

No. 64312-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

v.

APV North America, Inc., Petitioner,

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**APPELLANT'S REPLY BRIEF**

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON  
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## SUMMARY

Plaintiff agrees that Yankee was not exposed to any gaskets or packing manufactured or sold by APV.<sup>1</sup> Both *Simonetta v. Viad* and *Braaten v. Saberhagen Holdings* held that a product manufacturer cannot be liable under these circumstances.<sup>2</sup> Plaintiff argues for a new exception to *Simonetta* and *Braaten* which would impose liability if a manufacturer specifies asbestos-containing components with its products. This argument fails because: (1) *Simonetta* and *Braaten* did not recognize this exception; (2) The APV documents Plaintiff offers do not constitute “specifications”; and (3) Plaintiff’s employer Alcoa did not use the components that APV allegedly specified.

Plaintiff falls back on an argument that APV gratuitously assumed a duty to warn because it sold replacement parts to Alcoa and conducted periodic inspections of its mixers. But some of the *Braaten* defendants sold replacement parts and the court did not hold these defendants liable. And the post-sale inspections Plaintiff refers to actually consist of a single inspection for ball bearings. This lone inspection of a non-asbestos-containing part is not enough to impose liability on APV for asbestos in other manufacturers’ products.

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<sup>1</sup> Respondent’s Brief, pg. 1.

<sup>2</sup> *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 363, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings, et al.*, 165 Wn.2d 373, 398, 198 P.3d 493 (2008).

whether a manufacturer could be liable for specifying products it did not manufacture or sell.<sup>7</sup> The comments from *Braaten* that Plaintiff cites are merely *dicta*, and do not provide a legal foundation for Plaintiff's claim.

Plaintiff argues that the court's comments in *Braaten* about specifying asbestos-containing products suggest that the Supreme Court would recognize her claim. But this simply underscores why the trial court should have granted summary judgment. By arguing that the Supreme Court *would* recognize the claim, Plaintiff is acknowledging that the Supreme Court has *not yet* recognized it. And if the Supreme Court has not yet recognized a claim for specifying asbestos-containing parts, the trial court should have followed the general rule in *Simonetta* and *Braaten* that prevents Plaintiff from suing APV for another company's products. This is what Commissioner Ellis concluded in deciding APV's Motion for Discretionary Review.

## **II. The Record Does not Support the Conclusion that APV Specified any Asbestos-containing Components**

APV did not specify any particular gasket or packing, asbestos-containing or otherwise. APV demonstrated in its opening brief why the APV documents Plaintiff offers do not constitute product specifications. APV will not repeat that discussion here, and will only address Plaintiff's response concerning defendant Crane in *Braaten*.

APV argued that it was similar to defendant Crane, in that Crane

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<sup>7</sup> *Braaten*, 165 Wn.2d at 397.

advertised asbestos-containing insulation, gaskets, and packing to use with its equipment. Despite this evidence, *Braaten* did not hold Crane liable for “specifying” asbestos-containing gaskets or packing.<sup>8</sup> In the same way, APV argued that this Court should not consider its inventory sheets and operating instructions “specifications” either.

Plaintiff responds that Crane’s advertisement is different from the APV documents because Crane listed both asbestos and non-asbestos products. Plaintiff is not entirely correct, as Crane only listed non-asbestos-containing options for gaskets and packing.<sup>9</sup> The Johns Manville insulation Crane listed in its advertisement was asbestos-containing.<sup>10</sup> But Crane’s liability did not turn on whether its advertisement listed non-asbestos-containing options. The more important issue for the *Braaten* court was whether Crane was in the chain of distribution for the products at issue:

With respect to Crane Company, the plaintiff points to a Crane Company catalog that included Johns-Mansville asbestos-containing insulation products, but there is no evidence that Mr. Braaten was exposed to Johns-Mansville products sold by Crane or, in fact, to any asbestos-containing components supplied by Crane.<sup>11</sup>

The discussion of Crane in *Braaten* underscores the fact that *Braaten* did not create a “specification” exception. *Braaten* did not apply it to Crane’s

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 389, FN 11.

<sup>11</sup> *Braaten*, 165 Wn.2d at 397.

advertisement of Johns Manville insulation, this Court should not apply it to the APV inventory sheets and operating instructions.

### **III. APV did not specify asbestos**

Not only did the Supreme Court decline to create a specification exception in *Braaten*, Alcoa did not follow any recommendations made by APV. The APV documents offered by Plaintiff mention Durabla gaskets, U.S. Rubber gaskets, and Palmetto packing. However, Yankee used only Garlock gaskets and packing. APV cannot be liable for Garlock product that that it never specified, much less recommended.

Plaintiff responds that it does not matter that Yankee did not use the same brands that APV allegedly specified, because APV was specifying asbestos. According to Plaintiff, if Durabla, U.S. Rubber, and Palmetto manufactured asbestos-containing gaskets and packing, a jury could infer that APV's documents require Alcoa to buy asbestos-containing replacements. But this argument strains the concept of inferences beyond the breaking point. APV never specified asbestos. None of the APV documents Plaintiff offers state that asbestos is a necessary ingredient for gaskets and packing. In fact, APV's documents never mention the word asbestos. APV cannot be liable for specifying an ingredient—*asbestos*—that it never mentioned.

A court should not deny a motion for summary judgment on the basis of an unreasonable inference.<sup>12</sup> According to *Snohomish County v.*

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<sup>12</sup> CR 56(c), *Scott v. Blanchet High School*, 50 Wn. App. 37, 41, 747 P.2d 1124 (1987).

*Rugg*, a court need not draw an inference if it would, “contradict those raised by evidence of undisputed accuracy.”<sup>13</sup> The plain language of the APV documents does not support the inference that APV specified asbestos.

Plaintiff’s suggestion to the contrary is not reasonable. In *Scott v. Blanchet High School*, the court rejected a similarly-unreasonable inference. *Scott* involved a claim by a high school girl’s parents against the high school and a high school teacher that alleged an inappropriate relationship between the teacher and student. The evidence of the inappropriate relationship consisted of statements by third parties that the teacher and student had admitted that they had slept together naked, drank champagne, and were in love. The plaintiffs asked the court to infer from this evidence that the inappropriate relationship occurred in conjunction with school-sponsored counseling. But the court refused to make that inference, saying it relied on, “vague evidence and leaps in logic.”<sup>14</sup>

The court reached a similar conclusion in *Snohomish County v. Rugg*. There, the plaintiff County charged defendant Rugg with a zoning violation for basing a commercial, heavy-equipment business out of Rugg’s residential property. The County moved for summary judgment, and supported that motion with declarations from neighbors who catalogued the frequent arrival and departure of heavy equipment on the property. Rugg opposed the motion with declarations from his family, and

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<sup>13</sup> *Snohomish County v. Rugg*, 115 Wn. App. 218, 229, 61 P.3d 1184 (2003).

<sup>14</sup> *Scott*, 50 Wn. App. at 42.

from employees of his business, stating that the activity on the property was for improving the residential property, and not for any business purpose. But the court noted that the amount of improvements done to the residential property could not explain the volume of activity recorded by the County and the neighbors. The court then affirmed summary judgment, finding that Rugg's suggested inference that the activity was solely related to property improvements was not reasonable.

Plaintiff suggests an equally-unreasonable inference. Just because APV supplied Durabla and U.S. Rubber gaskets and Palmetto packing to Alcoa does not mean that APV was commanding Alcoa to use only asbestos-containing replacement gaskets and packing. If APV had wanted to specify asbestos as a necessary ingredient in gaskets and packing, it would have at least used the word, "asbestos," in its documents. It did not, and no specification for asbestos exists.

Taking Plaintiff's argument one step further demonstrates another flaw. If Plaintiff is correct that APV specified asbestos by simply listing a brand of product, then APV must have also specified every other ingredient in those brands. The alleged specification would not simply be limited to asbestos, but to every other ingredient in Durabla and U.S. Rubber gaskets, and Palmetto packing. If this Court were to find any specification at all, it would be for gaskets and packing that exactly match the composition of Durabla and U.S. Rubber gaskets, and Palmetto packing. Plaintiff has not shown that the Garlock gaskets and packing have these same ingredients, which means that Plaintiff has not shown that

Alcoa followed the alleged specification.

#### **IV. APV Did Not Assume a Duty to Warn**

Plaintiff claims that APV assumed a duty to warn of asbestos hazards by conducting post-sale inspections of the APV Mixers. But the only inspection APV ever did at the Vancouver Alcoa plant was to check ball bearings. That one inspection on an unrelated component part does not create a duty that circumvents *Braaten* and *Simonetta*.

Plaintiff asserts that APV “conducted periodic inspections” of the APV Mixers and had a fifty-year relationship with Alcoa.<sup>15</sup> But according to the machine docket maintained by APV, APV made only one field service trip to the Vancouver mill to look at ball bearings.<sup>16</sup> Most of the nearly 250 documents Plaintiff refers to involve inspections that took place before the APV Mixers were shipped to Alcoa, or inspections that occurred at the APV facility, not at Alcoa in Vancouver.<sup>17</sup>

*Simonetta* and *Braaten* held that a product manufacturer is not liable, in products liability or negligence, for products the manufacturer did not make or sell.<sup>18</sup> Both cases limited the duty to warn to those within the product’s chain of distribution.<sup>19</sup> Plaintiff wants this Court to disregard this rule because APV allegedly voluntarily assumed a duty in negligence. But neither *Simonetta* nor *Braaten* even hinted that this

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<sup>15</sup> Plf. Brief, pg. 10.

<sup>16</sup> CP 495-496 (Kress p. 19:18-20:8); CP 513-514 (Kress pp. 138:18-139:23); CP 525 (Field Service Report, BP 76).

<sup>17</sup> *See, e.g.*, CP 497 (Kress p. 52).

<sup>18</sup> *Braaten*, 165 Wn.2d at 398; *Simonetta*, 165 Wn.2d at 363.

<sup>19</sup> *Simonetta*, 165 Wn.2d at 354.

exception exists, and the cases from the 1800s and early 1900s that Plaintiff cites do not apply.

Plaintiff's primary argument rests on *Sheridan v. Aetna Casualty & Surety Co.*,<sup>20</sup> a 1940 decision which pre-dates the *Braaten* and *Simonetta* decisions by over sixty years. In *Sheridan*, the defendant insurer voluntarily agreed to conduct safety inspections of an elevator. The insurer failed to identify a defective condition of the elevator, which injured the plaintiff. The court concluded that the insurer's voluntary safety inspection for the elevator created a duty to conduct that inspection with reasonable care.<sup>21</sup> Plaintiff has the burden of establishing that the defendant's conduct created a duty.<sup>22</sup>

Plaintiff argues that *Sheridan* applies here for two reasons. First, Plaintiff points to APV's sale of replacement parts. But at least two of the defendants in *Braaten* sold replacement parts, and *Braaten* explicitly found that no duty existed.<sup>23</sup> There is no merit to the suggestion that selling replacement parts triggers liability for products APV did not manufacture or sell.

Plaintiff next argues that APV's post-sale inspections created a duty to warn. But APV only conducted one ball bearing inspection at Alcoa, and that one, limited inspection is far different than the comprehensive safety inspection conducted by the insurer in *Sheridan*. By

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<sup>20</sup> *Sheridan v. Aetna Casualty & Surety Co.*, 3 Wn.2d 423, 100 P.2d 1024 (1940).

<sup>21</sup> *Id.*

<sup>22</sup> *Lake Washington Sch. Dist. No. 414 v. Schuck's Auto Supply, Inc.*, 26 Wn. App. 618, 621, 613 P.2d 561 (1980).

<sup>23</sup> *Braaten* 165 Wn. 2d at 395.

inspecting ball bearings, APV did not voluntarily assume a duty to warn Alcoa or Yankee about asbestos or any other part of the carbon mixer. Plaintiff's claim is not about ball bearings; it is about whether APV should have warned Alcoa about asbestos. *Sheridan* does not apply.

The other cases cited by Plaintiff involve facts very different from those presented here. *Lough v. John Davis & Co.*,<sup>24</sup> a 1902 Washington case, involved the liability of a property manager for failing to repair a deck railing that broke, causing the plaintiff to fall. In *Ward v. Pullman Car Corp.*,<sup>25</sup> decided in Kentucky in 1908, a railroad brakeman was injured by a defective brake staff after the defendant railroad inspectors had inspected the railroad car and approved it as safe. And in *Van Winkle v. American Steam-Boiler Ins. Co.*,<sup>26</sup> an 1890 New Jersey case, the plaintiff was injured when a boiler burst. The defendant had insured the boiler, and made "repeated" inspections for the express purpose of avoiding the type of accident that injured the plaintiff.

Unlike the defendants in *Sheridan*, *Lough*, *Ward*, and *Van Winkle*, APV did not do a safety inspection, did not conduct any inspection related to asbestos, and did not have control over the carbon mixers at Alcoa. APV's single ball bearing inspection cannot support holding APV liable for asbestos-containing products it neither manufactured nor sold.

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<sup>24</sup> *Lough v. John Davis & Co.*, 59 L.R.A. 802, 30 Wash. 204, 70 P. 491 (1902).

<sup>25</sup> *Ward v. Pullman Car Corp.*, 131 Ky. 142, 114 S.W. 754 (1908).

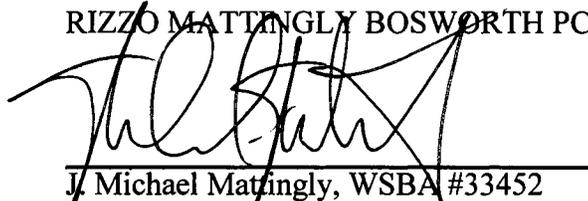
<sup>26</sup> *Van Winkle v. American Steam-Boiler Ins. Co.*, 52 N.J.L. 240, 19 A. 472 (1890).

## CONCLUSION

Because APV was not in the chain of commerce for any of the Garlock gaskets and packing Yankee was exposed to, the Trial Court should have granted summary judgment. *Simonetta* and *Braaten* did not create a “specification” exception, and even if they did, none of the documents Plaintiff has offered are specifications. Nor has Plaintiff successfully shown that APV gratuitously assumed a duty to warn Yankee about asbestos hazards. APV respectfully requests that this Court reverse the Trial Court and grant APV summary judgment.

Respectfully submitted this 23<sup>rd</sup> day of September, 2010.

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

I HEREBY CERTIFY that on the 23<sup>rd</sup> day of September, 2010, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served upon the following parties in the manner indicated.

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

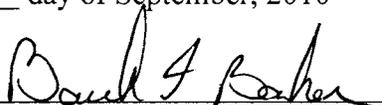
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I declare under penalty of perjury and under the laws of the State of Washington (RCW 9A.72.085) that the foregoing is true and correct.

Executed at Portland, Oregon, this 23<sup>rd</sup> day of September, 2010

  
\_\_\_\_\_  
Barbra A. Baker, Paralegal

## ARGUMENT

### I. *Braaten* Did Not Recognize an Exception for “Specifying” Asbestos Containing Products

*Simonetta* and *Braaten* held that a product manufacturer is not liable for products it did not manufacture or sell.<sup>3</sup> The “general rule” established by both cases was whether the defendant was in the product’s chain of distribution.<sup>4</sup> As *Braaten* stated:

The general rule under the common law is, as explained in *Simonetta*, that a manufacturer does not have an obligation to warn of the dangers of another manufacturer's product. The defendant-manufacturers are not in the chain of distribution of asbestos-containing packing and gaskets that replaced the original packing and gaskets and thus fall within this general rule.<sup>5</sup>

By Plaintiff’s own admission, APV was not in the chain of distribution of any of the gaskets or packing that Yankee was exposed to. Under the *Simonetta* and *Braaten*’s “general rule,” APV is not liable.

Plaintiff argues that this Court should create an exception to this general rule whereby a product manufacturer could be liable for specifying asbestos-containing products.<sup>6</sup> But *Braaten* did not create this exception. In fact, *Braaten* specifically stated that it did not reach the issue of

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<sup>3</sup> *Braaten*, 165 Wn.2d at 398, *Simonetta*, 165 Wn.2d at 363.

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

<sup>5</sup> *Braaten*, 165 Wn.2d at 391 (2008).

<sup>6</sup> Response Brief, p. 3.