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No. 98296-1

No. 51253-0-II

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.

REPLY BRIEF OF APPELLANT NAPA

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. STATEMENT OF THE CASE.....	2
C. SUMMARY OF ARGUMENT	3
D. ARGUMENT	4
(1) <u>Legal Issues Raised on Summary Judgment Are Preserved for Appellate Review by a Party’s Filing of Appropriate CR 50 Motions</u>	4
(2) <u>The Coogans Fail to Seriously Address the Argument that the Trial Court Erred in Deferring to the Jury the Legal Question of the Applicable Law</u>	5
(3) <u>NAPA Is Not Strictly Liable</u>	9
(4) <u>There Is No Basis for This Court to Affirm on Alternative Grounds</u>	16
E. CONCLUSION.....	23
Appendix	

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Bostwick v. Ballard Marine, Inc., 127 Wn. App. 762,
112 P.3d 571 (2005), *review denied*,
163 Wn.2d 1048 (2008).....11

Braaten v. Saberhagen Holdings, 165 Wn.2d 373,
198 P.3d 493 (2008).....12, 13, 14

Buttelo v. S.A. Woods-Yates American Machine Co., Inc.,
72 Wn. App. 397, 864 P.2d 948 (1993).....11

Donner v. Blue, 187 Wn. App. 51, 347 P.3d 881 (2015).....6

Erwin v. Cotter Health Centers, 161 Wn.2d 676,
167 P.3d 1112 (2007).....6

Fagg v. Bartells Asbestos Settlement Trust, 184 Wn. App. 804,
339 P.3d 207 (2014).....7

Goodman v. Goodman, 128 Wn.2d 366, 907 P.2d 290 (1995).....6

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907,
32 P.3d 250 (2001).....4

Johnson v. Recreational Equipment, Inc., 159 Wn. App. 939,
247 P.3d 18, *review denied*, 172 Wn.2d 1007 (2011).....11

Macias v. Saberhagen, 175 Wn.2d 402, 282 P.3d 1069 (2012) *passim*

McKee v. AT&T Corp., 164 Wn.2d 372, 191 P.3d 845 (2008).....6

Rublee v. Carrier Corp., 192 Wn.2d 190,
428 P.3d 1207 (2018).....4, 16, 20

Seattle-First National Bank v. Tabert, 86 Wn.2d 145,
542 P.2d 774 (1975).....10

Simonetta v. Viad Corp., 165 Wn.2d 341, 197 P.3d 127 (2008) ...11, 12, 14

State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2017).....17

Viereck v. Fibreboard Corp., 81 Wn. App. 579, 915 P.2d 581,
review denied, 130 Wn.2d 1009 (1996).....5, 6

Washburn v. City of Federal Way, 178 Wn.2d 732,
310 P.3d 1275 (2013).....4

Zamora v. Mobil Corp., 104 Wn.2d 199, 704 P.2d 584 (1985).....10

Federal Cases

Harmon v. National Automobile Parts Ass'n,
720 F. Supp. 79 (N.D. Miss. 1989).....21

Other Cases

Nelson v. Garcia, 494 N.Y.S.2d 276 (N.Y. Super. 1985).....16

Statutes

RCW 4.22.9207
RCW 7.721
RCW 7.72.040(e).....20

Codes, Rules and Regulations

CR 504

Other Authorities

Restatement (Third) of Torts, Products Liability § 14 (1998)15

A. INTRODUCTION

The respondents Gerri S. Coogan and James P. Spurgetis, the personal representative of Jerry Coogan's estate,¹ contend that Coogan was exposed to asbestos-containing products for which National Automotive Parts Association ("NAPA") was strictly liable, either as a manufacturer or product seller. But NAPA is not, and never has been, a manufacturer, seller, or distributor of asbestos-containing products of any kind. As a mere licensor of its logo, it had no liability under the Washington Product Liability Act, RCW 7.72 *et seq.* ("WPLA"), or Washington common law predating the WPLA's enactment.

Recognizing the weakness of their factual and legal position, the Coogans resort to raising a different theory – that the jury could have held NAPA liable even if it did not actually sell the products at issue so long as the jury found that NAPA was the apparent manufacturer of those products. This Court should reject that argument for many reasons, not least of which is that under the jury instructions, the jury could have held NAPA liable only if it found that NAPA was in the chain of distribution. For the reasons articulated in its opening brief and herein, and for the reasons set forth in Genuine Parts Company's ("GPC") briefing, which

¹ The respondents are referenced as "the Coogans" throughout this brief.

NAPA adopts, the Court should reverse the judgment against NAPA.

B. STATEMENT OF THE CASE²

The Coogans' counter-statement of the case points to no evidence showing that NAPA was in the chain of distribution. To be sure, certain parts of that counter-statement *say* that Coogan bought products "from NAPA" (*e.g.*, Resp'ts Br. at 3), but the record citations do not support propositions like that. Coogan never bought any product from NAPA, and nor did the so-called NAPA "jobbers" (including Doy Coogan's brother).

The Coogans also suggest that a GPC Rayloc catalog shows that NAPA remanufactured Rayloc brakes (Resp'ts Br. at 30, 35), but the catalog does nothing of the sort. The Coogans seize on the following excerpt from that catalog:



Ex. 98 at 2. But, read in context, it is clear that the phrase "World's

² The Coogans complain in their brief at 19-20 that NAPA's statement of the case relied on evidence adduced on summary judgment to the exclusion of trial evidence. That is false. NAPA specifically noted in its opening brief at 2 n.2 that it relied on evidence from the motions *and* trial for its statement of the case.

Largest Remanufacturer” applies to Rayloc, not NAPA, and that NAPA’s name is nothing more than a branding logo.

The Coogans’ evidence aside, their brief is filled with many instances where they use the name NAPA when they are really referring to GPC. For instance, the Coogans say that “NAPA executives were also involved in setting the vision for NAPA distribution centers” and that “[t]hey visited the Spokane NAPA distribution center.” Resp’ts Br. at 9; *see also, id.* at 27. But the context of the cited testimony makes clear that the executives are GPC’s executives, not NAPA’s. *See* 22 RP 46–48. The same holds true for many other places in the Coogans’ brief where they refer to NAPA.

C. SUMMARY OF ARGUMENT

The Coogans’ responsive brief misstates the law pertaining to appellate review of summary judgment decisions, and then proceeds to avoid the critical point raised in NAPA’s opening brief. The question of the applicable law – the pre-WPLA product liability common law or the WPLA – was a *question of law for the court* and not the jury. In any event, NAPA was not strictly liable for products it licensed under either the common law or the WPLA.

This Court should also reject the Coogans’ belated effort to argue that the jury could have held NAPA strictly liable even if NAPA was not

in the chain of distribution: The jury instructions, to which the Coogans acquiesced, required the jury to find that NAPA was in the chain of distribution for liability to attach; the Coogans recognized the chain-of-distribution requirement throughout trial. In any event, the Supreme Court's recent decision in *Rublee v. Carrier Corp.*, 192 Wn.2d 190, 428 P.3d 1207 (2018) supports NAPA's position, not the Coogans'.

D. ARGUMENT³

(1) Legal Issues Raised on Summary Judgment Are Preserved for Appellate Review by a Party's Filing of Appropriate CR 50 Motions

The Coogans advance the sweeping argument in their brief at 18-20 that NAPA is "barred" from appealing the trial court's erroneous summary judgment rulings on the law. They are simply wrong, as they ignore the fact that NAPA not only appealed the denial of its summary judgment rulings on the applicable law, but appealed the trial court's erroneous CR 50(a) ruling on the law as well. NAPA Br. at 2. In *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013), our Supreme Court held that an appellate court could review a trial court's denial of a motion for summary judgment asserting no duty was owed by a

³ 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.*

defendant and a subsequent CR 50(a) motion raising the same legal issue, even though the defendant failed to file a CR 50(b) motion. The Court specifically overruled a contrary Division I opinion. *Id.* at 745, 751-52. The Court then proceeded to analyze the denial of summary judgment and the denial of the CR 50(a) motion. *Id.* at 752-61.

By filing a motion for summary judgment that it owed no duty to the Coogans, as well as preserving that issue by filing a subsequent CR 50(a) motion, NAPA fully complied with the rule that the filing of a CR 50(a) motion for judgment as a matter of law preserves for appellate review an erroneous trial court ruling on summary judgment. NAPA preserved the issues it raises here for this Court's review.

(2) The Coogans Fail to Seriously Address the Argument that the Trial Court Erred in Deferring to the Jury the Legal Question of the Applicable Law

The Coogans address the point set forth in NAPA's opening brief at 12-13 – that the trial court erred in failing to address the law applicable to the case as a question of law for the court – only tangentially in their brief at 20-24. As noted by NAPA, 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 Coogans fail to even address *Viereck* at all in their brief, hoping to ignore its holding. But they cannot. *Viereck*

remains good law.⁴

The only case they do cite for the proposition that juries, not courts, establish the applicable law, *Goodman v. Goodman*, 128 Wn.2d 366, 907 P.2d 290 (1995), Resp'ts Br. at 23-24, is neither an asbestos nor a product liability case. It does not support their argument. That case *nowhere* contradicts the holding in *Viereck* that the law governing the case is a *question of law* for the court. *Goodman* involved the application of the statute of limitations for an action on an express or constructive trust. The Supreme Court noted that whether a statute of limitations bars a suit is a legal question, but the jury could decide the underlying “factual questions.” *Id.* at 373. But the question of what law governs in a case is more fundamental, touching upon all aspects of the resolution of the case. It must be decided initially, and early, in the case by the court as a question of law, just as a court decides the applicable law in a choice of law setting, *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007) (“Choice of law is a question of law that we review de novo.”), or if federal law preempts the application of state law. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 388, 191 P.3d 845 (2008) (“Preemption is a question of law we review de novo.”). Nor should a jury decide which

⁴ This Court may presume that the Coogans’ counsel researched this question and, after a diligent search, found no authority distinguishing the actual holding in *Viereck*. *Donner v. Blue*, 187 Wn. App. 51, 61, 347 P.3d 881 (2015).

product liability law applies. A court abdicates its proper role in doing so.

The trial court here erred in declining to perform its duty by leaving to the jury to decide, in effect, whether Washington's common law or the WPLA applied. CP 14964 (Instruction 12).⁵

Had the trial court properly performed its duty, it would have concluded that the WPLA applies. That statute supplanted the product liability common law when a product claim arose on or after July 26, 1981, the WPLA's effective date. RCW 4.22.920. The WPLA governs a plaintiff's products liability claim unless "substantially all" claimed exposure occurred before the WPLA's effective date. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 408, 282 P.3d 1069 (2012). Our Supreme Court did not define precisely what it meant by "substantially all." This Court has 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

⁵ The trial court's employment of alternative instructions and jury verdict forms was plainly confusing. No court would instruct the jury in a case where a choice of law issue was present on the multiple potential state laws that apply and the consequences that would flow from each. But that is effectively what the trial court did here by presenting the jury with alternative jury instructions that hinged on whether the WPLA or common law applied. The trial court should have performed its duty to state the applicable law so as to simplify and streamline the submission of the issues to the jury.

exposure of the claimant.

Either way, 85% of Coogan's alleged exposures did not occur before July 26, 1981.⁶ The Coogans' causation expert said as much at trial. According to Dr. Brodtkin, Coogan had "two major periods of exposure" totaling about 19 years – from 1963 to 1970, when Coogan allegedly worked with cars alongside his grandfather and high school friends, and "from 1975 through the late 1980s," when Coogan worked on heavy automotive equipment. 7 RP 122-23. If "the late 1980s" means about 1988, then at least 7 of Coogan's 19 years of alleged exposures occurred after July 1981.⁷

That testimony alone confirms that more than 15% of Coogan's alleged exposures occurred after July 1981, but there is more. As the Coogans' opposition to GPC's opening brief explains, Coogan "did car repair and maintenance throughout the 1970s, 1980s, and 1990s, working on both his own cars and those of his friends and family." Resp'ts GPC Opp. Br. at 5 (quoting 13 RP 52-53). The Coogans go on to argue that "[g]iven that Rayloc brakes contained asbestos until 2001, [Coogan's]

⁶ In other words, the evidence confirms that more than 15% of Coogan's alleged exposures occurred after that date.

⁷ The Coogans suggest that Doy Coogan's earlier exposures might have counted more because "Dr. Arnold Brody testified that people are more vulnerable to developing diseases from asbestos exposure when they are exposed as children" (Resp'ts Br. at 3), but the cited testimony is much more equivocal than the Coogans represent. See 8 RP 86 (Dr. Brody: "[Y]ou can say [children] might be [more vulnerable]").

exposures from GPC/NAPA products spanned 45 years.”⁸ *Id.* at 11 (citing 14 RP 33-34); *see also, id.* at 13 (“GPC/NAPA sold asbestos Rayloc brakes until 2001.”).

Even while arguing in response to GPC that Coogan’s exposures lasted 45 years, the Coogans argue in response to NAPA that more than 15% of Coogan’s exposures did not occur after July 1981. *See, e.g., Resp’ts Br.* at 4-5. It is easy enough to see what they are trying to do: They are trying to prop up their case against GPC by pointing to later alleged exposures – including alleged exposures running until 2001 – while simultaneously downplaying those alleged exposures in response to NAPA’s arguments in an effort to avoid the WPLA’s application. The law does not countenance that type of gamesmanship. Given Coogan’s post-1981 claimed exposures, the trial court below should have held that more than 15% of Coogan’s alleged exposures occurred after July 1981. The trial court erred in submitting the issue of the applicable law to the jury.

(3) NAPA Is Not Strictly Liable

The Coogans assert in their brief at 24-31 that although NAPA merely licensed its logo, NAPA is strictly liable under the common law or

⁸ The evidence does not support this claimed exposure. But for purposes of the WPLA, the important point is that the Coogans *claimed* that the GPC exposure lasted until 2001. *See, e.g., Macias*, 175 Wn.2d at 408 (considering when the plaintiff “was allegedly exposed to asbestos”).

the WPLA. The Coogans are wrong.

The Coogans take no issue with NAPA's recitation of the history of Washington's product liability common law or the legislative history of the WPLA in its opening brief at 13-18. The Coogans thereby *concede* the accuracy and propriety of NAPA's argument there.

The Coogans also gloss over the Supreme Court's holding in *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 542 P.2d 774 (1975) that product sellers should be strictly liable under § 402A only 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). Resp'ts Br. at 25. Instead, they cite *Zamora v. Mobil Corp.*, 104 Wn.2d 199, 704 P.2d 584 (1985) as authority for the proposition that a mere licensor of a logo should have strict liability as a product seller. Resp'ts Br. at 25-26. That case does not help them. In *Zamora*, the defendant was plainly in the chain of distribution that resulted in the harm to the plaintiff. Mobil manufactured propane gas at its Ferndale refinery. Cal Gas bought the propane from Mobil and in turn

sold it to Northwest Propane, who then delivered to the plaintiffs. The propane gas caught fire; the gas was inadequately odorized and no one detected the gas leak that caused the fire. The issue was whether Cal Gas was liable as a distributor. The Court rejected liability based on negligence. 104 Wn.2d at 204-05. But the Court concluded that Cal Gas was liable under § 402A because, although it did not “handle” the gas, it was in its chain of distribution; it was not “merely a ‘passive conduit’ in the marketing of the propane.” *Id.* at 207. Plainly, the case has nothing to do with the situation of NAPA, a mere licensor of a logo.

The Coogans simply have no answer to the cases cited by NAPA in its opening brief at 17-18 in which Washington courts held that entities that are not product sellers are not strictly liable under the common law.⁹ By contrast, in *Johnson v. Recreational Equipment, Inc.*, 159 Wn. App. 939, 247 P.3d 18, *review denied*, 172 Wn.2d 1007 (2011), Division I held that REI was liable as a product seller where it sold a defective bicycle labeled as its own. Critical to Division I’s analysis, however, was the fact that REI *sold* the bicycle at issue because the court described the liability

⁹ *E.g.*, *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); *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).

as a form of vicarious liability where the seller brands and sells the product as its own. *Id.* at 947-48.

In particular, the Coogans have no good answer to the fact that under the common law (as described in § 402A) or the WPLA, the entity must be in the product's chain of distribution – regardless of whether the entity is a seller or manufacturer. *Macias*, 175 Wn.2d at 410-11; *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 385, 198 P.3d 493 (2008); *Simonetta, supra*.

In *Simonetta*, the Court was clear 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. 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.* In defense of a pre-WPLA product liability negligence claim, the defendant argued that it had no duty in negligence as to a product that it did not manufacture, supply, or sell, and 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. Critical to the Court's decision was the fact that the defendant did not manufacture the injury-causing product; 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.

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.”).

Yet again, rather than confronting controlling authority, the Coogans choose to ignore it. They fail to address *Braaten*, *Simonetta*, or *Macias anywhere* in their brief. Instead, they rely on factual contentions, Resp’ts Br. at 26-31, hoping that the law will go away.

But even those factual contentions – including the Coogans’ contention that NAPA was in the chain of distribution as a mere product licensor – are false. *Cf.* Resp’ts Br. 26-27. NAPA did not design, manufacture, supply, or sell the products at issue here. For example, the testimony of Byron Frantz makes 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.

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; *see also*, 14 RP 60 (“Genuine Parts Company was trying to sell automotive clutches and brakes. NAPA didn’t sell anything.”); CP 195-96 (same).¹⁰ Moreover, NAPA did not distribute the products at issue here.¹¹ CP 194-96; *see also*, 14 RP 41 (“Genuine Parts Company was distributing the parts. They sold the parts themselves.”). NAPA also never received payment for any GPC sales. CP at 194-96. GPC, not NAPA, owned the distribution centers.¹² RP (2/9/17):59-60. NAPA was not a retailer and did not own the independent jobber stores in Kettle Falls and Colville that Coogan allegedly bought from.¹³ Nor did

¹⁰ As explained *supra*, the fact that manufacturers put NAPA’s logo close to the manufacturers’ own logos does not somehow show that NAPA itself was a manufacturer.

¹¹ The Coogans misstate the record by arguing that one of GPC’s corporate representatives (Brewer) conceded that NAPA is in the chain of distribution. Resp’ts Br. 26. She said no such thing. On the contrary, Brewer testified that GPC “sent products from NAPA distribution centers” (which are owned by GPC or other companies) to jobber stores. 21 RP 174; *see also, id.* (Brewer worked for GPC “in the distribution center” in Spokane); *id.* at 153 (same).

¹² The Coogans betray the weakness of their chain-of-distribution argument by asserting that “Mr. Frantz provided no documentation for his claim that GPC owned the NAPA Distribution Center in Spokane at any point in time.” Resp’ts Br. 27. Nothing in Washington law imposes a bring-documents-or-else requirement on corporate representatives or otherwise relieves the Coogans of their burden to prove their own case. Nor should the Court credit the Coogans’ speculation that NAPA *might* have owned the Spokane distribution center before GPC bought it in the mid-1960s. There is no evidence to that effect. Frantz testified that GPC does not own every automotive parts distribution center, that GPC bought the Spokane center “in the early to mid 1960s,” and that NAPA does not (and has never) sold anything. 14 RP 59-60. That testimony leaves no room for the Coogans’ hypothesis that NAPA – as opposed to a manufacturer or retailer other than GPC – might have owned the distribution center before GPC did.

¹³ The mere placement of a logo on a product, without any specific connection to the product such as its testing, does not subject an entity to strict liability. *See, e.g., Restatement (Third) of Torts, Products Liability* § 14, cmt. d (1998) (licensor “who does

NAPA exercise any control over its licensees' business operations. CP 194-95.

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.

(4) There Is No Basis for This Court to Affirm on Alternative Grounds.

Recognizing the weakness of their arguments in response to NAPA's opening brief, the Coogans pivot to a different argument – that NAPA could have been held strictly liable under the common law even if it was not in the chain of distribution, so long as the jury would have found that NAPA was the apparent seller (and apparent manufacturer) of those products. Resp'ts Br. at 31-35. They hope to capitalize upon the Supreme Court's recent decision in *Ruble v. Carrier Corp.*, 192 Wn.2d 190, 428 P.3d 1207 (2018), in which the Court held that under the common law, a non-manufacturer can be held liable to the same extent as a manufacturer if an ordinary consumer would have inferred from the company's branding and representations that it manufactured the product in question. *Id.* at 1218. In that opinion, the Court also held that a

not sell or otherwise distribute products, is not liable"); *Nelson v. Garcia*, 494 N.Y.S.2d 276 (N.Y. Super. 1985).

company need not be in the chain of distribution for apparent-manufacturer liability to attach. *Id.* at 1219.

But this Court should not reach the Coogans' alternative argument. The Coogans chose to try this case below on the principle that NAPA had to be in the chain of distribution to be liable under the common law. In making that choice, the Coogans cannot switch gears on appeal. Under the law of the case doctrine, they are bound by the law applied by the trial court below. *State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017). There, our Supreme Court noted that jury instructions, even ones containing errors of law, that are not objected to are treated as the law of the case. *Id.* at 755. The Court upheld the defendant's theft conviction even though the "to convict" instruction placed an added factual element to the crime not found in the theft statute. The Court so concluded even though the element set forth in the instruction modified the State's burden of proof; the Court further held that the State met it. *Id.* at 754-56.

Under the jury instructions, the jury could have held NAPA liable only after finding that it was in the chain of distribution. The trial court instructed the jury that "[t]o find a Defendant liable, you must find that they were either a . . . product seller . . . or . . . manufacturer . . . of the

products to which Mr. Coogan alleged he was exposed to.”¹⁴ 47 RP 103-04; CP 14966. The court then instructed the jury that the term “product seller” includes only companies that are in the chain of distribution: “A product seller is any business that is engaged in the business of selling products whether the sale is for resale or for use in consumption. The term includes manufacturer, wholesaler, distributor or retailer of the relevant product.” 47 RP 104; CP 14966; *see also, id.* (“On Plaintiffs’ strict liability claim for unsafe product design, Plaintiffs have the burden of proving . . . that the Defendant supplied a product”). The Coogans did not submit an instruction that the jury could hold NAPA liable for common law claims even if it was not a “product seller.” *Cf.* 46 RP 115 (trial court noting parties’ agreement on “product seller” definition).

Indeed, throughout the trial, the Coogans recognized that they needed to prove that NAPA was in the chain of distribution to hold it strictly liable under the common law. In their directed verdict papers, for instance, the Coogans conceded that NAPA’s liability hinged on their proving that NAPA was in the chain of distribution. *See, e.g.*, CP 11400 (“[Restatement] Section 402A applies strict liability to all those in the chain of distribution of a product.”); *id.* (“Plaintiffs have presented

¹⁴ The second question on the verdict form similarly asked the jury whether NAPA “manufacture[d], distribute[d], or [sold] a product” CP 14998.

sufficient evidence to demonstrate that NAPA was more than just a trade organization and was within the chain of distribution for asbestos-containing brakes, clutches, and gaskets.”); *see also, id.* at 11402 (arguing that under the WPLA, “NAPA has the strict liability of a manufacturer because *it sold* products under its own name”) (emphasis added). The Coogans made similar concessions at the jury charge conference.¹⁵ *See, e.g.,* 47 RP 46 (the Coogans’ attorney noting that for purposes of WPLA liability, “I have two things that I have to prove, [1] product seller, and in order for them to be held liable as a manufacturer [2] that [the product] was marketed under [NAPA’s] trade name or the brand name”); *id.* (“What I have to show is product seller as defined.”); *id.* at 47 (“I think what I have to prove must include for NAPA . . . product seller.”). And the Coogans’ closing argument was more of the same. *See id.* at 135 (“We have to show that NAPA is a product seller, which is a term of art.”).

Against that backdrop, it is clear that the jury did not decide – indeed, it *could not* have decided – that NAPA was an apparent seller and apparent manufacturer for purposes of the Coogans’ common-law claims. This was not their task because there was no instruction on that issue.¹⁶

¹⁵ *See also*, CP 14966 (Instruction 14: “Plaintiffs contend that defendants NAPA and Genuine Parts Company are product sellers of brakes, bulk brake lining, gaskets, packing, and clutches.”).

¹⁶ In the trial court, the Coogans argued that if the jury determined that the

And yet the Coogans are nevertheless asking this Court to now decide – as a matter of law – how the jury would have answered the “alternative” questions that they were never asked. That sort of counterfactual hypothesizing is no basis for this Court to affirm on alternative grounds.

In any event, the apparent seller and apparent manufacturer issues are fundamentally factual in nature. Indeed, it is ironic that the Coogans lean on *Rublee* because that case supports the opposite result: Our Supreme Court held that the question of whether a defendant was an “apparent manufacturer” under the common law was a “factual question” that “cannot be decided on summary judgment.” 192 Wn.2d at 210-11.

That reasoning holds equally true here. At its core, the apparent manufacturer doctrine comes into play when an entity appears to be a product’s manufacturer or the product appears to be made for a particular entity. *Rublee*, 192 Wn.2d at 199-200. The *Rublee* court adopted an objective reliance test to determine the “apparency” of the product’s status:

WPLA applied and that NAPA marketed products “under its trade name or brand name” (RCW 7.72.040(e)), then the jury could hold NAPA liable to the same extent as a manufacturer under the WPLA. *See, e.g.*, 47 RP 46; *see also*, CP 14985 (Instruction 31: “[A] product seller has the liability of a manufacturer . . . if you find that the product was marketed under a trade name or brand name of the product seller.”). But there is a world of difference between that argument – which assumed that NAPA is a product seller – and arguing that NAPA could be held strictly liable under the common law even if it was not a seller in the first place. In all events, the jury found that the common law governed the Coogans’ claims, so it never determined whether NAPA was liable to the same extent as a manufacturer under the WPLA.

Under a consumer-focused objective reliance test, the plaintiff is required to show 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 210-11.

But that test was never designed to hold every licensor of a logo to strict liability for a product. Comment d to *Restatement* § 400 notes that liability exists under this section “*only* where the actor puts the chattel out as his own product.”¹⁷ (emphasis added). Moreover, “where the real manufacturer or packer is clearly and accurately identified on the label or other markings on the goods, and it is also clearly stated that another who is also named has nothing to do with the goods except to distribute or sell them, the latter does not put out such goods as his own.” *Id.* Here, NAPA did nothing but offer its logo. As noted *supra*, it neither sold nor distributed the products in question. And, with at least certain of the products at issue in this case, the Coogans *admitted* that “[i]t’s very clear

¹⁷ Cases arising in other jurisdictions support the proposition that an entity merely supplying a logo in connection with a product does not render it liable as a product manufacturer or retailer. For example, in *Harmon v. National Automobile Parts Ass’n*, 720 F. Supp. 79 (N.D. Miss. 1989), the court declined to apply either § 402A or § 400 to NAPA where NAPA “merely allows its name to be placed on a product but neither sells nor distributes the product.” *Id.* at 81. The court noted that “there is apparently no state which extends liability for injuries caused by defective products to those who merely devised the marketing or advertising scheme under which the product is promoted. *Id.*”

that American Brakebloc is the manufacturer and that NAPA is just giving it their quality assurance.” 46 RP 115; *see also, id.* at 118 (“[s]ome of [the products], they are correct, show, for instance, the American Brakebloc name, as its own, and then just references NAPA as the quality assurance”). Besides that, in the logo-branding examples that the Coogans excerpt in their brief, the product manufacturer’s name features prominently next to the NAPA logo; NAPA’s logo did not replace the manufacturers’ branding. *See* Resp’ts Br. at 13.

A mere licensor (like NAPA) is not an apparent manufacturer. But at the very least – and this is being more generous than is warranted – it is a fact question whether the ordinary consumer would have mistaken NAPA as the manufacturer of products on which the NAPA logo appeared.

* * *

By the Coogans’ analysis, an organization that acts as a marketer, offering its logo as part of the marketing, invariably renders that organization potentially liable as product manufacturers. That is wrong. For example, Washington State itself places logos from its commodity commissions on products. Should the State be liable for defects in a bag of apple chips because the logo of the Apple Commission appeared on the bag?

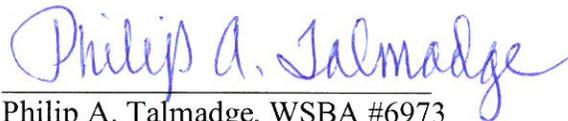
This Court should reject the application of § 400 to mere licensors of logos.

E. 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 14~~th~~ day of March, 2019.

Respectfully submitted,



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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 ***Reply Brief of Appellant NAPA*** in Court of Appeals Cause No. 51253-0-II to the following parties:

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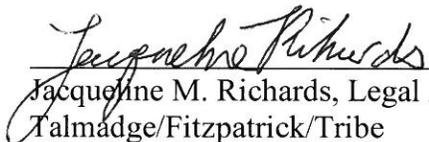
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 14, 2019 at Seattle, Washington.



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