the NAPA certification and seal of approval is used because it is powerful. 22 RP 81.

NAPA even published a 125-page training manual for brake mechanics. Ex. 132; 14 RP 128-30. It bears a logo reading “NAPA Institute of Automotive Technology.” *Id.* It contains an entire section on

the hazards of asbestos exposure from working with asbestos brakes. Ex. 132, p. 74.

IV. Procedural History

NAPA moved for summary judgment, contending that it was entitled to judgment “on the basis that it is not and never has been a manufacturer, seller or distributor of asbestos-containing products of any kind.” CP 159. It argued that the WPLA governs Plaintiffs’ claims against it and that it is neither a manufacturer or seller within the meaning of that Act. CP 163-65; 11/29/16 RP 4, 10. Plaintiffs responded with evidence that “NAPA was the distribution arm for GPC” and that the WPLA does not apply because “85% or more of his exposure [to Rayloc brakes] was before 1981.” CP 516, 530; 11/29/16 RP at 10-13.

The motion for summary judgment was denied. CP 1016-17. At the hearing, Trial Judge Vicki L. Hogan ruled that there were genuine issues of material fact and that the jury should decide whether at least 85% of Mr. Coogan’s exposure to NAPA asbestos products occurred prior to July 26, 1981, the effective date of the WPLA. 11/29/16 RP 15-16.

At trial, NAPA moved for judgment as a matter of law under CR 50(a), asking the court to rule that the WPLA applies and that NAPA is not a manufacturer or seller. CP 10097-101. Trial Judge Stanley J. Rumbaugh found that there were genuine issues of fact for the jury on

those issues. 36 RP 5-8; 43 RP 177, 194-95.

The jury found that substantially all of Mr. Coogan's asbestos exposures to NAPA products occurred prior to July 26, 1981. CP 15018. Based on this finding, it used Verdict Form A that set forth the liability standards under Washington common law. CP 15019-20. The jury found NAPA liable under theories of negligence, product liability design defect, and product liability failure to warn. CP 15019-20. Under the product liability theories, the jury found that NAPA had manufactured, distributed, or sold products that were not reasonably safe. CP 15019.

After trial, NAPA did not renew its motion for judgment as a matter of law after trial under CR 50(b), nor did it seek a new trial on the grounds raised in this appeal. Its motion for new trial was brought purely on the grounds that the verdict is excessive. CP 16356-72. Its assignment of error that "[t]he trial court erred in denying defendants' post trial motions on December 1, 2017," should be disregarded as there were no post-trial motions brought by NAPA that are relevant to this appeal.

STANDARD OF REVIEW

This Court applies a de novo standard of review to the denial of a motion for judgment as a matter of law,⁵ applying the same standard as the trial court. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530–31, 70 P.3d

⁵ NAPA acknowledges that "this is an appeal from the denial of its CR 50(b) motion for judgment as a matter of law . . ." NAPA Br. 2 n2.

126, 131 (2003); *Clype v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 789, 358 P.3d 464, 471 (2015). A judgment as a matter of law requires the court to conclude, “as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.” *Indus. Indem. Co. of the Nw. v. Kallevig*, 114 Wn.2d 907, 915–16, 792 P.2d 520 (1990). “Overturning a jury verdict is appropriate only when [the verdict] is clearly unsupported by substantial evidence.” *Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009) (alteration in original) (quoting *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 107–08, 864 P.2d 937 (1994)).

“Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the premise is true.” *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008). The Court interprets the evidence against the moving party and in the light most favorable to the nonmoving party. *Faust, supra*, 167 Wn.2d at 537–38, 222 P.3d 1208. In fact, the party moving for judgment as a matter of law “admits the truth of the opponent’s evidence and all inferences which can reasonably be drawn therefrom” *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 254, 386 P.2d 958 (1963).

ARGUMENT

I. NAPA may not appeal the summary judgment rulings.

NAPA has assigned error to the trial court's denial of summary judgment and denial of reconsideration of the order granting summary judgment. This Court cannot, however, review a summary judgment order after a trial on the merits decides questions of fact raised at summary judgment. "[A] denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact." *Johnson v. Rothstein*, 52 Wn. App. 303, 303, 759 P.2d 471, 472 (1988). There are good policy reasons for this rule. It would "defeat the fundamental purpose of judicial inquiry" to deprive a party of a jury verdict on the basis of a less-developed record at the summary judgment stage. *Id.* at 307 (quoting *Home Indem. Co. v. Reynolds & Co.*, 187 N.E.2d 274, 278 (Ill. App. Ct. 1962)). It "would be unjust to the party that was victorious at the trial, which won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised." *Id.* (quoting *Home Indem.*, 187 N.E.2d at 278).

Further, issues decided at the summary judgment stage become merged into the jury verdict. *Id.* This is because the summary judgment procedure is designed to determine whether a trial is even necessary.

“[T]he nature of a summary judgment is such that once the issues have been tried to a finder of fact, the summary judgment procedure to determine the presence of genuine, material issues of fact has no further relevance.” *Id.*

Here, the trial court found that there were genuine issues of material fact regarding the years of Mr. Coogan’s exposure and whether NAPA had a role in the chain of distribution. CP 1016-17; 11/29/16 RP 15-16. Now that the jury has decided those factual issues in Plaintiffs’ favor, the summary judgment orders are moot.

Further, while NAPA attempts to rely on evidence it raised at the summary judgment stage, “[t]he final judgment in a case can be tested upon the record made at trial, not the record made at the time summary judgment was denied.” *Johnson, supra*, 52 Wn. App. at 307, 759 P.2d 471 (quoting *Evans v. Jensen*, 655 P.2d 454, 459 (1982)). The Court should not consider evidence raised by NAPA at summary judgment but not at trial. *See Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993); *Lopez v. Reynoso*, 129 Wn. App. 165, 174, 118 P.3d 398, 404 (2005). This includes all the references to the Clerk’s Papers discussed at pages 3 to 5 of NAPA’s Brief. This evidence largely consists of an affidavit from a NAPA employee, Gaylord Spencer, who did not testify at trial, and many of his assertions are not otherwise

supported by the trial record.⁶ The question before this Court is whether the jury's verdict is supported by substantial evidence; consideration of material not presented to the jury does not advance this inquiry.

II. NAPA has failed to show that no competent and substantial evidence supports the jury's verdict.

A. It was for the jury to determine the facts underlying the legal question of whether Washington common law or the WPLA applies to Plaintiffs' product liability claims.

NAPA has waived any potential challenge to the trial court's determination that it was for the jury to decide whether substantially all of Mr. Coogan's asbestos exposure to NAPA products occurred prior to July 26, 1981. It assigned error to the court's decision to give a jury instruction on this issue, given as Instruction 12. NAPA Br. 2, 12. NAPA did not offer any legal argument, however, beyond a footnote stating that the trial court's approach of using alternative verdict forms was "unnecessarily confusing" and the observation that questions of law are ordinarily reserved to the court. *Id.* at p. 12. An assignment of error must be supported by argument or it is waived. *Ortblad v. State*, 85 Wn.2d 109, 112, 530 P.2d 635, 637 (1975).

NAPA also concedes that "it makes no difference" whether the WPLA or Washington common law applies to Plaintiffs' claims. *Id.* at p.

⁶NAPA did not offer testimony from a corporate representative at trial.

13. This would also appear to be a waiver of any challenge to Instruction 12. Instructional error is not grounds for reversal unless it affected the outcome of the trial. *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 278, 135 P.3d 955, 962 (2006).

In any event, there was no error in the trial court's instruction directing the jury to determine the facts underlying application of the WPLA. The WPLA applies to product claims arising on or after its effective date of July 26, 1981. *Fagg v. Bartells Asbestos Settlement Trust, et al.*, 184 Wn. App. 184, 812-13, 339 P.3d 207, 211 (2014). When, however, the plaintiff's exposure to the product in question is "prolonged or continuous in nature . . . Washington courts consider when 'substantially all' of the exposure occurred in determining when the claim arises." *Id.* The term "substantially all" was intended to mean "nearly all," and has been quantified at 85% or more. *Id.* The term substantially all is measured by the plaintiff's exposure to a specific defendant's products and the WPLA will apply only if substantially all of a plaintiff's exposure to that defendant's product occurred after July 26, 1981. *Id.* at 212.

There was no error in the trial court's determination that it was for the jury to decide the question of when "substantially all" of Mr. Coogan's exposure to NAPA asbestos products occurred. The court found that there were "multiple issues of fact as to whether the 85 percent threshold was

met related to Mr. Doy Coogan's exposure before July 26, 1981." 36 RP

8. The trial court reasoned that simply adding up the years of exposure was "flawed and greatly oversimplified" because it did not take into account the qualitative factors that the jury must consider in the causation analysis:

The analysis of the other variables, including but not necessarily limited to the intensity of the dose that Doy Coogan was exposed to, the frequency of his exposure, the presence or absence of industrial controls related to that exposure, all of which has to be accounted for when applying the substantially all test from Fagg v. Bartella.

36 RP 6. Further, case law instructs that for purposes of assessing exposures under the "substantially all" test, the date of exposure is determined at the time of installation, not at the time of later removal. 36 RP 7. The court relied on *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 472, 804 P.2d 659, 664 (1991), which held that when an individual was exposed to asbestos in the late 1960s, 1970s, and 1980s, substantially all of the "injury-producing" events had occurred prior to 1981. *Id.* There, "[a]ll parties agree[d] that the degree of exposure was less in the later years with the advent of preventative and precautionary measures." *Id.* at 472 n.4.

NAPA has offered no argument on appeal that Mr. Coogan's asbestos exposures did *not* substantially occur prior to July 26, 1981. As

set forth above, his exposures to NAPA products began in the 1950s, when he was present when his grandfather was working with automotive products purchased at NAPA, and were concentrated in the 1960s, 1970s, and 1980s. His childhood exposures in the 1950s and 1960s carry more weight than his later exposures, and his heaviest exposures were the operational exposures from bulk brake linings purchased at NAPA and used on his crane in the 1970s. In later years, he switched to equipment that used hydraulic controls instead of bulk brake linings, cars began using disc brakes instead of drum brakes, and product manufacturers began phasing out their asbestos products in favor of alternatives.

The weighing of factors affecting causation in an asbestos case is properly a jury function. *See Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 248, 744 P.2d 605, 613 (1987); *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 736, 248 P.3d 1052, 1060 (2011). Moreover, juries are routinely directed to make factual findings that will determine the applicable law. This most commonly occurs in statute of limitations cases where the applicability of the limitations period is a legal question, but the jury must decide the underlying factual questions unless the facts are susceptible of only one reasonable interpretation. *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290, 294 (1995). The same logic applies here. Where reasonable minds may differ on an issue of fact, it is for the jury, not the

court, to make the determination. *Mulkey v. Spokane, P. & S. Ry. Co.*, 65 Wn.2d 116, 121–22, 396 P.2d 158, 162 (1964).

Finally, as to NAPA’s contention that the trial court’s approach was “confusing,” there is absolutely no indication that the jury was confused by having two alternative verdict forms dependent on how it answered this threshold issue. NAPA has pointed to no such evidence and the jury was able to unanimously reach a verdict in this case.

To the extent NAPA has not waived this issue, it has failed to show that the trial court should have taken this issue from the jury. It has not shown that the time period of Mr. Coogan’s greatest asbestos exposures could be determined as a matter of law. Because the underlying facts were in dispute, it was for the jury to determine whether substantially all of Mr. Coogan’s exposure to NAPA asbestos products occurred prior to July 26, 1981. Based on those factual findings, which NAPA does not deny are supported by the record, Washington common law was properly applied.

B. NAPA is liable as a product seller, manufacturer, or distributor under both the common law and the WPLA.

The jury’s verdict has substantial support in the evidence, regardless of whether Washington common law or the WPLA is applied.

Prior to the WPLA, product liability claims in Washington were governed by strict liability rule of Restatement (Second) of Torts § 402A,

adopted as to manufacturers in *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 531-32, 452 P.2d 729 (1969). In *Seattle-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 148, 542 P.2d 774, 776 (1975), the Court extended strict liability under Section 402A to all those in the chain of distribution. Section 402A imposes strict liability “if ‘the seller is engaged in the business of selling such a product,’” even if there is a lack of privity with the consumer. *Id.* (quoting Restatement (Second) of Torts § 402A(1)(a)). Comment f indicates that this rule applies to any manufacturer, wholesale or retail dealer, or distributor. *Id.* In *Seattle-First National Bank*, the importer of a Volkswagen microbus was held strictly liable because it was “within the chain of distribution and within the scope of liability under section 402A.” *Id.* at 149.

In *Zamora v. Mobil Corp.*, 104 Wn.2d 199, 201, 206, 704 P.2d 584 (1985), the court imposed strict liability on the distributor of propane gas even though it never had possession or control over the gas. The distributor, Cal Gas, bought the propane gas from the manufacturer and sold it a retailer that delivered it directly to the plaintiffs who were injured when the gas leaked and caused an explosion. *Id.* at 202. It was an entirely a paper transaction. *Id.* The Court nevertheless found that Cal Gas was properly regarded as a member in the chain of distribution of the propane. *Id.* at 205.

The Court reasoned that “Section 402A, by its literal terms, imposes strict liability for *any* sale of a defective product.” *Id.* at 206 (emphasis in original). “The primary policy justification . . . for the extension of strict liability to all sellers in the chain of distribution is provision of the ‘maximum of protection’ to the consumer.” *Id.* (quoting *Seattle-First Nat. Bank v. Tabert, supra*). Even when a seller never handles or controls the product, this policy rationale of protecting the consumer still applies. “[T]he *degree* of a seller’s participation in the marketing process is less important to our decision than the public protection consideration where, as here, a seller has had *some* identifiable role in placing a defective product on the market.” *Id.* at 207 (emphasis in original).

Viewed in the light most favorable to Plaintiffs, there is substantial evidence supporting the jury’s finding that NAPA had an identifiable role in placing asbestos brakes, clutches, and gaskets on the market. As demonstrated, the brakes, clutches, and gaskets sold at the Kettle Falls and Colville NAPA stores came from NAPA. A career employee of the Spokane NAPA Distribution Center, Ms. Brewer, acknowledged that NAPA Distribution Centers were in the chain of distribution for NAPA products, and indicated repeatedly that NAPA supplied the products to

NAPA jobbers.⁷ Records for the Colville NAPA store show that most of the products sold at that store originated from the Spokane NAPA Distribution Center. NAPA's role in the sales process included creating bids to customers. NAPA leadership was heavily involved in the vision and structure of the Spokane NAPA Distribution Center.

NAPA relies on testimony from GPC's corporate representative, Byron Frantz, that GPC "owned" the Spokane Distribution Center. In reality, Mr. Frantz testified that "not all NAPA Distribution Centers were owned by Genuine Parts Company, depending on the time." 14 RP 59. He further acknowledged that the distribution center at issue in this case was only owned by GPC for a subset of the relevant years of exposure. 14 RP 59. Mr. Frantz does not claim that GPC had any ownership in the NAPA Distribution Center in Spokane until the early to mid-1960. 14 RP 59. GPC did not own the Spokane Distribution Center during the earliest years of exposure in this case, specifically from the 1950s until the at least the first part of the 1960s. Moreover, Mr. Frantz provided no documentation for his claim that GPC owned the NAPA Distribution Center in Spokane at any point in time. Ms. Brewer called his knowledge into doubt when she testified that Mr. Frantz was from Atlanta, had only been to Spokane

⁷ NAPA's contention that Ms. Brewer "reaffirmed that NAPA was not in the product chain of distribution" is not supported by the record. NAPA Br. 7. In the cited testimony, Ms. Brewer only stated that she did not know that the inventory at the NAPA Distribution Center included asbestos-containing products. *Id.* (citing 21 RP 31).

once, and “wouldn’t be able to talk about Jay [Coogan] and our distribution center relationship.” 21 RP 191. Given Mr. Frantz’s lack of documentary support and lack of familiarity with the NAPA Distribution Center in Spokane, the jury was justified in disbelieving his testimony and instead believing that the NAPA Distribution Center, bearing the NAPA name and logo, correctly identified the owner of the distribution center.⁸

NAPA claims that the term “NAPA Distribution Center” is a misnomer. NAPA Br. 6. No witness at trial made this statement. Nor does any witness give any rationale as to why a distribution center that does not interact with retail customers would bear the name NAPA unless NAPA was, as testified to, involved in the bidding, selling, and distributing of parts through the NAPA Distribution Center. 13 RP 127, 141-42, 169, 172-73; 21 RP 153-54, 174, 198, 200; 22 RP 43, 46-48, 69-70, 104-05.

Even had NAPA or GPC denied NAPA’s ownership of the Distribution Centers, that would not absolve it of being the distributor of products sent from the NAPA Distribution Center to stores. NAPA cites no law in support of its apparent position that ownership of the distribution center is dispositive of the distribution question.

Not only is there ample evidence for the jury to determine that NAPA was the distributor of the products sold at NAPA stores, but there

⁸ The jury was already skeptical of Mr. Frantz given his apparent lack of knowledge about the topics for which he was offered to testify. CP 9077.

is evidence that NAPA was also the product manufacturer and seller. NAPA called itself “the world’s largest remanufacturer.” Ex. 98. NAPA put its name and logo on the product catalogs for the very brakes sold to Mr. Coogan. It provided explicit quality assurance for those products. The entire purpose of all NAPA branding was to “inspire confidence in the products . . . that were NAPA branded.” 14 RP 68. NAPA put out training manuals for brakes, branded “NAPA Institute of Automotive Technology.”

The jury was entitled to find, from all the ways in which NAPA was involved in marketing automotive products—from the level of the distribution center to the individual products and catalogs—that NAPA was in the chain of distribution. There were fact issues for the jury’s determination, and a reasonable person could certainly find from this record that NAPA was the distributor, and even the seller and manufacturer, of NAPA-branded products coming from the NAPA Distribution Center to NAPA-branded stores.

The result does not change under the WPLA. The WPLA imposes liability against product “sellers” and “manufacturers.” A “product seller” is defined as “any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the

relevant product.” RCW 7.72.010(1). A “manufacturer” is defined as a “product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.” RCW 7.72.010.

Given that the evidence supports a finding that NAPA was a distributor or even a manufacturer of the automotive products at issue, it is certainly encompassed within the term “seller” as defined in the WPLA. It is true that the WPLA defines liability for sellers more narrowly, but one of the grounds on which sellers may be liable is if they are negligent. RCW 7.72.040(1)(a). Here, the jury found that NAPA was negligent, CP 15020, and NAPA has not challenged that finding on appeal.

The evidence also supports a finding that NAPA was a manufacturer within the meaning of the WPLA. NAPA called itself the “the world’s largest remanufacturer.” Ex. 98. NAPA held itself out as the manufacturer through its branding. RCW 7.72.010(2). The trial court found that a reasonable consumer could believe NAPA to be the manufacturer based on its representations. 43 RP 194.

Thus, a finding of liability under Washington common law or the WPLA is supported by the evidence that NAPA distributed the products

and put its name and branding on virtually every other step of the distribution process, including on the retail stores and product catalogs, and even called itself a “remanufacturer.”

III. The evidence supports affirmance on the alternative ground that NAPA is an apparent manufacturer.

NAPA’s entire argument is premised on its contention, repeated many times in its Opening Brief, that there can be no strict products liability for those not in the chain of distribution. NAPA Br. 11-12, 17-18, 22. The Supreme Court’s recent decision in *Rublee v. Carrier Corp.*, 428 P.3d 1207, 1219 (2018), establishes otherwise.

Rublee was an asbestos case in which Pfizer put its name and logo on bags of asbestos-containing insulating cement manufactured and distributed by its subsidiary, Quigley. *Id.* at 1210. The plaintiff used the insulating cement, and observed the name Pfizer on the bags, while was working at Puget Sound Naval Shipyard. *Id.* The evidence showed that Pfizer placed its logo next to Quigley’s on advertising fliers and other promotional materials, as well as on stationary, invoices, and technical data sheets. *Id.*

In deciding the case, the Supreme Court adopted the apparent manufacturer doctrine set forth in Section 400 of the Restatement (Second) of Torts for claims arising before the effective date of the

WPLA. *Id.* at 1213. “[T]he apparent manufacturer doctrine imposes a manufacturer’s liability on a nonmanufacturing entity that holds itself out to the public as the actual manufacturer of a product.” *Id.* at 1212. There are two predominant ways a nonmanufacturer puts out a product as its own: “(1) the entity appears to be the manufacturer of the product or (2) the product appears to have been made for the particular entity.” *Id.* The doctrine was first applied to retailers and distributors who placed their own house labels on products manufactured by another company. *Id.*

The apparent manufacturer doctrine is a type of estoppel against “a nonmanufacturing seller who, through its labeling or advertising of a product, causes the public to believe it is the manufacturer of the product and to purchase the product in reliance on that specific belief.” *Id.* Under those circumstances, the nonmanufacturer is estopped from denying that it is the manufacturer. *Id.*

The Supreme Court noted that recognizing Section 400 for common law claims aligns with the WPLA’s explicit adoption of apparent manufacturer liability in RCW 7.72.010(2). *Id.* at 1213. That provision provides that a manufacturer includes “a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.” The court reasoned that claimants whose injuries occur before the effective

date of the WPLA should also have the benefit of the apparent manufacturer doctrine. *Id.* at 1214.

As adopted and applied in *Rublee*, the apparent manufacturer doctrine requires a showing “that an ordinary, reasonable consumer could have (1) inferred from the defendant’s representations in the advertising, distribution, and sale of the product that the defendant manufactured the product and (2) relied on the defendant’s reputation as an assurance of the product’s quality.” *Id.* at 1217-18. In evaluating these questions, all of the defendant’s representations are considered, including those on labels, advertisements, and other relevant materials. *Id.* at 1218.

Considering the evidence against Pfizer, the court found there was a question of fact as to whether a reasonable consumer would be induced to rely on its representations. *Id.* at 1218-19. There was sufficient evidence to support a finding of apparent manufacturer liability from the evidence that Pfizer’s and Quigley’s logos appeared side by side on labels, advertisements, and other promotional materials. *Id.* at 1218.

Finally, and importantly for this case, the Court held that apparent manufacturer liability is not limited to those in the chain of distribution for the product. *Id.* at 1219. Rather, “a nonmanufacturing defendant that places its trade name on products manufactured by another may assume apparent manufacturer liability based on the nature of its representations,

regardless of whether it was a link in the chain of distribution.” *Id.* This is so because by affixing its trademark the entity “represents a level of quality to the consumer and ultimate user, derives an economic benefit from the sale of the product, and should share in the costs of injury resulting from the defective product.” *Id.*

Here, there can be little question that the evidence would support a finding of apparent manufacture liability against NAPA. In finding that the jury could reasonably find NAPA to be in the chain of distribution, the trial court noted that its status is “based on their presentation to the consumer.” 43 RP 194. “The NAPA store, the NAPA advertising, you know, the manner in which they marketed NAPA products, the NAPA guarantee of quality, buy it at the NAPA store, you know, it’s the best that you can buy.” *Id.* All of that would lead the consumer to understand that NAPA was the product manufacturer. *Id.*

As Pfizer did in *Rublee*, here NAPA placed its own logo alongside the logo of the product manufacturers on catalogs and stationary. Exs. 98, 101, 102, 113, 114, 129, 132. It referred to the products as “NAPA American Brakeblok and NAPA Rayloc.” Ex. 113 at bates no. NOVO30371; 14 RP 60-61, 65-66. And it did so for the express purpose of inducing consumers to associate an assurance of quality with the products. 14 RP 51, 67-68; 22 RP 81. NAPA even provided a literal

“assurance of quality” with its logo. Ex. 103; 14 RP 170-71. NAPA even called itself the “the world’s largest remanufacturer.” Ex. 98.

Given that the jury found, based on substantial evidence, that NAPA was in the actual chain of distribution, much of that same evidence would support a finding that NAPA was an apparent manufacturer. This Court may affirm on any ground supported by the record. *Syrov v. Alpine Res., Inc.*, 80 Wn. App. 50, 55, 906 P.2d 377, 379 (1995). Plaintiffs urge the Court to uphold the jury’s verdict on the alternative ground that NAPA was an apparent manufacturer because it placed its trade name on products manufactured by others and did so to induce reliance on its reputation for good quality.

CONCLUSION

For the reasons set forth herein, Plaintiffs ask the Court to find that there is substantial evidence supporting the jury’s findings that NAPA was in the chain of distribution for asbestos brakes, clutches, and gaskets purchased by Mr. Coogan and his family at NAPA stores, and affirm the judgment against NAPA. As alternative grounds for affirmance, the Court should find that NAPA was an apparent manufacturer of those products.

Respectfully submitted this 14th day of December, 2018.

/s/Lisa W. Shirley
Lisa W. Shirley (admitted *Pro Hac Vice*)

Jessica M. Dean (admitted *Pro Hac Vice*)
Dean Omar & Branham, LLP
302 N. Market St., Suite 300
Dallas, TX 75202
214-722-5990

William Rutzick, WSBA #11533
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104
(206) 622-8000

Benjamin R. Couture, WSBA #39304
Brian D. Weinstein, WSBA #24497
Alexandra B. Caggiano, WSBA #47862
Weinstein Couture PLLC
601 Union Street, Suite 2420
Seattle, Washington 98101

Counsel for Plaintiffs/Respondents

SCHROETER GOLDMARK BENDER

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