

No. 64312-6  
(Consolidated with No. 65019-0-1)

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

v.

APV North America, Inc., Petitioner,

*And*

Renata Needles, Personal Representative for the Estate of Witold  
Siemieniec, Appellant,

v.

APV North America, Inc., Respondent,

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**RESPONDENT'S RESPONSIVE BRIEF**

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J. Michael Mattingly  
Claude F. Bosworth  
Allen E. Eraut  
Attorneys for Petitioner APV North America, Inc.

Rizzo Mattingly Bosworth PC  
411 S.W. 2<sup>nd</sup> Avenue, Suite 200  
Portland, OR 97204  
(503) 229-1819  
J. Michael Mattingly, WSBA # 33452  
Claude F. Bosworth, WSBA #42568  
Allen E. Eraut, WSBA #30940

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## INTRODUCTION

Plaintiff's decedent Witold Siemieniec was a welder at an aluminum mill. Plaintiff claims that Siemieniec worked on asbestos-containing insulation, gaskets, and packing installed on carbon mixers sold by a predecessor of Defendant APV North America. Many years later, Siemieniec contracted an asbestos-related disease. Plaintiff brought this suit against APV and several other defendants, claiming that asbestos exposure from defendants' products caused Siemieniec's disease.

APV filed a motion for summary judgment because APV did not manufacture or sell any of the asbestos-containing insulation, gaskets, or packing Siemieniec was exposed to. Under *Simonetta v. Viad* and *Braaten v. Saberhagen Holdings*, an equipment manufacturer such as APV cannot be liable for asbestos-containing products used with its equipment if other companies manufactured or sold those products.<sup>1</sup>

Plaintiff opposed summary judgment with three arguments relevant to this appeal. Plaintiff first argued that Siemieniec was exposed to Superex insulation installed in trough extension covers on the carbon mixers. But the carbon mixers at issue here did not have these trough extension covers, and thus did not have the Superex insulation. Even if the carbon mixers did have these trough extension covers, the Superex insulation was sealed within welded steel plates that Siemieniec never worked on. And even if the carbon mixers had the trough extension

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<sup>1</sup> *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).

covers, and Siemieniec worked on those covers, the original Superex insulation would have been replaced long before.

Plaintiff second argument is that the trial court should carve out a new exception to *Simonetta* and *Braaten*. That new exception would impose liability for the insulation, gaskets, and packing sold by other companies, if the product manufacturer “specified” those parts with its equipment. This argument fails because: (1) *Simonetta* and *Braaten* did not recognize a “specification” exception; (2) The APV documents Plaintiff offered do not constitute “specifications”; and (3) Mr. Siemieniec did not use as replacements the components that APV allegedly specified.

Plaintiff’s third argument on appeal is that APV gratuitously assumed a duty to warn because it sold replacement parts to Alcoa and conducted periodic inspections of its mixers. But some of the defendants in *Braaten* sold replacement parts and the court did not apply this doctrine. And the post-sale inspections Plaintiff refers to actually consist of a single inspection for ball bearings. This lone inspection is not enough to impose liability on APV for other manufacturers’ products.

### **RESPONSES TO ASSIGNMENTS OF ERROR**

The Trial Court correctly granted APV’s Motion for Summary Judgment.

Issue 1 (alleged exposure to insulation): Mr. Siemieniec was not exposed to any asbestos-insulation sold by APV. Plaintiff cites documents from APV that show Superex insulation installed in trough extension

covers. But the APV Mixers did not have these trough extension covers, and thus, did not contain any Superex insulation. Even if the APV Mixers had Superex insulation, Plaintiff has not offered any evidence that Siemieniec ever worked with that insulation. And even if Siemieniec worked on the trough extension covers, the original insulation would have replaced during regular maintenance long before.

Issue 2 (specification exception): The Trial Court properly rejected Plaintiff's argument that APV should be liable for specifying asbestos-containing components with its mixers. Under *Simonetta* and *Braaten*, APV is not liable for products it did not manufacture or sell.<sup>2</sup> *Simonetta* and *Braaten* do not recognize an exception to this rule if a defendant "specifies" asbestos-containing parts with its products. Moreover, APV did not specify the products Siemieniec was allegedly exposed to.

Issue 3 (gratuitous duty): APV did not voluntarily assume a duty to warn Aloca employees like Mr. Siemieniec about asbestos by its occasional sale of replacement parts, and by conducting one post-sale inspection about ball bearings.

### STATEMENT OF THE CASE

Renata Needles, individually, and as the personal representative of the estate of Witold Siemieniec, brought claims for wrongful death, survival, and loss of consortium arising out of Siemieniec's alleged

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

exposure to asbestos.<sup>3</sup> Plaintiff claims that Siemieniec was exposed to asbestos while working at an Alcoa aluminum mill in Vancouver, Washington.<sup>4</sup> Baker Perkins, a predecessor-in-interest to APV, sold five carbon mixers to the Alcoa mill in 1940 and 1941.<sup>5</sup> For ease of reference, APV will refer to these five carbon mixers as the “APV Mixers.”

A carbon mixer is a large piece of equipment made of cast iron and steel.<sup>6</sup> The carbon mixer heats and combines several different elements to make liquid carbon.<sup>7</sup> That liquid carbon is then poured through a press to form 300 pound blocks.<sup>8</sup> Alcoa sends those carbon blocks to the aluminum pots, where a copper rod is inserted.<sup>9</sup> Alumina ore is placed in the pots, and the carbon blocks are charged with electricity.<sup>10</sup> That process converts the alumina ore into aluminum.<sup>11</sup>

APV is the successor-in-interest to Baker Perkins pursuant to asset purchase and sale agreements.

#### **A. Siemieniec’s Work at the Alcoa Mill**

Siemieniec began working for Alcoa as a Welder and General Mechanic in 1966.<sup>12</sup> The only evidence of Siemieniec’s duties at Alcoa

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<sup>3</sup> CP 1-6 (Fourth Amended Complaint for Wrongful Death and Survivorship).

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

<sup>5</sup> CP 56-57 (Yankee pp. 934:23 – 935:1); CP 162-164 (APV’s Responses to Interrogatories and Request for Production)

<sup>6</sup> CP 61-62 (Yankee pp. 193:22-194:4).

<sup>7</sup> CP 420 (Yankee p. 38:3-25); CP 421 (Yankee 119:16-120:9).

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

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

<sup>10</sup> CP 419 (Yankee p. 31:1-18).

<sup>11</sup> *Id.*

<sup>12</sup> CP 155-56 (employee service records).

comes from co-workers Dennis Yankee, Al Moore, and Marv Eiesland. Siemieniec gave his own deposition, but that deposition testimony is not admissible against APV.<sup>13</sup> APV was not present for Siemieniec's deposition, and Plaintiff had not even served APV with this lawsuit at the time.<sup>14</sup> The Trial Court accordingly struck Siemieniec's deposition testimony on APV's motion, and did not consider it.<sup>15</sup> Plaintiff has not cited any testimony from Siemieniec in her opening brief, and has not appealed the Trial Court's ruling on APV's motion to strike.

Co-workers Yankee and Eiesland did not testify about Siemieniec's work; they only testified about what work was generally done at Alcoa.<sup>16</sup> Moore recalled Siemieniec, but did not work with him.<sup>17</sup> Moore's entire testimony about Siemieniec's work consists of the following statement:

I also knew Witold ("Vic") Siemieniec, who was employed as a welder at Alcoa. Although I did not work directly with Mr. Siemieniec, I observed him on many occasions performing welding work on the carbon mixers. I also observed him rebuilding one or more of the carbon mixers in the maintenance shop after the machine had been moved there for that purpose.<sup>18</sup>

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<sup>13</sup> RP 3:24-4:22.

<sup>14</sup> *Id.*

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

<sup>16</sup> CP 418-430 (Yankee pp. 539-554); CP 432 (Eiesland declaration).

<sup>17</sup> CP 434 (Moore declaration).

<sup>18</sup> CP 434 (Moore declaration p. 1:15-19).

According to Moore, Siemieniec did “welding” and “rebuilding” work on the APV Mixers.<sup>19</sup> But Moore did not explain what “welding” and “rebuilding” means in the context of work on the APV Mixers. The only other source of information about what Siemieniec’s job duties may have been is Yankee, who worked as a millwright, not a welder.

Yankee testified that Alcoa employees would perform regular maintenance on the APV Mixers.<sup>20</sup> That work included repacking the swing joints on the paddles, fixing the air cylinders on the doors, and repairing the interior lining of the mixers and paddles.<sup>21</sup>

When regular maintenance was not enough to keep an APV Mixers running properly, Alcoa would overhaul them. Each mixer would be overhauled every three to four years.<sup>22</sup> The overhaul process took six months.

Yankee testified that the first step in an overhaul was to remove the exterior insulation from the mixer.<sup>23</sup> He then would remove the “hundreds” of bolts that held the mixer together. Yankee then jacked up the mixer body so he could pull both end caps off, and remove the paddles. Last, Yankee would attach a chainfall to slide the mixer across the floor so he could move the mixer with an overhead crane to the maintenance shop.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> CP 429 (Yankee p. 932:8-12).

<sup>22</sup> CP 54 (Yankee p. 122:7-19).

<sup>23</sup> CP 426 (Yankee p. 198:6-25); CP 430 (Yankee p. 934:13-18).

Plaintiff has alleged that Siemieniec participated in the regular maintenance and overhaul work on the APV Mixers, and that this work exposed him to asbestos from insulation, gaskets, and packing. APV discusses each type of alleged exposure below.

### 1. Insulation

APV did not insulate the APV Mixers before shipping them to Alcoa.<sup>24</sup> After the APV Mixers arrived at Alcoa, Alcoa workers—not APV—covered the exterior of the APV Mixers with a blanket insulation material.<sup>25</sup> Those Alcoa workers then applied mud over the blanket material, and covered both the mud and blanket insulation with a 1/16<sup>th</sup> inch metal jacket.<sup>26</sup> APV did not manufacture, sell, or install the blanket insulation, mud insulation, or 1/16<sup>th</sup> inch metal covering.<sup>27</sup>

During an overhaul, Yankee testified that he would remove the 1/16<sup>th</sup> inch metal cover, and take off the mud and blanket insulation.<sup>28</sup> When asked if he removed insulation from any other area on the APV Mixers, Yankee identified the area of the swing joints or end caps. Yankee explained that this was the same blanket and mud insulation that Alcoa applied to the outside of the mixer, but the insulation near the swing joints and end caps was not covered by the 1/16<sup>th</sup> inch metal cover. A threaded pipe connected to the mixer in this area, and Yankee had to dig

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<sup>24</sup> CP 532 (Kress p. 32:3-8).

<sup>25</sup> CP 52-53 (Yankee pp. 120:10 – 121:2); CP 532 (Kress p. 32:3-8).

<sup>26</sup> *Id.*

<sup>27</sup> CP 421 (Yankee pp. 120:12-121:2).

<sup>28</sup> CP 422 (Yankee p. 123:10-124:11).

out some of the insulation installed here to access the pipe.<sup>29</sup> Yankee confirmed that he did not remove insulation from any other part of the APV Mixers. As he later testified, the only two areas where he removed insulation were the “outside” of the mixer, and near the end caps:

Q. Where was the insulation that you disturbed on these mixers?

A. The insulation was on the outside of the mixer on the mixer body, and on the end caps of the mixer.<sup>30</sup>

Yankee’s testimony was confirmed by Moore and Eiesland, who also testified that the insulation was located on the “outside” of the mixer:

Moore: “They [the APV Mixers] were insulated on the outside, and the insulation was covered by a metal skin. The insulation would be removed by millwrights when maintenance needed to be done on the carbon mixers; some insulation residue would remain, however, on the outside of the carbon mixer when the insulation was removed.<sup>31</sup>

Eiesland: At the Alcoa/Vanalco facility, there were machines known as carbon mixers where located in the carbon plant. All of them were manufactured by Baker Perkins. They were insulated on the outside.<sup>32</sup>

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<sup>29</sup> CP 422 (Yankee p. 124:5-11); CP 426 (Yankee p. 199: 1-19).

<sup>30</sup> CP 425 (Yankee p. 194:16-19).

<sup>31</sup> CP 434 (Moore declaration p. 1:9-12).

<sup>32</sup> CP 432 (Eiesland declaration p. 1:10-12).

Yankee, Moore, and Eiesland did not discuss working with, removing, or disturbing insulation on any other part of the APV mixers other than the exterior insulation installed by Alcoa, and the insulation Alcoa applied to the swing joints and end caps.<sup>33</sup> APV did not manufacture or sell any of this insulation.

## 2. Gaskets and Packing

Plaintiff claims that Siemieniec removed and reinstalled gaskets and packing on the APV Mixers during the overhaul process.<sup>34</sup> According to Yankee, the gaskets were located on the “end caps” and on “various ports.”<sup>35</sup> Yankee testified that the packing was located on each end of the mixer paddles, in each of the four swing joints, and in two air cylinders.<sup>36</sup>

The APV Mixers contained gaskets and packing when APV shipped them to Alcoa.<sup>37</sup> But Siemieniec was not exposed to these original gaskets and packing.<sup>38</sup> Yankee testified that the APV mixers did not contain any of the original gaskets or packing when he worked on them.<sup>39</sup> Alcoa overhauled the APV Mixers every three to four years, and Siemieniec did not begin work at Alcoa 1966.<sup>40</sup> Because Alcoa installed APV Mixers in the early 1940’s, other Alcoa workers had replaced the

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<sup>33</sup> CP 432 (Eiesland declaration); CP 434 (Moore declaration).

<sup>34</sup> CP 63-64 (Yankee pp. 204:25-205:3).

<sup>35</sup> CP 427 (Yankee p. 201:18-23).

<sup>36</sup> CP 64 (Yankee p. 205:2-14).

<sup>37</sup> CP 56-57 (Yankee pp. 934 – 935).

<sup>38</sup> CP 56-57 (Yankee pp. 934:23 – 935:22).

<sup>39</sup> *Id.*

<sup>40</sup> CP 54 (Yankee p. 122:7 – 16); CP 420-421 (Yankee pp. 39:19 – 40:5).

gaskets and packing many times over by the time Siemieniec started work in 1966.<sup>41</sup>

Alcoa only used Garlock gaskets or packing.<sup>42</sup> According to Yankee, Garlock gaskets and packing came from the “stores” at the Alcoa mill, not from APV.<sup>43</sup> Garlock was the only brand of gasket that Alcoa used at the mill.<sup>44</sup>

### **B. The Trial Court’s Ruling**

APV argued in its Motion for Summary Judgment that Plaintiff could not sustain her burden required by *Simonetta* and *Braaten* to prove that Siemieniec was exposed to an asbestos-containing product APV manufactured or sold, *i.e.*, a product in APV’s chain of distribution.<sup>45</sup> In response, Plaintiff raised three legal arguments. First, Plaintiff argued that Siemieniec was exposed to Superex insulation contained with trough extension covers on the APV Mixers. Second, Plaintiff argued that APV was liable because it specified asbestos-containing components for its mixers.<sup>46</sup> Third, plaintiff argued that APV had voluntarily assumed a duty to warn Mr. Siemieniec of asbestos-related hazards because APV had conducted post-sale inspections of APV’s mixers.<sup>47</sup>

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<sup>41</sup> CP 56-57 (Yankee pp. 934:23 – 935:22).

<sup>42</sup> CP 546-549 (Yankee pp. 68 – 71); CP 56-59 (Yankee pp. 934 – 937).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> CP 20-35 (Defendant APV North America, Inc.’s Motion for Summary Judgment; *Braaten*, 165 Wn.2d 373 (2008); *Simonetta*, 165 Wn.2d 341 (2008).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

The Honorable Bruce Heller (“Trial Court”) rejected each of Plaintiff’s arguments, and granted APV’s motion.<sup>48</sup> This appeal followed.

## ARGUMENT

An appellate court reviews summary judgment rulings *de novo*, performing the same inquiry as the trial court.<sup>49</sup> Summary judgment should be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>50</sup> A fact is “material” when the outcome of the litigation depends on it.<sup>51</sup> The Court should construe the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party.<sup>52</sup>

### I

#### **Plaintiff’s First Theory of Liability, Alleged Exposure to Superex Insulation, Is Not Supported by Any Admissible Evidence.**

Plaintiff argues that Siemieniec worked with Superex insulation installed inside trough extension covers on the APV Mixers. Plaintiff points to APV drawing No. 83-703,<sup>53</sup> which describes the use of “Superex” insulation used inside trough extension covers on different mixers sold by APV.<sup>54</sup> Appendix 1 is a highlighted version of drawing No. 83-703 that shows the trough extension covers. Those extensions are

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<sup>48</sup> CP 579-580 (Order Granting Defendant APV North America, Inc.’s Motion for Summary Judgment ).

<sup>49</sup> *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

<sup>50</sup> CR 56(c); *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

<sup>51</sup> *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

<sup>52</sup> *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

<sup>53</sup> CP 570 (APV drawing No. 83-703, Bates No. BP000280)

<sup>54</sup> CP 109(Page 3 from Plaintiff’s Response to Motion for Summary Judgment).

welded closed.<sup>55</sup> APV placed Superex insulation, an asbestos-containing insulation manufactured by Johns Manville, between the steel plates before welding it closed.<sup>56</sup>

**A. The APV Mixers Did Not Have Trough Extension Covers.**

The APV Mixers sold to Alcoa in 1940 and 1941 did not have trough extension covers.<sup>57</sup> APV created drawing No. 83-703 on November 1, 1941, several months *after* APV sold the APV Mixers to Alcoa.<sup>58</sup> Drawing No. 83-703 is for carbon mixers sold to a different customer, not Alcoa.<sup>59</sup> The drawing for the carbon mixers APV sold to Alcoa—CP 564—does not show these trough extensions.<sup>60</sup> As APV's corporate representative John Kress testified:

Q. Well, was a piece like this [trough extension cover] supplied with the Alcoa mixer?

A. I cannot find documentation saying that there were any extensions or covers on the five machines that were supplied [the APV Mixers].<sup>61</sup>

The highlighted version of the drawing for the APV Mixers (CP 564, Appendix 2) shows where the trough extensions would have been if they

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<sup>55</sup> CP 534 (Kress pp. 101:1-6).

<sup>56</sup> *Id.*; CP 446-451 (Manville Corporation Asbestos Disease Compensation Fund's Answers to First Amended Standard Set of Liability Interrogatories).

<sup>57</sup> CP 537 (Kress p. 104:19-23).

<sup>58</sup> CP 534 (Kress p. 101:16 – 21).

<sup>59</sup> CP 532, 537 (Kress p 32:3-8, 104:19-23).

<sup>60</sup> CP 537 (Kress p. 104:19-23); CP 564 (drawing 1-703); CP 565 (drawing 47-703).

<sup>61</sup> CP 537 (Kress p. 104:19-23).

had been included. Appendix 3 shows what a carbon mixer with a trough extension would look like. Because the APV Mixers did not have trough extension covers; Siemieniec could not have been exposed to Superex insulation.

Plaintiff argues that because drawing No. 83-703 is for the same model mixer (22 DRM-2), and is only dated six months after the last sale of the APV Mixers to Alcoa, the Trial Court could infer that the APV Mixers had these trough extension covers. But the documents do not leave room for that inference. CP 564 (Appendix 2) is the drawing for the APV Mixers, and that drawing does not show trough extensions. The drawing that Plaintiff relies on (83-703, CP 570, Appendix 1), did not exist when the APV Mixers were sold.<sup>62</sup> This Court need not look beyond the drawing for the APV Mixers to resolve this question.

Plaintiff next argues that the record does not support APV's statement that the APV Mixers did not have trough extension covers. Plaintiff is wrong. Mr. Kress identified the drawing that does not show the trough extensions—CP 564, Appendix 2—as coming from the machine docket for the APV Mixers.<sup>63</sup> That machine docket contains the drawings for the APV Mixers.<sup>64</sup> Mr. Kress testified that he had reviewed this machine docket and could not locate any document that showed APV insulated its APV mixers before shipping them to Alcoa.<sup>65</sup> Plaintiff's

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<sup>62</sup> CP 535 (Kress p. 102:17-20).

<sup>63</sup> CP 528 (Kress pp. 19:18 – 20:8).

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

<sup>65</sup> CP 532 (Kress p. 32:3-16).

counsel specifically asked if Mr. Kress was including insulation “encased in metal,” meaning included inside trough extension covers. *Id.* Mr. Kress responded that APV did not insulate the APV Mixers with Superex insulation.<sup>66</sup>

**B. Siemieniec Never Worked on Trough Extension Covers or With Superex Insulation.**

Not only did the APV Mixers not have trough extension covers or Superex insulation, Plaintiff has not offered any evidence that Siemieniec ever worked on such parts. The only insulation that Yankee, Moore and Eiesland mentioned was blanket and mud insulation placed around the exterior of the APV Mixers.<sup>67</sup> Yankee specifically described where that insulation was located, and it was not inside trough extension covers: “The insulation was on the outside of the mixer on the mixer body, and on the end caps of the mixer.”<sup>68</sup> And Superex insulation does not even look like the insulation that Yankee described. Superex insulation comes in block or sheet form; it is not a blanket or mud material like Yankee described.<sup>69</sup>

The Trial Court agreed with APV that Plaintiff had not offered any evidence that Siemieniec worked with Superex insulation:

Now, at oral argument, Mr. Owens pointed out that as a welder, Mr. Siemieniec would have been the only guy who would have come into contact with Super X [sic]. But

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<sup>66</sup> *Id.*

<sup>67</sup> CP 425-426 (Yankee pp. 194 – 199).

<sup>68</sup> CP 425 (Yankee p. 194:18-19).

<sup>69</sup> CP 450 (Manville Corporation Asbestos Disease Compensation Fund’s Answers to First Amended Standard Set of Liability Interrogatories).

the Court concludes that the potential for contact does not equate with actual contact. In sum, there is no evidence that Mr. Siemieniec came into contact with any asbestos product manufactured or sold by APV.<sup>70</sup>

Without any evidence that Siemieniec ever worked with Superex insulation, Plaintiff's claim of exposure to this product must fail.

**C. Siemieniec Could Not Have Worked With the Original Superex Insulation.**

In addition to the foregoing, summary judgment was appropriate since the APV Mixers had been overhauled on numerous occasions before Siemieniec ever worked on them. Yankee did not know the maintenance history of any of the APV Mixers.<sup>71</sup> He was "positive," however, that he was not the first one to overhaul an APV Mixer.<sup>72</sup>

In fact, Alcoa overhauled the APV mixers every three to four years.<sup>73</sup> Because APV sold the APV Mixers to Alcoa in 1941, and Siemieniec started work at Alcoa in 1966, the APV Mixers had been in service for 25 years before Siemieniec ever started work on them. If Alcoa overhauled the APV Mixers every three to four years, the APV Mixers would have undergone six to eight overhauls before Siemieniec arrived at Alcoa. Plaintiff claims that these overhauls included working on the Superex insulation. If so, the Superex insulation would have been replaced six to eight times before Siemieniec started working at Alcoa.

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<sup>70</sup> RP p. 9:4-10.

<sup>71</sup> CP 430 (Yankee p. 934:19-22).

<sup>72</sup> CP 430 (Yankee p. 937:10-13).

<sup>73</sup> CP 54 (Yankee p.122:7-19).

Thus, Siemieniec could not have been exposed to the original Superex insulation that came with the APV Mixers in 1941. Under *Simonetta* and *Braaten*, APV is not liable for the replacement insulation that APV neither manufactured nor sold.

Plaintiff has not argued in this appeal that Siemieniec was exposed to the original gaskets or packing that came with the APV Mixers. Plaintiff correctly agreed that those original gaskets and packing would have been replaced many times before Siemieniec arrived at Alcoa. But the same rationale applies to the alleged exposure to insulation. For the same reasons, Plaintiff's claim regarding exposure to insulation fails.

## II

### **Plaintiff's Second Theory of Liability Fails Because APV Did Not Specify Asbestos-Containing Components.**

Plaintiff next argues that even though Siemieniec was not exposed to any of the original asbestos-containing products that came with the APV Mixers, APV remains liable because APV allegedly "specified" asbestos-containing materials with its mixers. Plaintiff's argument is both legally and factually flawed.

#### **A. Plaintiff's Argument Conflicts with Controlling Precedent from the Washington Supreme Court.**

Plaintiff's specification argument directly conflicts with the Washington Supreme Court's decisions in *Simonetta* and *Braaten*. *Simonetta* and *Braaten* held that an equipment manufacturer is not liable

for asbestos-containing products it did not manufacture or sell.<sup>74</sup> *Braaten* found that a product manufacturer is only responsible for its own products; it need not become an expert in another manufacturer's products.<sup>75</sup> *Braaten* specifically held that a product manufacturer is not liable for replacement gaskets, even if the original product contained gaskets, and even if the replacement gasket is "virtually the same as the original part."<sup>76</sup> Both *Braaten* and *Simonetta* held that, "it makes no difference" whether the manufacturer knew that asbestos-containing products would be used with the manufacturer's product.<sup>77</sup>

The facts presented in *Braaten* are very similar to those presented here. Vernon Braaten claimed that he developed mesothelioma from asbestos exposure.<sup>78</sup> Mr. Braaten had worked as a pipefitter for the Navy, and had worked on external insulation that was applied over equipment such as pumps and valves.<sup>79</sup> Mr. Braaten also claimed exposure from gaskets and packing that were installed inside the equipment.<sup>80</sup> Mr. Braaten was unable to present any evidence that any of the defendant product manufacturers ever manufactured the external insulation applied to the equipment.<sup>81</sup> Nor could Mr. Braaten present evidence that any of the gaskets or packing he worked with or around were the original gaskets

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<sup>74</sup> *Simonetta*, 165 Wn.2d at 363; *Braaten*, 165 Wn.2d at 398.

<sup>75</sup> *Braaten*, 165 Wn.2d at 385-86.

<sup>76</sup> *Id.* at 392.

<sup>77</sup> *Simonetta*, 165 Wn.2d at 363; *Braaten*, 165 Wn.2d at 385.

<sup>78</sup> *Braaten*, 165 Wn.2d at 381-82.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

or packing sold with the equipment.<sup>82</sup>

The Washington Supreme Court held that the defendant equipment manufacturers were not responsible for products they did not manufacture or sell.<sup>83</sup> Because these defendants did not manufacture or sell the insulation, gaskets, or packing that Mr. Braaten was exposed to, they could not be held liable under products liability or negligence theories.<sup>84</sup>

Mr. Siemieniec was not exposed to any asbestos-containing product that APV manufactured or sold. Under *Simonetta* and *Braaten*, the trial court correctly granted summary judgment.

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

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

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

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 398.

<sup>84</sup> *Id.*

In light of the facts here, we need not and do not reach the issue of whether a duty to warn might arise with respect to the danger of exposure to asbestos-containing products specified by the manufacturer to be applied to, in, or connected to their products, or required because of a peculiar, unusual, or unique design.<sup>85</sup>

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

The problem with Plaintiff's argument is that *Braaten* never held that a product manufacturer is liable for specifying certain products, or even that a manufacturer might be liable. The court merely noted, in *dicta*, that it did not reach the issue.<sup>86</sup> Plaintiff cannot rely on the absence of a holding as support for her argument. In rejecting Plaintiff's argument, the Trial Court correctly followed the express holdings of *Simonetta* and *Braaten*, which prevent Plaintiff from holding APV liable for other companies' products.

*Braaten* supports this interpretation. In *Braaten*, the plaintiff presented evidence that defendant Crane Company actually advertised asbestos-containing packing and gaskets for use with Crane's equipment.<sup>87</sup> Despite Crane's suggestion that its customers use asbestos-containing components with its equipment, *Braaten* did not hold that Crane should be

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<sup>85</sup> *Braaten*, 165 Wash.2d at 397.

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

<sup>87</sup> *Id.* at 389.

liable for any asbestos-containing gaskets or packing that a third-party may install on Crane's equipment.<sup>88</sup>

APV is no different than defendant Crane, or any of the other defendants that *Simonetta* and *Braaten* found not liable. The *Braaten* Court did not create a "specification" exception to hold Crane liable, and this Court should not create an exception to hold APV liable.

Moreover, reversing the Trial Court's ruling on this point would render the Trial Court's ruling internally inconsistent. In one part of the Trial Court's order, the Trial Court correctly concluded that APV could not be liable under a design defect theory for products APV did not manufacture or sell.<sup>89</sup> Plaintiff has not appealed that portion of the Trial Court's order. But Plaintiff is asking this Court to reach the opposite conclusion by creating this exception for "specifying" asbestos-containing products. There is no material difference between designing a product to use asbestos containing components, and "specifying" that a product use asbestos-containing components. If APV cannot be liable for designing a product with asbestos-containing insulation, gaskets, or packing sold by other companies, then it also cannot be liable for allegedly specifying that its products incorporate asbestos-containing parts sold by other companies. In either case, the responsibility for asbestos exposure alleged lies with the manufacturer supplying the asbestos-containing replacement insulation, gasket, or packing, not with APV.

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<sup>88</sup> *Id.*

<sup>89</sup> RP 11:19-12:2.

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

*Braaten* did not create a “specification” exception. But there is a second reason why plaintiff’s theory does not apply. The record shows that APV did not specify any asbestos-containing products with its mixers. APV will discuss the three different alleged specifications below.

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

Plaintiff relies upon APV drawing No. 83-703,<sup>90</sup> which describes the use of “Superex” insulation used inside trough extension covers.<sup>91</sup> APV has highlighted the reference to Superex insulation in Appendix 1. Superex was an asbestos-containing insulation manufactured by Johns Manville.<sup>92</sup> Plaintiff argues that APV’s use of Superex insulation inside these trough extension covers constitutes a specification, or requirement, that Alcoa use asbestos-containing insulation around the outside of the APV Mixers.

As discussed above, the APV Mixers sold to Alcoa in 1940 and 1941 did not have these trough extension covers, and thus, did not contain any Superex insulation.<sup>93</sup> And Plaintiff has not offered any evidence that Siemieniec ever worked with trough extension covers. The only insulation that Mr. Siemieniec removed from the APV Mixers was blanket

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<sup>90</sup> CP 570 (APV drawing No. 83-703, Bates No. BP000280)

<sup>91</sup> CP 1091 (Page 3 from Plaintiff’s Response to Motion for Summary Judgment).

<sup>92</sup> CP 446-451 (Manville Corporation Asbestos Disease Compensation Fund’s Answers to First Amended Standard Set of Liability Interrogatories).

<sup>93</sup> CP 537 (Kress p. 104:19-23).

and mud insulation placed around the exterior of the APV Mixers.<sup>94</sup>

Regardless, APV drawing no. 83-703 does not tell Alcoa to insulate the exterior of the APV Mixers, much less insulate them with asbestos. It only states that APV has insulated the inside of the trough extension covers with Superex. Without a single statement from APV to Alcoa about whether to insulate the APV Mixers, or what to insulate them with, Plaintiff's claim that APV somehow specified asbestos insulation with its mixers must fail.

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

The APV Mixers contained gaskets when APV shipped them to Alcoa.<sup>95</sup> One of the brands of gaskets that the APV Mixers used was Durabla.<sup>96</sup> Durabla manufactured an asbestos-containing gasket.<sup>97</sup> Plaintiff argues that because APV used Durabla gaskets with its mixers, APV was therefore specifying that Alcoa use asbestos-containing replacement gaskets.

Plaintiff offered two APV documents to support her conclusion that APV specified asbestos gaskets for its mixers. The first, titled Repair Order Dispatch List (CP 568, Appendix 4), is a March 25, 1943 inventory packing sheet showing materials sent to the Alcoa mill.<sup>98</sup> That document lists two Durabla gaskets.<sup>99</sup> The packing sheet never mentions that Alcoa

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<sup>94</sup> CP 425-426 (Yankee pp. 194 – 199).

<sup>95</sup> CP 56-57 (Yankee pp. 934 – 935).

<sup>96</sup> CP 568 (Repair Order Dispatch List, Bates No. BP000228).

<sup>97</sup> CP 455-474 (1997 Durabla Gasket Materials Catalog)

<sup>98</sup> CP 568 (Repair Order Dispatch List, Bates No. BP 000228).

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

must use Durabla—or any other type of gasket—in the future.<sup>100</sup> Nor does it mention the word “asbestos.”<sup>101</sup>

The second document, a parts list (CP 569, Appendix 5), is an October 28, 1955 inventory list that references gaskets supplied by U.S. Rubber Co.<sup>102</sup> The document does not mention asbestos, and does not specify what type of gaskets Alcoa should use.<sup>103</sup>

These documents are inventory sheets that simply tell Alcoa what parts APV is providing.<sup>104</sup> They do not tell Alcoa what kind of gaskets or packing Alcoa to use, and do not use the word, “asbestos.”<sup>105</sup> Indeed, Alcoa used only Garlock gaskets, which Alcoa selected, purchased, and stored in its “stores” department.<sup>106</sup> APV’s documents do not constitute a “specification” such that APV should assume the liability for any Garlock replacement gasket Alcoa decided to use.

### 3. Third Alleged Specification: Packing

The APV Mixers contained Palmetto packing when APV shipped them to Alcoa.<sup>107</sup> At the time, Palmetto manufactured an asbestos-containing packing. But, Mr. Siemieniec never worked with the original Palmetto packing.<sup>108</sup> Instead, Mr. Siemieniec only worked with the

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> CP 569 (parts list, Bates No. BP 000243).

<sup>103</sup> *Id.*

<sup>104</sup> CP 385, 564, 565, 567, 568

<sup>105</sup> *Id.*

<sup>106</sup> CP 546-549 (Yankee pp. 68 – 71); CP 56-59 (Yankee pp. 934 – 937).

<sup>107</sup> CP 567 (Operating Instructions, Bates No. BP 000112).

<sup>108</sup> CP 57-59 (Yankee pp. 935 – 937).

Garlock packing that Alcoa purchased from someone other than APV.<sup>109</sup> Alcoa did not use any other brand of packing.<sup>110</sup>

Plaintiff claims that APV should be legally responsible for this Garlock packing because it specified asbestos-containing packing for its mixers. The first document Plaintiff relied on as evidence of this specification is entitled “Operating Instructions” (CP 567, Appendix 6).<sup>111</sup> Item 16 in that document states, “Use Packing Palmetto 1x1.”<sup>112</sup> This document does not specify what type of replacement packing Alcoa should use; it simply states that Alcoa should install the Palmetto packing provided with the mixer when initially installing the mixer.<sup>113</sup>

The second document Plaintiff relies on, Maintenance of Glands with Soft Packing (CP 571, Appendix 7), provides instructions for replacement packing.<sup>114</sup> But this instruction sheet does not specify the use of Palmetto packing, or any other brand, and does not mention the word “asbestos.”<sup>115</sup> Instead, it merely states that Alcoa should use a “square braided packing,” which can be purchased “from large hardware stores, millwright supply houses, or direct from Baker Perkins.”<sup>116</sup> Alcoa was free to choose any replacement packing and did so with Garlock packing.

APV is even further removed than defendant Crane in *Braaten*,

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> CP 567 (Operating Instructions, Bates No. BP 000112).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> CP 571 (Maintenance of Glands with Soft Packing, Bates No. BP 000291).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

who supplied asbestos-containing gaskets with its equipment, and actually advertised, if not recommended or specified, asbestos-containing replacement gaskets.<sup>117</sup> If the *Braaten* court did not find that Crane's advertisement of asbestos-containing replacement gaskets constitute specification, the trial court should not have concluded that the APV documents were specifications.

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

Plaintiff's "specification" argument fails for a third reason. Alcoa did not follow what plaintiff claims are APV's specifications. APV's documents mention Superex insulation, Durabla and U.S. Rubber gaskets, and Palmetto packing.<sup>118</sup> Mr. Siemieniec used a different blanket and mud insulation, and Garlock gaskets and packing.<sup>119</sup> APV cannot be liable for products that it never specified.

Plaintiff has argued that it does not matter that Alcoa used a different brand of insulation, gasket, or packing; what is important is that Alcoa used insulation, gaskets, and packing that contained asbestos. Stated another way, APV should be liable because it specified asbestos, generally. But APV never specified asbestos. None of the APV documents Plaintiff relies on to support her argument state that asbestos is a necessary ingredient for insulation, gaskets, or packing. APV's documents do not even mention the word "asbestos." APV cannot be

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<sup>117</sup> *Braaten*, 165 Wash.2d at 394-97.

<sup>118</sup> CP 568 (Repair Order Dispatch List, Bates No. BP000228); CP 567 (Operating Instructions, Bates No. BP 000112)

<sup>119</sup> CP 57-59 (Yankee pp. 935 – 937).

liable for specifying as a replacement an ingredient (asbestos) that it never mentioned.

### III

#### **Plaintiff's Third Argument: The Gratuitous Duty Doctrine**

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

Plaintiff asserts that APV “conducted periodic inspections” of the APV Mixers and had a fifty-year relationship with Alcoa.<sup>120</sup> But according to the machine docket maintained by APV, APV made only one field service trip to the Vancouver mill to look at ball bearings.<sup>121</sup> Most of the nearly 250 documents Plaintiff refers to involve inspections that took place before the APV Mixers were shipped to Alcoa, or inspections that occurred at the APV facility, not at Alcoa in Vancouver.<sup>122</sup>

*Simonetta* and *Braaten* held that a product manufacturer is not liable, in products liability or negligence, for products the manufacturer did not make or sell.<sup>123</sup> Both cases limited the duty to warn to those within the product's chain of distribution.<sup>124</sup> Plaintiff suggests that this

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<sup>120</sup> Plf. Brief, pg. 11.

<sup>121</sup> CP 528-529 (Kress pp. 19:18-20:8); CP 574-575 (Kress pp. 138-139); CP 566.

<sup>122</sup> CP 533 (Kress p. 52).

<sup>123</sup> *Braaten*, 165 Wn.2d at 398; *Simonetta*, 165 Wn.2d at 363.

<sup>124</sup> *Simonetta*, 165 Wn.2d at 354

rule should be disregarded if APV voluntarily assumed a duty in negligence. But neither *Simonetta* nor *Braaten* even hinted that this exception exists, and the cases from the 1800s and early 1900s that Plaintiff cites do not apply.

Plaintiff's primary argument rests on *Sheridan v. Aetna Casualty & Surety Co.*,<sup>125</sup> a 1940 decision which pre-dates the *Braaten* and *Simonetta* decisions by over sixty years. In *Sheridan*, the defendant insurer voluntarily agreed to conduct safety inspections of an elevator. The insurer failed to identify a defective condition of the elevator, which injured the plaintiff. The court concluded that the insurer's voluntary safety inspection for the elevator created a duty to conduct that inspection with reasonable care.<sup>126</sup> Plaintiff has the burden of establishing that the defendant's conduct created a duty.<sup>127</sup>

Plaintiff thinks that *Sheridan* applies here for two reasons. First, Plaintiff points to APV's sale of replacement parts. But at least two of the defendants in *Braaten* sold replacement parts, and *Braaten* explicitly found that no duty existed.<sup>128</sup> There is no merit to the suggestion that selling replacement parts triggers liability for products APV did not manufacture or sell.

Plaintiff next argues that APV's post-sale inspections created a duty to warn. But APV only conducted one ball bearing inspection at

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<sup>125</sup> *Sheridan v. Aetna Casualty & Surety Co.*, 3 Wn.2d 423, 100 P.2d 1024 (1940).

<sup>126</sup> *Id.*

<sup>127</sup> *Lake Washington Sch. Dist. No. 414 v. Schuck's Auto Supply, Inc.*, 26 Wn. App. 618, 621, 613 P.2d 561 (1980).

<sup>128</sup> *Braaten* 165 Wn. 2d at 395.

Alcoa, and that one, limited inspection is far different than the comprehensive safety inspection conducted by the insurer in *Sheridan*. By inspecting ball bearings, APV did not voluntarily assume a duty to warn Alcoa or Siemieniec about asbestos. Plaintiff's claim is not about ball bearings; it is about whether APV should have warned Alcoa about asbestos. *Sheridan* does not apply here.

The other cases cited by Plaintiff involve facts very different from those presented here. *Lough v. John Davis & Co.*,<sup>129</sup> a 1902 Washington case, involved the liability of a property manager for failing to repair a deck railing that broke, causing the plaintiff to fall. In *Ward v. Pullman Car Corp.*,<sup>130</sup> decided in Kentucky in 1908, a railroad brakeman was injured by a defective brake staff after the defendant railroad inspectors had inspected the railroad car and approved it as safe. And in *Van Winkle v. American Steam-Boiler Ins. Co.*,<sup>131</sup> an 1890 New Jersey case, the plaintiff was injured when a boiler burst. The defendant had insured the boiler, and made "repeated" inspections for the express purpose of avoiding the type of accident that injured the plaintiff.

Unlike the defendants in *Sheridan*, *Lough*, *Ward*, and *Van Winkle*, APV did not do a safety inspection, did not conduct any inspection related to asbestos, and did not have control over the carbon mixers at Alcoa.

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<sup>129</sup> *Lough v. John Davis & Co.*, 59 L.R.A. 802, 30 Wash. 204, 70 P. 491 (1902)

<sup>130</sup> *Ward v. Pullman Car Corp.*, 131 Ky. 142, 114 S.W. 754 (1908)

<sup>131</sup> *Van Winkle v. American Steam-Boiler Ins. Co.*, 52 N.J.L. 240, 19 A. 472 (1890)

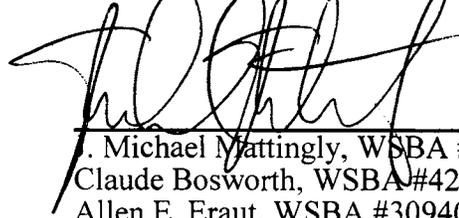
APV's single ball bearing inspection cannot support holding APV liable for asbestos-containing products it neither manufactured nor sold.

### CONCLUSION

Under *Simonetta* and *Braaten*, APV's liability to Plaintiff is limited to those asbestos-containing products that are within APV's chain of commerce. None of the asbestos products that Mr. Siemieniec was exposed to were within APV's chain of commerce. Thus, APV is not liable to Plaintiff. In an effort to salvage her claim, Plaintiff has claimed exposure to Superex insulation that APV never installed on the APV Mixers, re-cast APV's packing sheets and inventory lists as "specifications," and tried to impose a gratuitous duty without the necessary facts to support it. The Trial Court properly rejected each of the Plaintiff's arguments, and this Court affirm the Trial Court's grant of summary judgment in favor of APV.

Respectfully submitted this 30<sup>th</sup> day of August, 2010.

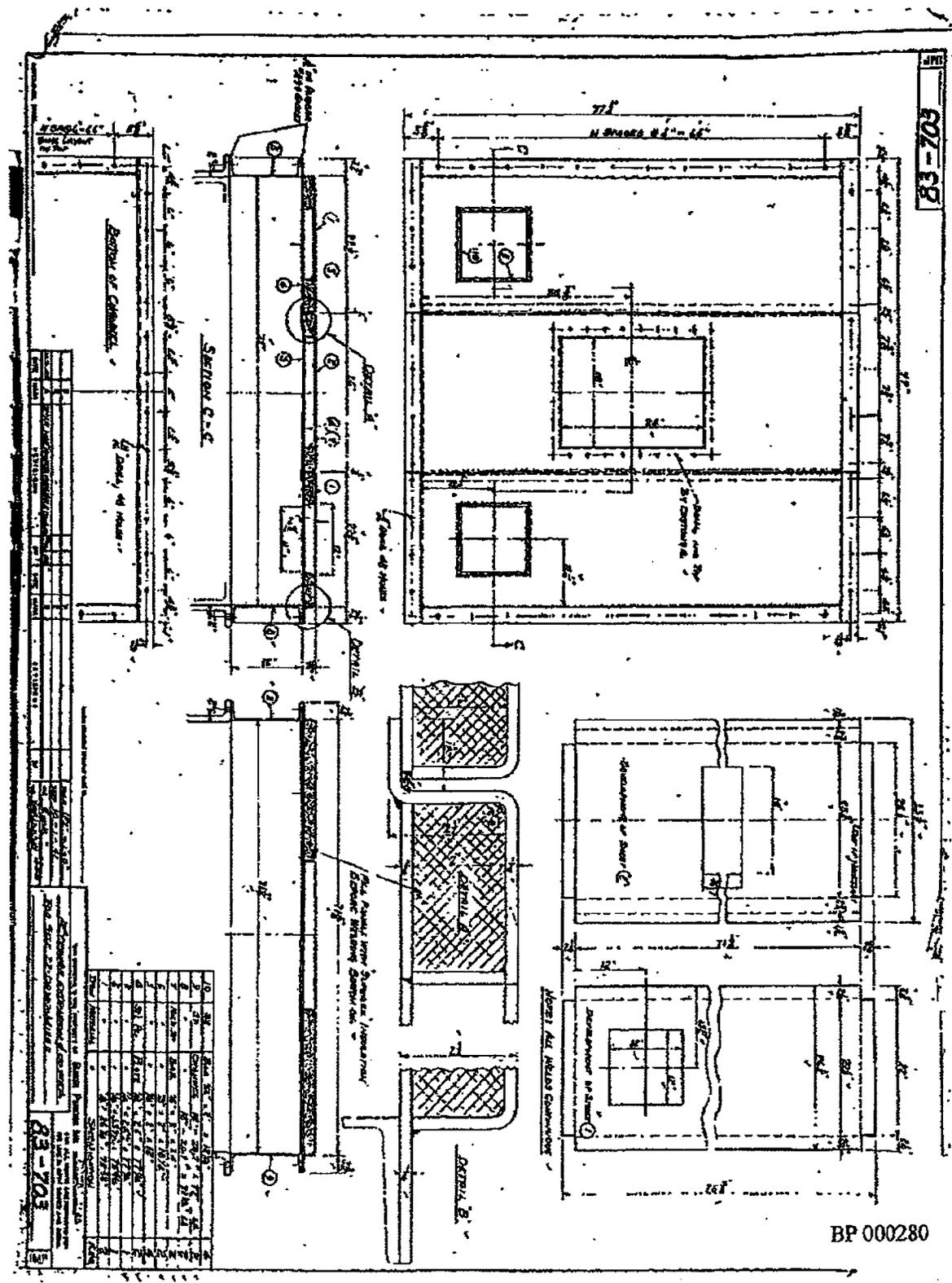
RIZZO MATTINGLY BOSWORTH PC



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J. Michael Mattingly, WSBA #33452  
Claude Bosworth, WSBA #42568  
Allen E. Eraut, WSBA #30940  
Attorneys for Defendant-Appellant  
APV, LLC

**APPENDIX I**



83-703

NO.	DESCRIPTION	QTY.	UNIT	PRICE	TOTAL
1	...	...	...	...	...
2	...	...	...	...	...
3	...	...	...	...	...
4	...	...	...	...	...
5	...	...	...	...	...
6	...	...	...	...	...
7	...	...	...	...	...
8	...	...	...	...	...
9	...	...	...	...	...
10	...	...	...	...	...

83-703

BP 000280

EXHIBIT 0  
PAGE OF

## **APPENDIX II**



**APPENDIX III**

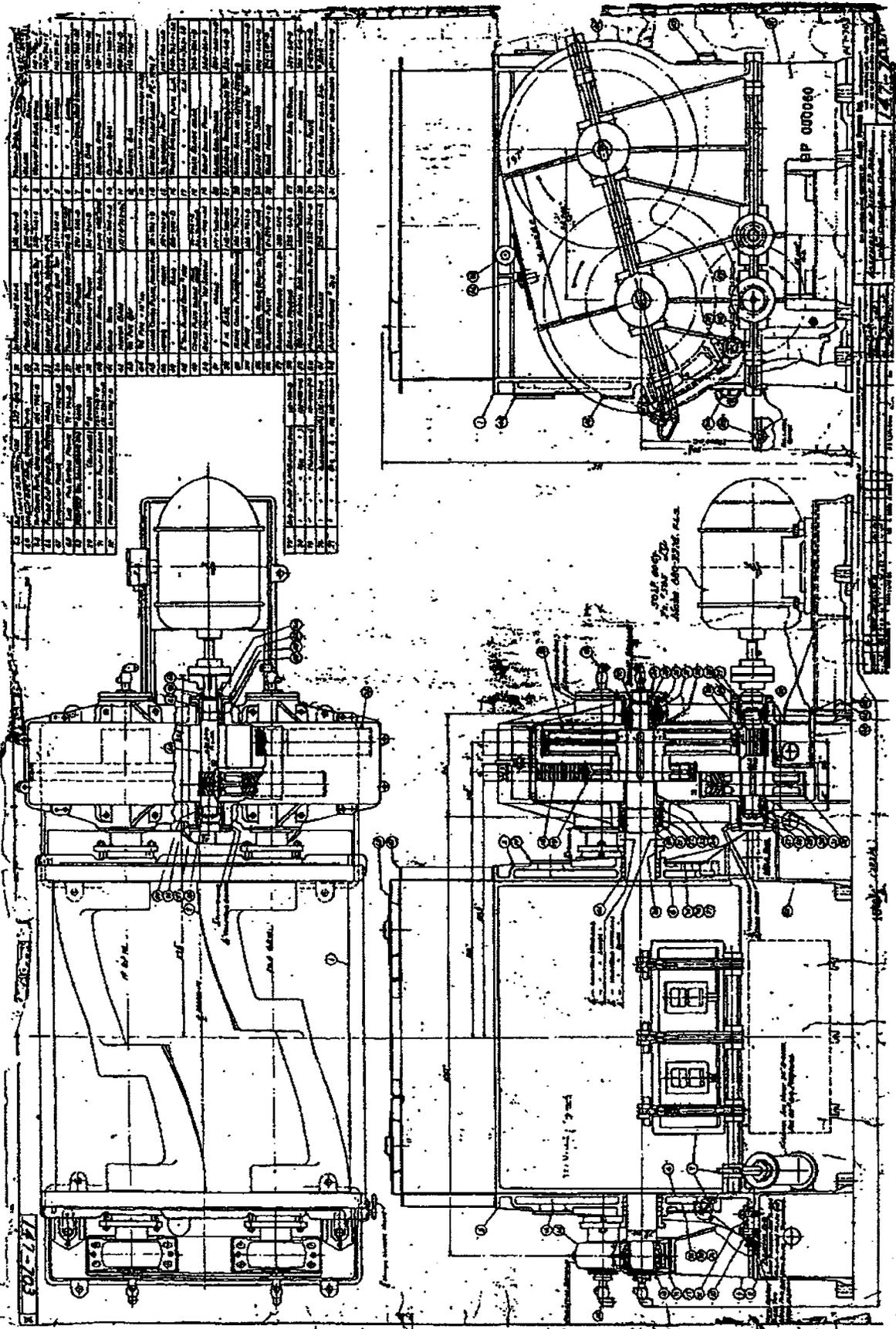


EXHIBIT 0  
PAGE OF

**APPENDIX IV**

BAKER PERKINS INC.  
SAGINAW, MICHIGAN

SHEET NO. 1

(Repair Order)

DISPATCH LIST

R. O. NO.

19111

TO:

Aluminum Company of America  
P.O. #211249  
STREET  
CITY Yacouver, STATE Washington  
VIA Freight PREPAID, G.O. Q.D.

SHIPMENT PROMISED CUSTOMER

DATE SHIPPED

CAR NO.

WEIGHT

ROUTING

QUAN.	MAT.	PART NO.	DRG. NO.	SIZE	SPECIFICATIONS	A. P. NO.	S. O. NO.
1-	GI #1 35000 TENSILE	56-703		DE	Saddle Section. Note: Cast Iron of the following analysis: Carbon 2.00 - 2.20%, Phos. 15% Max. Silicon 1.90 - 2.20% Nickel .90 - 1.25%, Mang. .50 - .90%, MnSlyb. .40 - .60%, Sulphur .10% MAX.		
120-	St.				Studs, 3/4"-10 x 2 1/2" lg.		
120-	"				Hex. Nuts 3/4"-10 S.F.		
1-	St. Fl.	60-703		D	Cover Plate for (Saddle), 5/8" x 8" x 62 3/4" lg.		
1-	"	60-703-1		D	Cover Plate for (Saddle), 5/8" x 8" x 62 3/4" lg.		
2-	Durable				Gaskets, 1/16" x 8" x 62 3/4" lg. Assemble above parts.		
					Note: Do not drill bolt holes or holes for studs for assembling to front and rear trough shell sections. These are to be marked off and drilled in the field.		
NOTE INVOICING DEPT. This Saddle section is being furnished as a standby pending outcome of repairs made locally on original saddle section. It has been agreed between the customer and ourselves that final decision will not be made until one year from date. Therefore invoice should be withheld until March 15th, 1944					Test for circulating steam at 125# steam pressure but first test with 150# Hydrostatic. To be code inspected by the Hartford Steam Boiler inspection and insurance Company Inspector and to be stamped as per B.P. Drg. #83-506-D. Made of Cast Iron of A.S.T.M. specification A-48-36, Class-35, and 3 copies of foundry reports		
					For Size 22 DPM2 Mixers #40760-61.		
					(#-31530) shipped 1-18-43.		
Rating AA-1, CMP Allotment WRO-Sched. 1 USA 8.10 62 - USN 8.10 23 - LL 8.10 15					BP 000228		
Customer's P.O. #211249 of 3-18-43.							

WORKS	WORKS	ORDER & INVOICING	STORES	ASSEMBLY	CONTRACT NO.
ENGINEERING	PRIME COST	SERVICE			EXHIBIT D 19111

**APPENDIX V**

11-20-50  
 SHEETS 2  
 SERIAL NUMBER

10-23-53  
 DATE

BAKER PERKINS INC.  
 SAGINAW, MICH.

QTY.	MATERIAL	PART NO.-DESC. NO.	MAX. WGT.	SPECIFICATION - PART NAME - SIZE OF STOCK	AP NUMBER	RECEIPT	STOCK	MR.	DATE
2		Liners for Jacketed Trough Shell		✓	146-703				
2		Everson Abrasion Resisting Liners for Trough Ends & Access. (Note: Holes for Screws & Bolts are not to be drilled. Drill only (2) Holes 7/16" Dia.). Holes to be drilled & located from ends by customer.			153-703				
2	C.I.#1A	62-703-1	I	Valve Door (Note: Do not drill holes for Unbrako Cap Screws 5/8" - 11 x 1-1/2" Long) Studs 5/8" - 11 x 2" Long				X	10-23-53
2	St.							X	
2	St.			Max. Nuts 5/8" - 11 E.P.				X	
2	St.P.I.	79-703	D	Door Jacket Plate (As shown), Plate 1/2" x 7" x 11-1/2" Long				X	
2	St.P.I.	79-703-1	D	Door Jacket Plate (Without Pipe Tap), Plate 1/2" x 7" x 11-1/2" Long				X	
2	St.P.I.			Gaskets 1/16" x 7" x 11-1/2" Long				X	
2	#899							X	

ORDERED BY: AMERICAN RUBBER CO. OF AMERICA RUBBER CO. (2) Size 22-7742 PL-11113  
 EQUIPMENT  
 10001, INC.

EXHIBIT 0  
 PAGE OF  
 BP 000243

**APPENDIX VI**

OPERATING INSTRUCTIONS

1. Contract No. M-30670 Works Order No. 3814
2. Customer ALUMINUM CO OF AMERICA.
3. Machine Size 22-DRM (22 IV BB)
4. Foundation Plan Dwg.No. 2-703 IMP. ✓
5. Machine No. 41141 - 41142 - 41143
6. Instructions - Machine 3068 ✓
7. Instructions - Cover NONE Cylinder for Cover Oper. NONE
8. Instructions - Tilt NONE Operating Pressure NONE
9. Instructions - Valve Door 3072 ✓ Air Operating Pressure \_\_\_\_\_
10. Trough Shell & Ends Jacketed for Steam-Water-Brine \_\_\_\_\_  
at 125 lbs.
11. Blades Equipped for Steam-Water-Brine at 125 lbs.
12. Flexible Joints \_\_\_\_\_ Swivel Head \_\_\_\_\_
13. Cleaning of Jacket #131. ✓
14. Mixing Chamber Tested for NONE
15. Blade Axle Glands-Soft Packing Metals ~~in \_\_\_\_\_ ~~\_\_\_\_\_~~~~
16. Use Packing PALMETTO 1" x 1" 16.7.3
17. Drive Shaft Gland - Soft Packing - Use Packing NONE
18. Soft Packing Gland Inst. #3010 ✓
19. Lubrication 3011 ✓
20. Drive Chain Galola ✓ belt \_\_\_\_\_ Pulley \_\_\_\_\_ ~~BY CUSTOMER~~
21. Electric Motor FURNISHED BY CUSTOMER ✓
22. Other Instructions: Falk # 10,140 - 1402 - 3401 -
23. 4150
24. \_\_\_\_\_

BAKER PERKINS INC,  
SAGINAW, MICHIGAN BP 000112

EXHIBIT 0  
PAGE     OF    

*Comm*

**APPENDIX VII**

BAKER PERKINS INC.  
Saginaw, Michigan

# MASTER COPY

## MAINTENANCE OF GLANDS WITH SOFT PACKING

MAKE A COPY OF #3010 AS SHOWN

The machine is equipped with one of the following types of gland:



- Standard Adjustable Soft Packing
- Soft Packing with Lantern Ring
- Soft Packing combined with Metal to Metal
- Soft Packing with \_\_\_\_\_ first ring

Square braided packing, as called for on the parts list, if used at the factory and is obtainable from large hardware stores, millwright supply houses, or direct from Baker Perkins Inc. An inferior grade of packing should not be used for re-packing glands.

When it becomes necessary to repack glands, remove all of the old packing. Clean blade axle, or shaft, before re-packing. Make sure that it is smooth. Consult the assembly drawing for proper location of gland parts when reassembling the gland. Cut the new packing on a 45° angle, and of such lengths that they fit closely when wrapped tightly around the axle or shaft. Enter the rings in the stuffing box so that the joints are staggered around the shaft; that is, so that no two joints are in the same line along the shaft. When placing the rings into the stuffing box, always determine that each ring is properly seated before inserting the next ring.

Use a wood stick, or the gland, to force the packing home. Do not use any tools that will mar shaft and cause premature destruction of the packing.

A new, or repacked gland must be tightened frequently, in some cases daily, a little at a time, until the packing is set. Do not tighten the gland enough to cause heating or seize on the shaft.

When a lantern ring, or other means of applying a lubricant (other than that impregnated in the packing) is used, a lubricant that is not detrimental to the material being processed must be used. (USE BOW CORNING SILICONE GREASE #DC-44)

12-52

Inst. Sheet  
No. X-3010

EXHIBIT 0 BP 000291  
PAGE \_\_\_\_\_ OF \_\_\_\_\_



cc: R. Krueger            T. McNier  
G. Dittmar            W. Diggs  
J. Felch               R. McDaniel  
G. Sohn                R. Surdock  
R. Ray - Houston

FIELD SERVICE REPORT C-380

CUSTOMER: Van Alco, Inc.  
5701 NW Lower River Rd.  
Vancouver, Washington

EQUIPMENT: Size 22 DRM Mixer

MACHINE NO: 41141

CONTRACT NO: M-30670

SERVICEMAN: R. Surdock

DESCRIPTION:

8/7 Travel

8/8 Arrived at plant and met with Bob Suter who called Don Nelson who is in charge of machines. They are concerned about only one machine at this time in which they have totally disassembled and want me to discuss their problem of bearing failures. Discussed problem and main causes are the bearings were not assembled properly, lack of grease, and the bearings were not locked up tight.

8/9 Travel (got bumped from flight and now waiting at airport for next flight.)

8/10 Still traveling.

EXHIBIT 0  
PAGE      OF     

BP 000076

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

4 I HEREBY CERTIFY that a true and correct copy of the foregoing **Respondent's**  
5 **Responsive Brief** was served upon the following parties in the manner indicated:

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

9 VIA E-MAIL AND OVERNIGHT  
10 DELIVERY:

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

17 Robert A. Green  
18 Simon Eddins & Greenstone, LLP  
19 301 E. Ocean Boulevard, Suite 1950  
20 Long Beach, CA 90802  
21 **Attorneys for Plaintiffs**  
22 rgreen@seglaw.com

23 I declare under penalty of perjury and under the laws of the State of Washington (RCW  
24 9A.72.085) that the foregoing is true and correct.

25 Executed at Portland, Oregon, this 30<sup>th</sup> day of August, 2010

26 Heather Perkins  
Heather Perkins, Paralegal

FILED  
COURT OF APPEALS  
STATE OF OREGON  
2010 AUG 30 PM 3:34