

FILED  
Court of Appeals  
Division II  
State of Washington  
10/17/2018 12:11 PM

No. 51253-0-II

No. 98296-1

---

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,

v.

GENUINE PARTS COMPANY d/b/a NATIONAL AUTOMOTIVE  
PARTS ASSOCIATION a/k/a NAPA; NATIONAL AUTOMOTIVE  
PARTS ASSOCIATION,

Appellants,

and

BORG-WARNER MORSE TEC INC. (sued individually and as  
successor-in-interest to BORG-WARNER CORPORATION);  
CATERPILLAR GLOBAL MINING, LLC (sued individually and as a  
successor-in-interest to BUCYRUS INTERNATIONAL  
f/k/a BUCYRUS-ERIE CO.); CERTAINTEED CORPORATION;  
DANA COMPANIES LLC (sued individually and as successor-in-interest  
to VICTOR GASKET MANUFACTURING COMPANY); DEERE &  
COMP ANY d/b/a JOHN DEERE; FMC CORPORATION (d/b/a LINK-  
BELT Cranes and Heavy Construction Equipment); FORMOSA  
PLASTICS CORPORATION U.S.A. (sued individually and as parent,  
alter ego and successor-in-interest to J-M MANUFACTURING  
COMPANY and to JM AIC PIPE CORPORATION);  
HOLLINGSWORTH & VOSE COMPANY; HONEYWELL  
INTERNATIONAL, INC. f/k/a ALLIED-SIGNAL, INC. (sued  
individually and as successor-in-interest to BENDIX CORPORATION);  
J-M MANUFACTURING COMPANY, INC. (sued individually and as

parent and alter ego to J-M A/C PIPE CORPORATION); KAISER GYPSUM COMPANY, INC.; LINK-BELT CONSTRUCTION EQUIPMENT COMPANY, L.P., LLLP; NORTHWEST DRYER & MACHINERY CO.; OFFICEMAX, INCORPORATED (f/k/a BOISE CASCADE CORPORATION); PARKER-HANNIFIN CORPORATION; PNEUMO ABEX LLC (sued as successor-in-interest to ABEX CORPORATION); SABERHAGEN HOLDINGS, INC. (sued as successor-in-interest to THE BROWER COMPANY); STANDARD MOTOR PRODUCTS, INC. d/b/a EIS; SPX CORPORATION (sued individually and as successor-in-interest to UNITED DOMINION INDUSTRIES LIMITED f/k/a AMCA International Corporation, individually and as successor in interest to Desa Industries Inc and/or Insley Manufacturing as well as Koehring Company, individually and as successor in interest to Schield Bantam Company); TEREX CORPORATION d/b/a Koehring Company individually and as successor in interest to Schield Bantam Company; and WELLONS, INC.,

Defendants.

---

BRIEF OF APPELLANT NAPA

---

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Appellant NAPA

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii-iii
A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	1
(1) <u>Assignments of Error</u> .....	1
(2) <u>Issues Pertaining to Assignments of Error</u> .....	2
C. STATEMENT OF THE CASE.....	2
(1) <u>NAPA’s Business</u> .....	2
(2) <u>The Trial</u> .....	3
(3) <u>NAPA’s Rule 50(c) Motion</u> .....	4
D. SUMMARY OF ARGUMENT .....	10
E. ARGUMENT .....	11
(1) <u>Washington Law on a Product Seller or         Manufacturer</u> .....	13
(a) <u>Washington’s Pre-WPLA Product             Liability Law</u> .....	13
(b) <u>Background on the WPLA</u> .....	15
(2) <u>NAPA Was Neither a Product Seller         Nor Manufacturer</u> .....	19
F. CONCLUSION .....	22
Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Bostwick v. Ballard Marine, Inc.</i> , 127 Wn. App. 762, 112 P.3d 571 (2005), <i>review denied</i> , 163 Wn.2d 1048 (2008).....	18
<i>Braaten v. Saberhagen Holdings</i> , 165 Wn.2d 373, 198 P.3d 493 (2008).....	19, 20
<i>Buttelo v. S.A. Woods-Yates American Machine Co., Inc.</i> , 72 Wn. App. 397, 864 P.2d 948 (1993).....	17
<i>Fagg v. Bartells Asbestos Settlement Trust</i> , 184 Wn. App. 804, 339 P.3d 207 (2014).....	13
<i>Godfrey v. State</i> , 84 Wn.2d 959, 530 P.2d 630 (1975).....	15
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wn.2d 907, 32 P.3d 250 (2001).....	12
<i>Johnson v. Recreational Equipment, Inc.</i> , 159 Wn. App. 939, 247 P.3d 18, <i>review denied</i> , 172 Wn.2d 1007 (2011).....	18
<i>Macias v. Saberhagen</i> , 175 Wn.2d 402, 282 P.3d 1069 (2012) ....	13, 18, 21
<i>Seattle-First National Bank v. Tabert</i> , 86 Wn.2d 145, 542 P.2d 774 (1975).....	14
<i>Seay v. Chrysler Corp.</i> , 93 Wn.2d 319, 609 P.2d 1382 (1980) .....	15
<i>Simonetta v. Viad Corp.</i> , 165 Wn.2d 341, 197 P.3d 127 (2008) ...	17, 19, 20
<i>Ulmer v. Ford Motor Co.</i> , 75 Wn.2d 522, 452 P.2d 729 (1969) .....	14
<i>Viereck v. Fibreboard Corp.</i> , 81 Wn. App. 579, 584, 915 P.2d 581, <i>review denied</i> , 130 Wn.2d 1009 (1996).....	12
<i>Wash. Water Power Co. v. Graybar Electric Co.</i> , 112 Wn.2d 847, 774 P.2d 1199 (1989).....	16
<i>Wenatchee Wenoka Growers Ass'n v. Krack Corp.</i> , 89 Wn.2d 847, 576 P.2d 388 (1978).....	15
 <u>Federal Cases</u>	
<i>Ortiz v. Jordan</i> , 562 U.S. 180, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2011).....	2

Statutes

RCW 4.22.920 .....12  
RCW 7.72.010(1).....16  
RCW 7.72.010(2).....17  
RCW 7.70.010(4).....16  
RCW 7.72.030 .....16  
RCW 7.72.040 .....16, 17  
RCW 7.72.040(a).....16

Other Authorities

42 Fed. Register 62718 .....18  
1981 *Senate Journal* .....14, 16, 18  
Philip A. Talmadge, *Washington's Product Liability Act*,  
5 U. Puget Sd. L. Rev. 1 (1981)..... 15-16, 17  
*Restatement (Second) of Torts* § 402A .....14  
*Torts – Strict Products Liability for Retailers? – Ulmer v. Ford  
Motor Co.*, 75 Wash. Dec. 2d 537, 452 P.2d 729 (1969),  
45 Wash. L. Rev. 431 (1970).....15

## A. INTRODUCTION

The respondent Gerri S. Coogan and James P. Spurgetis, the personal representative of Jerry (“Doy”) Coogan’s estate, contend that Doy Coogan was exposed to asbestos-containing products manufactured, sold, or distributed by 23 defendants, including National Automotive Parts Association (“NAPA”).<sup>1</sup> But NAPA is not, and never has been, a manufacturer, seller, or distributor of asbestos-containing products of any kind. Rather, it is a mere licensor of its logo. As such, it should have had no liability under the Washington Product Liability Act, RCW 7.72 *et seq.* (“WPLA”), or even Washington common law predating the WPLA’s enactment. For these reasons and for the reasons in the brief of appellant GPC, which NAPA adopts, the Court should reverse the judgment against NAPA and remand for a new trial.

## B. ASSIGNMENTS OF ERROR

### (1) Assignments of Error

1. The trial court erred in denying NAPA’s motion for summary judgment by its order entered on November 29, 2016.

2. The trial court erred in denying NAPA’s motion for reconsideration of the denial of summary judgment on December 22, 2016.

---

<sup>1</sup> We refer to the plaintiffs as “the Coogans.”

3. The trial court erred in denying defendants' CR 50(a) motion on March 22, 2017.

4. The trial court erred in giving Instruction 12 to the jury.

5. The trial court erred in entering the judgment on the jury's verdict on October 6, 2017.

6. The trial court erred in denying defendants' post trial motions on December 1, 2017.

(2) Issues Pertaining to Assignments of Error

1. Where NAPA is a trade association that merely licenses a trademark and was not in the chain of distribution of the products that allegedly resulted in Coogan's asbestos exposure, did the trial court err by allowing the jury to apply strict product liability principles to NAPA as an alleged manufacturer or seller of such products? (Assignments of Error Numbers 1-6)

2. Where NAPA licensed a trademark and did not design, manufacture, distribute, or sell the products at issue, or otherwise hold itself out as the products' manufacturer, did the trial court err by allowing the jury to find that NAPA was the products' manufacturer? (Assignments of Error Numbers 1-6)

C. STATEMENT OF THE CASE<sup>2</sup>

NAPA acknowledges the Statement of the Case in the brief of appellant GPC. It confines its Statement of the Case to the facts and

---

<sup>2</sup> NAPA recognizes that this is an appeal from the denial of its CR 50(b) motion for judgment as a matter of law and that this Court will review the trial court's decision in light of evidence adduced by the parties at trial. *See, e.g., Ortiz v. Jordan*, 562 U.S. 180, 183-84, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2011). Nevertheless, the evidence before the trial court on summary judgment is relevant as well to this Court's inquiry and was largely reinforced by trial testimony, as will be noted *infra*.

procedures pertinent to it.

(1) NAPA's business

NAPA is an acronym for the National Automotive Parts Association, a not-for-profit membership corporation founded in 1925. CP 194-95. NAPA functions as a trade association and provides training and marketing programs for its members. As a membership organization, NAPA does not design, manufacture, supply, distribute, or sell automotive parts. CP 195. Nor does NAPA own any retail stores. CP 196.

NAPA members operate automotive parts distribution centers. CP 194-95. Additionally, parts manufacturers who supply parts to NAPA members through the member-operated distribution centers are licensed to use the "NAPA" logo and trademark on parts sold to NAPA members. *Id.* The NAPA retail stores, referred to as "NAPA jobbers," are independently owned and also have permission to use the "NAPA" logo and trademark as part of their business operations. *Id.*

As a membership organization, NAPA exercises control over who can use the NAPA logo and trademark, but it does not exercise control over its members' or licensees' business decisions or operations. CP 195. Nor does it exercise any direction or control as to the manufacturing, design, specifications, or formulations of automotive parts and related packaging. *Id.* It does not exercise any control over the marketing,

distribution or sale of automotive parts by its members or the NAPA jobbers. CP 194-95. Finally, it does not receive any payment from the sale of any particular automotive part by its members or the NAPA jobbers. CP 196.

NAPA has never manufactured asbestos-containing automotive parts or any automotive parts of any kind. CP 195. It has never been involved in the design of any asbestos-containing automotive parts or any automotive parts of any kind. *Id.* It has never distributed or supplied any such parts – and has never sold, on a wholesale or retail basis, or by any other means, any asbestos-containing automotive parts or any automotive parts of any kind. CP 195-96.

(2) The Trial

The Coogans filed the present action in the Pierce County Superior Court against NAPA and other defendants on June 18, 2015. CP 1-7. It alleged that Coogan developed mesothelioma, an asbestos-related disease, because of his alleged exposure to asbestos-containing products “manufactured, sold, and/or distributed” by 23 different defendants, including NAPA, from “[a]pproximately the 1950s to 1990s.” CP 179.

In support of its claims, the Coogans deposed Doy Coogan’s brother, Jay Coogan, who testified that Doy worked with or around products purchased from NAPA during the 1960s, 1970s, and 1980s. CP

187-88. Jay Coogan, however, stated that when he testified about “NAPA,” he meant Colville Auto Parts, a local, independently owned auto parts retailer. CP 192.

NAPA moved for summary judgment on the question of whether it was subject to Washington product liability common law or the WPLA, and whether any WPLA claims against it should be dismissed. CP 159-69. The trial court denied the motion leaving the issues for the jury. CP 1016-17. It denied NAPA’s motion for reconsideration as well. CP 1503.

At trial, the main testimony on the nature of NAPA’s role came through two GPC corporate representatives, Byron Frantz and Liane Brewer. Frantz made clear that any products were sold through GPC and that NAPA merely provided a product trademark. He testified that GPC sold parts to jobbers’ stores:

Q. Certainly you know from both your study and your own experience that Genuine Parts Company sold their parts all throughout the country, so it wouldn't surprise you that they made it to northeastern Washington?

A. From what I understand of the time period, Genuine Parts Company owned a distribution center in Spokane which would have serviced the store at Colville. So I believe Genuine Parts Company would have been able to sell parts if the Colville store bought from the Genuine Parts Company D.C. during the time frame involved.

RP (2/9/18):26. Frantz further testified that GPC sold brake lining from distribution centers:

Q. That included bulk brake lining?

A. For a period of time, Genuine Parts Company did sell – distribution centers did sell bulk brake lining. Yes, ma'am.

*Id.* at 37; *see also, id.* at 41 (“Genuine Parts Company was distributing the parts. They were not training technicians on how to install or uninstall parts. They sold the parts themselves.”).

In fact, Frantz also testified that NAPA Distribution Center was a misnomer. GPC owned the distribution center in Spokane:

Q. In terms of how the Genuine Parts Company products were sold, they were sold through NAPA Distribution Centers, correct?

A. Yes, ma'am. That would be accurate. Well, no. Genuine Parts Company was sold through Genuine Parts Company Distribution Centers. Not all NAPA Distribution Centers were owned by Genuine Parts Company, depending on the time.

Q. What about the Spokane center?

A. The Spokane Distribution Center – Genuine Parts Company would have purchased that in the early to mid 1960s.

Q. And so for the dates of 1963ish until even the 1990s, the Spokane Distribution Center which would be servicing Northeastern Washington was owned by whom?

A. I would have to go back and check the exact date, but in the early to mid '60s Genuine Parts Company purchased it, and they still operate it today.

*Id.* at 59-60. As Frantz further testified, NAPA did not sell anything:<sup>3</sup>

---

<sup>3</sup> He confirmed this point:

Rayloc remanufactures products, so it would buy components and remanufacture parts and then sell those finished goods to the Genuine Parts Company Distribution Centers. And NAPA does not make or sell anything. NAPA is the trade organization, the marketing arm, for the

Q. Part of the NAPA name was associated with marketing. I think you told us before we took the break, right?

A. Yes, ma'am. NAPA is a trade organization of the distributors who were the members. So NAPA is not – the business – NAPA is a marketing and programs promotional – not promotional – marketing and programs arm for the individual distributor members.

Q. And part of what they're marketing indicates is that NAPA set the standard for developing braking systems, right?

A. I'm sure they used a number of phrases in marketing over the years.

Q. And one of them – well, first of all, one of their efforts were to sell automotive parts, including brakes and clutches, right?

A. Genuine Parts Company was trying to sell automotive clutches and brakes. NAPA didn't sell anything.

*Id.* at 60.

Brewer worked for 32 years at GPC in Spokane at the distribution center. RP (2/23/18):26. She reaffirmed that NAPA was not in the product chain of distribution:

Q. You weren't aware that in the inventory that you helped control there was a variety of asbestos products that were being sold by NAPA?

A. The only place that we would be aware of that would be if there was information on the MSDS sheets, and like I said, I have worked in the office so it wasn't like I was installing, so there was no hazard that I knew of, no.

*Id.* at 31. According to Brewer, GPC, not NAPA, gave manufacturer representatives permission to go to NAPA stores:

---

stores and the suppliers.

RP (2/5/18):62-63.

Q. Then let me back up to others. You are aware that there were manufacturer representatives –

A. Yes.

Q. – that were sent out from the NAPA distribution center, even before you got there, so going into earlier years, that would go to the stores?

A. The manager reps were actually representatives of the manufacturer, so at that time frame, early on, they actually were employed by the manufacturer. They did have permission to go into our field and work with our customers, and they worked with everything from, you know, making sure they have the right inventory in their stores because each independent owner did have the ability to say this is how much money I want to put in overall inventory expense, and so they worked on their inventory to make sure that they had the right inventory.

...

Q. And when you say “permission,” they obtained permission to go to these NAPA small business owners through who? Who gave them permission?

A. Well, I would say it was information that was done by our corporate office in Atlanta. They knew these people were hired, and they were given the information and the territory that they served, so I guess that I would say that’s probably something that was directed through our Atlanta office.

Q. And so the Atlanta office of Genuine Parts Company permitted people to go on site and talk to the small business owners?

A. I would say that, yes, that’s true.

*Id.* at 33-34. Brewer also testified that Jay Coogan was a GPC customer, not a NAPA customer. *Id.* at 44-45.

Critically, Brewer confirmed that NAPA was merely a brand. *Id.*

at 45. She stated:

Q. It says, “Genuine Parts Company is a diversified global leader comprised of ten distinct business units,” and one

of those units you are aware of is the Rayloc division?

A. Yes, ma'am.

Q. And another is the NAPA division?

A. It's not actually NAPA. NAPA is just the brand that encompasses it. So NAPA is an entity, a brand logo that the service of pulling all of these parts together under. So it's actually not part of Genuine Parts Company. I think at one point I heard they maybe they had six or seven employees under the NAPA part, and that's for the branding part of it.

...

Q. How many employees did you say that you believed NAPA had, two to three?

A. Well, the brand, from what I understand, has that many. Genuine Parts Company is the umbrella that encompasses Rayloc and distribution centers and those kind of things.

*Id.* at 83-84.

Like Frantz, Brewer testified that GPC sent products from their distribution centers:

Q. Are you familiar – Well, let me go to the Power Point now. I want to talk about just a few basic things. You work for the Genuine Parts Company in the distribution center?

A. In Spokane, yes.

Q. Their headquarters are in Atlanta?

A. Yes, ma'am.

*Id.* at 46-47. GPC filled customer orders. *Id.* at 76.

Simply put, GPC, not NAPA, employed people in the chain of distribution:

Q. What is your understanding of how many employees work for NAPA Corporation?

...

A. So there is a difference – and I think it's confusing because NAPA is a brand that represents the company, the

marketing tool, so that people when they come into town they understand a NAPA store is a NAPA store and that's their brand. And so I did send a note to our HR person because I wanted to make sure that my facts were correct when I spoke on Thursday. And they were. Well, I think I said five or six, but there are fifteen people that are employed under the NAPA canopy. And there are 17,032 people, they said, that are employed by Genuine Parts Company.

*Id.* at 28. Nor were NAPA and GPC the same company:

Q. You were not the company representative for NAPA which you indicated was the marketing arm for GPC?

A. Well, there's an umbrella GPC that encompasses all of those. So NAPA is part of that entity. It's only got fifteen employees for marketing purposes.

Q. And I think the word you used this morning is it's a little confusing that even after being with a company for 30 years you over the weekend went and talked to your HR manager?

A. Well, what was confusing and I wanted to clarify when I was here last Thursday you put up the website that said this exact spot right here that said NAPA's been around a long time and has over 17,000 employees. And so I wanted to make sure that something had not changed, which I didn't believe it had because my W-2 comes with Genuine Parts Company as the company that has paid me. And so I mentioned to them that they need to look at this and maybe put something more like the NAPA family has been around a long time because NAPA is not – that is not an actual statement. The people get paid through Genuine Parts Company.

*Id.* at 79-80.

(3) NAPA's Rule 50(c) Motion

At the close of Plaintiffs' case, NAPA moved for judgment as a matter of law on the application of the WPLA to the case and for dismissal

of claims against it. CP 10097-101. The trial court determined that for purposes of applying the law, the date of installation of asbestos-containing products controlled, and it denied the motion, leaving the issue for the jury. RP (3/22/17):5-12. The trial court then instructed the jury on the question of whether the common law or the WPLA applied to the Coogans' claims in Instruction 12. CP 14964. It provided instructions on the law and jury verdict forms for the respective legal theories that might apply.

The jury returned a verdict for the Coogans, concluding that the common law applied—because it found that more than 85% of the exposures occurred before July 1981—and that NAPA was liable. CP 15018-22. The court entered a judgment on the jury's verdict. CP 16232-33.

GPC and NAPA moved for a new trial. CP 16356-73. The trial court denied the motion by an order entered on December 1, 2017. CP 20304. NAPA's timely appeal followed. CP 20303-08.

#### D. SUMMARY OF ARGUMENT

The trial court here allowed the jury to rule that Washington's product liability common law applied to Coogan's claims. While the applicable law was not a jury question, under either that common law or the WPLA, NAPA did not owe Coogan a duty because NAPA was not in

the chain of distribution for the products that allegedly harmed Coogan. NAPA was not a product designer, manufacturer, supplier, or seller. As such, it owed no duty to Coogan.

E. ARGUMENT<sup>4</sup>

Ordinarily, the question of what law applies to resolve a controversy before a court is a classic question of law. *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 584, 915 P.2d 581, *review denied*, 130 Wn.2d 1009 (1996). The trial court here erred in declining to perform its duty and in leaving it to the jury to decide, in effect, whether Washington’s common law or the WPLA applied. CP 14964 (Instruction 12).<sup>5</sup>

The WPLA supplants common law claims or actions based on harm caused by a product when those claims arise on or after the statute’s effective date, July 26, 1981. RCW 4.22.920. When a plaintiff’s alleged exposure to injury-causing products is prolonged or continuous in nature, as in the present case, Washington courts consider when “substantially all”

---

<sup>4</sup> This Court reviews *de novo* a trial court’s denial of a motion for judgment as a matter of law under CR 50. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). NAPA is entitled to judgment as a matter of law because no competent or substantial evidence can support a verdict against it. *Id.*

<sup>5</sup> The trial court’s employment of alternative instructions and jury verdict forms was simply unnecessarily confusing. The court should have performed its duty to state the applicable law so as to simply and streamline the submission of the issues to the jury.

of the exposure occurred in determining when the claim arises. *Id.* Unless “substantially all” claimed exposure occurred before the WPLA’s effective date, the WPLA governs a plaintiff’s products liability claim. *Macias v. Saberhagen*, 175 Wn.2d 402, 408, 282 P.3d 1069 (2012). Unfortunately, our Supreme Court did not define precisely what it meant by “substantially all.” *Id.* This Court determined that “substantially all” means “nearly all” or in terms of quantification “85 percent or more.” *Fagg v. Bartells Asbestos Settlement Trust*, 184 Wn. App. 804, 812, 339 P.3d 207, 211 (2014). But even then, the Court did not indicate whether that figure was temporal in nature or whether it related to the quantitative exposure of the claimant.

Below NAPA argued that the WPLA applied, and it continues to believe that the WPLA controls here, but, ultimately, it makes no difference because under either Washington’s common law or the WPLA, NAPA was not a product seller or manufacturer to which liability could attach in this case.

(1) Washington Law on a Product Seller or Manufacturer

NAPA is not a “product seller” or “manufacturer,” as those terms are defined by common law or the WPLA, and any claims against it should have been dismissed as a matter of law.

(a) Washington’s Pre-WPLA Product Liability Law

As a matter of common law, Washington recognized a variety of theories of liability ranging from negligence to breach of warranty to strict liability. *See* 1981 *Senate Journal* at 624 (“Historically, one of the most confusing areas in product liability tort law involves the variety of causes of action, including negligence, warranty and strict liability, available to the plaintiff seeking recovery for injuries allegedly resulting from a defective product. In order to ensure his greatest chance of recovery, plaintiff typically pleads all three causes...”). In *Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969), the Washington Supreme Court adopted the strict liability principles of the *Restatement (Second) of Torts* § 402A for product manufacturers, but did not override existing warranty or negligence theories. *Id.* at 531-32 (noting that § 402A was not “exclusive” and permitted other theories of product liability to persist).

Washington first adopted § 402A as to the liability of product sellers in *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975). Product sellers were strictly liable to the plaintiff without limitation for their more limited status as retailers. The *Tabert* court determined that public policy grounds justified the imposition of liability upon product sellers, citing a Washington Law Review note. 86 Wn.2d at

148.<sup>6</sup> In particular, the Court concluded that product sellers should be strictly liable under § 402A when they are in the product's chain of distribution:

According to the Restatement, strict liability is applicable if “the seller is engaged in the business of selling such a product” even though “the user or consumer has not bought the product from or entered into any contractual relation with the seller.” *Restatement (Second) of Torts* s 402A(1)(a) and (2)(b). Comment f states that the rule is intended to apply to any manufacturer, wholesale or retail dealer or Distributor. Thus, *such liability is extended to those in the chain of distribution.*

*Id.* (emphasis added). As with strict liability for manufacturers, the Court did not override existing warranty or negligence theories and merely superimposed § 402A strict liability on sellers.<sup>7</sup>

(b) Background on the WPLA

The Legislature enacted the WPLA in 1981 after considerable controversy over that issue and other proposed tort law reforms. Philip A.

---

<sup>6</sup> Prior to that decision, Washington courts attributed liability to retailers only under an implied warranty theory. *Torts – Strict Products Liability for Retailers? – Ulmer v. Ford Motor Co.*, 75 Wash. Dec. 2d 537, 452 P.2d 729 (1969), 45 Wash. L. Rev. 431, 443-44 (1970).

<sup>7</sup> Washington's common law was also confusing as to product defenses and allocation of fault. With regard to defenses to common law product liability claims, although the Legislature enacted a comparative fault statute for negligence claims in 1973, *Godfrey v. State*, 84 Wn.2d 959, 960-61, 530 P.2d 630 (1975), the Supreme Court declined to apply it to strict liability claims. *Seay v. Chrysler Corp.*, 93 Wn.2d 319, 609 P.2d 1382 (1980). Moreover, the Court adhered to a strict joint and several liability regime and foreclosed any common law right of contribution among those joint tortfeasors in products cases. *Wenatchee Wenoka Growers Ass'n v. Krack Corp.*, 89 Wn.2d 847, 853-54, 576 P.2d 388 (1978). No special retailer defenses were recognized. Talmadge at 10 & n.48.

Talmadge, *Washington's Product Liability Act*, 5 U. Puget Sd. L. Rev. 1, 1-2 (1981) ("Talmadge"). The WPLA was based on the United States Commerce Department's Model Uniform Product Liability Act ("MUPLA"). *Id.* The WPLA was enacted after extended hearings of a Senate Select Committee on the issue, *id.* at 2-6, whose extensive report, including a section-by-section discussion of legislative intent, was incorporated into the 1981 *Senate Journal*.

The WPLA created a single product liability claim. *Wash. Water Power Co. v. Graybar Electric Co.*, 112 Wn.2d 847, 853-54, 774 P.2d 1199 (1989); RCW 7.70.010(4). Talmadge, *supra* at 7-10. The WPLA provided that product liability claims may only be brought against a product "manufacturer" or a product "seller." RCW 7.72.030 (discussing liability of a manufacturer); RCW 7.72.040 (discussing liability of a product seller).<sup>8</sup> *See* Appendix.

RCW 7.72.010(1) defines a product seller 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. The term also includes a party who is in the business of leasing or bailing such products.

---

<sup>8</sup> The WPLA provides that product sellers may be liable to product users under circumstances separate from those pertinent to a product manufacturer. RCW 7.72.040(a). Those circumstances are narrower than the liability of a manufacturer.

There are express statutory exceptions to the definition, excluding sellers of real property, professionals, sellers of used products, finance lessors, and pharmacists from the definition of a seller. *Id.* Importantly, the Legislature provided only for limited liability against sellers. RCW 7.72.040. Talmadge, *supra* at 10-11 (discussing retailer itself).

The WPLA defines a product manufacturer 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(2). Clear from the WPLA's express terms is the requirement that an entity cannot be a product manufacturer *unless it is a product seller.*

Washington courts have addressed whether an entity is a product seller under the WPLA largely in the context of the statutory exceptions to product seller status. It is telling as to what entities are not product sellers. *See Simonetta v. Viad Corp.*, 165 Wn.2d 341, 352-54, 197 P.3d 127 (2008) (component sellers when component itself is not defective; where entity “did not manufacture, sell, or supply” insulation material, it had no duty to warn as matter of law). *See also, Buttelo v. S.A. Woods-Yates American Machine Co., Inc.*, 72 Wn. App. 397, 864 P.2d 948 (1993)

(lessor not in business of leasing); *Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. 762, 112 P.3d 571 (2005), *review denied*, 163 Wn.2d 1048 (2008) (sublessor not in the business of leasing was not a seller); *Johnson v. Recreational Equipment, Inc.*, 159 Wn. App. 939, 247 P.3d 18, *review denied*, 172 Wn.2d 1007 (2011) (court held that REI was liable as a product seller where it sold a defective bicycle labeled as its own; critically, REI *sold* the bicycle at issue).

What is clear under both Washington's product liability common law and under the WPLA is that an entity is not a "seller" unless it is in the product's chain of distribution by designing, manufacturing, or actually selling the relevant product. Perhaps most revealing as to what the Legislature intended with respect to a "seller" under the WPLA are the comments to the MUPLA. The Legislature adopted the MUPLA rule on a product seller. 1981 *Senate Journal* at 625. The intent of MUPLA's drafters was to limit a "seller" to an entity "in the regular commercial distribution chain." 44 Fed. Register at 62718. In other words, the seller had to be actively in the product's chain of distribution.

Thus, the central animating principle to product liability in Washington, whether under the common law of § 402A, or the WPLA, and whether the entity is a seller or manufacturer, is that the entity must be in the product's chain of distribution. *Macias*, 175 Wn.2d at 410-11;

*Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 385, 198 P.3d 493 (2008). That was plainly not the case as to NAPA, as will be discussed *infra*.

(2) NAPA Was Neither a Product Seller Nor Manufacturer

Whether under the common law or the WPLA, liability attaches to a defendant in a products claim only if the defendant is actually in the product's chain of distribution. This is the central thrust of our Supreme Court's decisions in *Braaten* and *Simonetta*.

In *Simonetta*, the Court could not have been any clearer that a duty does not attach unless a defendant is in the chain of distribution. There, in a common law case, the defendant sold an evaporator for use on board naval vessels for desalinization of water. *Simonetta*, 165 Wn.2d at 346. The defendant did not incorporate asbestos into the evaporator it sold, although it knew that asbestos insulation was ultimately necessary for the evaporator to work. *Id.* On the plaintiff's negligence claim, the Court held that the defendant owed no duty to a plaintiff exposed to asbestos insulation when that insulation was removed. *Id.* at 354. The defendant contended that it had no duty in negligence as to a product, it did not manufacture, supply, or sell. *Id.* at 350. The Court agreed, noting that Washington's common law principles "generally limit the analysis of the duty to warn of the hazards of a product to those in the chain of

distribution of the product, such as manufacturers, suppliers, or sellers.”

*Id.* at 353.

The Court similarly rejected strict liability under § 402A, summarizing that the evaporator manufacturer owed no duty to warn regarding another manufacturer’s product:

It is undisputed that Vlad sold the evaporator without insulation and that it did not manufacture, sell, or select the asbestos insulation. Therefore, the completed product was the evaporator as delivered by Vlad to the navy, sans asbestos insulation. Under § 402A, strict liability attaches when a manufacturer sells an unreasonably dangerous product. Like the court in *Lindstrom*, we conclude that the unreasonably dangerous product in this case was the asbestos insulation. And as in *Lindstrom*, we find Vlad cannot be held responsible for the asbestos contained in another manufacturer’s product.

*Id.* at 362-63.

In *Braaten*, the Court reinforced its *Simonetta* analysis, holding that manufacturers owe no duty to warn of asbestos contained in insulation of their product where the insulation was manufactured and supplied by third parties; manufacturers have no duty to warn of dangers in another manufacturer’s product. 165 Wn.2d at 385. In that case, a pipefitter was exposed to asbestos contained in the insulation in valves and pumps on board naval vessels. *Id.* at 379. Critical to the Court’s decision was the fact that the defendant did not manufacture the insulation, although it knew insulation was necessary for its valves and pumps and such

insulation did not necessarily require asbestos for the pumps or valves to function. *Id.* at 385. The Court concluded that liability under § 402A is confined to those in the chain of product distribution – the manufacturer, dealer, distributor, or seller. *Id.* at 384.<sup>9</sup>

In *Macias*, a WPLA case, the Court reaffirmed the general rule that “to find strict liability in a product liability case, the manufacturer must be in the chain of distribution.” 175 Wn.2d at 410. This cardinal principle of Washington product liability law applies whether the case arises under the common law or the WPLA. *Id.* at 411 (“Nothing in the WPLA modifies the rule that in general a manufacturer must be in the chain of distribution for strict product liability and thus the rule continues in force.”).

The record here reflects that NAPA was not in the chain of distribution of the products at issue. It did not design, manufacture, supply, or sell them. For example, the testimony of Byron Frantz makes it clear that NAPA did not make or sell any product:

Well, NAPA is a marketing trade organization. And, yes, you market the NAPA name from a quality perspective. I think any company would want their name represented with a quality stamp on it.

\*\*\*

---

<sup>9</sup> The *Braaten* court recognized that the general rule it articulated is inapplicable where a manufacturer incorporates a defective component part into its product. 165 Wn.2d at 385 n.7. *See also, Macias, supra* at 411 (concluding that manufacturers who made respirators with filters that accumulated asbestos dust to which a cleaner of such filters were exposed could be liable to the plaintiff as the assembler of the overall product). The assembler-liability exception does not apply here.

NAPA didn't sell anything.

\*\*\*

And NAPA does not make or sell anything. NAPA is the trade organization, the marketing arm, for the stores and the suppliers.

RP (2/9/17):51, 60, 62-63.

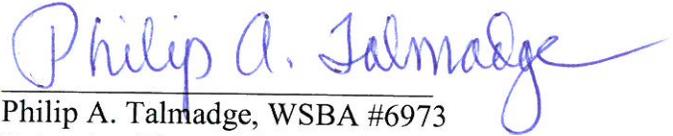
Moreover, NAPA did not distribute products. GPC, not NAPA, owned the distribution centers. NAPA was not a retailer. This case involves independent jobber stores in Kettle Falls and Colville. As a result, the Coogans' claims against NAPA, either under Washington's product liability common law or the WPLA, should have been dismissed because NAPA was not in the chain of distribution for the products at issue here.

#### F. CONCLUSION

The trial court erred in failing to rule as a matter of law that NAPA was neither a product seller nor manufacturer under either Washington's common law or the WPLA. This Court should reverse the judgment against NAPA and dismiss the Coogans' claims against it. Costs on appeal should be awarded to NAPA.

DATED this 17<sup>th</sup> day of October, 2018.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Appellant  
National Automotive Parts Association

# APPENDIX

RCW 7.72.010:

For the purposes of this chapter, unless the context clearly indicates to the contrary:

(1) Product seller. “Product seller” means 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. The term also includes a party who is in the business of leasing or bailing such products. The term “product seller” does not include:

(a) A seller of real property, unless that person is engaged in the mass production and sale of standardized dwellings or is otherwise a product seller;

(b) A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider;

(c) A commercial seller of used products who resells a product after use by a consumer or other product user: PROVIDED, That when it is resold, the used product is in essentially the same condition as when it was acquired for resale;

(d) A finance lessor who is not otherwise a product seller. A “finance lessor” is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

(e) A licensed pharmacist who dispenses a prescription product manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed prescribing practitioner if the claim against the pharmacist is based upon strict liability in tort or the implied warranty provisions under the uniform commercial code, Title 62A RCW, and if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules as

provided in RCW 7.72.040. Nothing in this subsection (1)(e) affects a pharmacist's liability under RCW 7.72.040(1).

(2) Manufacturer. "Manufacturer" includes 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.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of RCW 7.72.030(1)(a).

(3) Product. "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

The "relevant product" under this chapter is that product or its component part or parts, which gave rise to the product liability claim.

(4) Product liability claim. "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

(5) Claimant. "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm. A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.

(6) Harm. "Harm" includes any damages recognized by the courts of this state: PROVIDED, That the term "harm" does not include direct or consequential economic loss under Title 62A RCW.

RCW 7.72.030:

(1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

(a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product: PROVIDED, That a firearm or ammunition shall not be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

(c) A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

(2) A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW.

(a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

(b) A product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.

(c) Whether or not a product conforms to an implied warranty created under Title 62A RCW shall be determined under that title.

(3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

RCW 7.72.040:

(1) Except as provided in subsection (2) of this section, a product seller other than a manufacturer is liable to the claimant only if the claimant's harm was proximately caused by:

- (a) The negligence of such product seller; or
  - (b) Breach of an express warranty made by such product seller; or
  - (c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.
- (2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if:
- (a) No solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington; or
  - (b) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer; or
  - (c) The product seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the product seller; or
  - (d) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect in the product; or
  - (e) The product was marketed under a trade name or brand name of the product seller.
- (3) Subsection (2) of this section does not apply to a pharmacist who dispenses a prescription product in the form manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed practitioner if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellant NAPA* in Court of Appeals Cause No. 51253-0-II to the following parties:

Benjamin R. Couture, WSBA #39304  
Brian D. Weinstein, WSBA #24497  
Alexandra B. Caggiano, WSBA #47862  
Weinstein Couture, PLLC  
601 Union Street, Suite 2420  
Seattle, WA 98101-1362

William Joel Rutzick, WSBA #11533  
Schroeter Goldmark & Bender  
810 Third Avenue, Suite 2420  
Seattle, WA 98101-1362

Jessica M. Dean  
Benjamin H. Adams  
Lisa W. Shirley  
Dean Omar & Branham, LLP  
3900 Elm Street  
Dallas, TX 75226

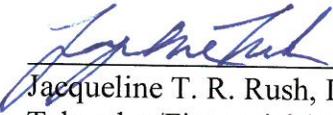
Michael B. King, WSBA #14405  
Timothy K. Thorson, WSBA #12860  
Jason W. Anderson, WSBA #30512  
Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010

Jeanne Loftis, WSBA #35355  
Brendan Philip Hanrahan, WSBA #42980  
Bullivant Houser Bailey PC  
888 SW 5th Avenue, Suite 300  
Portland, OR 97204-2017

Original E-filed with:  
Court of Appeals, Division II  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 17, 2018 at Seattle, Washington.

  
\_\_\_\_\_  
Jacqueline T. R. Rush, Legal Assistant  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

**October 17, 2018 - 12:11 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51253-0  
**Appellate Court Case Title:** Gerri S. Coogan, et al., Respondents v. Borg-Warner Morse Tec, Inc., et al.,  
Appellants  
**Superior Court Case Number:** 15-2-09504-3

**The following documents have been uploaded:**

- 512530\_Briefs\_20181017121021D2340667\_1239.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Brief of Appellant.pdf*

**A copy of the uploaded files will be sent to:**

- LShirley@dobllp.com
- alex@weinsteinouture.com
- anderson@carneylaw.com
- ben@weinsteinouture.com
- bhanrahan927@gmail.com
- brian@weinsteinouture.com
- jacqueline@tal-fitzlaw.com
- jdean@dobllp.com
- jeanne.loftis@bullivant.com
- king@carneylaw.com
- service@weinsteinouture.com
- thorson@carneylaw.com

**Comments:**

Brief of Appellant NAPA

---

Sender Name: Jacqueline T R Rush - Email: assistant@tal-fitzlaw.com

**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

**Note: The Filing Id is 20181017121021D2340667**