Supreme Court No. 92972-6
Court of Appeals No. 72416-9-I

SUPREME COURT
OF THE STATE OF WASHINGTON

ESTATE OF VIRGIL VICTOR BECKER, JR., by its Personal Representative, Jennifer L. White,

Petitioner,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

As the party seeking discretionary review, Petitioner/Plaintiff Nancy A. Becker, as personal representative of the Estate of Virgil Victor Becker, Jr. ("Becker") bears the burden of showing that the Court of Appeals' unanimous decision—interpreting federal law and concluding that the Federal Aviation Act and its self-implementing regulations pervasively regulate the discrete "area" of an airplane engine's fuel system and its component parts—conflicts with a decision of the Supreme Court or with another decision of the Court of Appeals; involves a significant question of law under the state or federal Constitution; or involves an issue of substantial public interest. Rule of Appellate Procedure ("RAP") 13.4(b)(1)-(4).

Becker does not carry this burden. Not once does Becker cite or explain how her petition merits consideration under RAP 13.4(b). Instead, Becker rehashes the same points that were raised before and repeatedly rejected by the trial court and Division One. Becker first *broadly* argues that the Court erred in affirming that the FAA and its concomitant regulations impliedly preempt the field of aviation safety. She contends that an airplane's engine fuel system and its component parts are not pervasively regulated by the federal government. But this argument does not fall under the rubric of RAP 13.4(b). It also patently ignores Division One's rigorous

analysis of the specific facts, Ninth Circuit cases, federal statutes, and specific federal regulations that expressly focus on performance and safety standards for engine fuel systems, including the carburetor and its component parts. *See Becker v. Forward Tech. Indus.*, 192 Wn. App. 65, 365 P.3d 1273 (2015).

Second, with a dearth of legal authority, Becker alternatively argues that if the field of aircraft safety is impliedly preempted by federal law, then FAA's general "airworthiness" regulation establishes the standard of care. But as the Court of Appeals explained, Becker "cites no authority that the general concept of airworthiness or any specific federal standard of care applies to Becker's state law manufacturing defect claims against FTI." *Id.* at 81 (citing RAP 10.3(a)(6) (requiring citations to legal authority)).

In her ancillary arguments, which have no footing in RAP 13.4(b), Becker contends that the trial court and Court of Appeals erred when they concluded that: (1) FTI did not waive its federal preemption defense, and Becker was neither surprised nor prejudiced because she did not object, and instead extensively briefed the defense; and (2) Becker's untimely motion for leave to file a third amended complaint to alleged specific federal violations against FTI was properly denied because the request was made *after FTI was dismissed.*

The Court of Appeals correctly and fairly decided the narrow issues in this appeal, and justice was served. Becker's petition for discretionary review should be denied because it does not satisfy any of the criteria of RAP 13.4(b).

II. IDENTITY OF ANSWERING PARTY

Respondent Forward Technology Industries, Inc. ("FTI") files this answer to Petitioner Becker's petition for discretionary review. The trial court dismissed FTI on summary judgment; the Court of Appeals unanimously affirmed the dismissal.[1]

III. COURT OF APPEALS DECISION

The Court of Appeals, in its December 28, 2015 published decision, unanimously affirmed the trial court's order dismissing with prejudice Becker's state causes of action for strict liability, negligence, and breach of warranty. *See Becker v. Forward Tech. Indus.*, 192 Wn. App. 65, 365 P.3d 1273 (2015). The appellate court denied reconsideration on February 18, 2016.

[1]The six remaining defendants—some of whom settled with Becker—were voluntarily dismissed. Defendant Avco, who manufactured the subject airplane engine and its fuel system, settled during trial.

IV. COUNTERSTATEMENT OF ISSUES

1. Whether discretionary review should be denied because the *Becker* decision neither conflicts with a Supreme Court decision nor another Court of Appeals decision. (RAP 13.4(b)(1)-(2))

2. Whether discretionary review should be denied because the *Becker* decision does not raise a significant question of law under the state or federal Constitution, nor does it involve an issue of substantial public interest. (RAP 13.4(b)(3)-(4)).

V. COUNTER-STATEMENT OF THE CASE

Respondent FTI rests on the counter-statement of the case presented in its Court of Appeals' response brief, as well as the facts recited in the Court of Appeals' published opinion, *Becker v. Forward Tech. Indus.*, 192 Wn. App. 65, 70-73, 365 P.3d 1273 (2015).

VI. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. THE *BECKER* DECISION DOES NOT CONFLICT WITH SUPREME COURT DECISIONS OR COURT OF APPEALS DECISIONS.

Becker has not directed this Court to any purported conflict between the *Becker* decision and any other state Supreme Court or Court of Appeals decision. Her petition does not merit consideration of discretionary review under the test in RAP 13.4(b)(1)-(2).

B. THE *BECKER* DECISION DOES NOT RAISE A SIGNIFICANT QUESTION OF LAW UNDER THE STATE OR FEDERAL CONSTITUTION OR INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

1. The Federal Aviation Act, codes, and regulations impliedly preempt the field of an aircraft engine fuel system.

Under *de novo* review and applying the facts and reasonable inferences therefrom in a light most favorable to Becker, the Court of Appeals correctly applied the doctrine of implied field preemption arising from the Federal Aviation Act (and its fact-specific and concomitant regulations) to this case.

The Court of Appeals, relying on Washington and United States law, observed that "Congress adopted the FAA [Federal Aviation Act] to create a 'uniform and exclusive system of federal regulation' in the area of aviation safety and commerce." *Becker*, 192 Wn. App. at 74 (quoting *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1993)). Accordingly, Congress "gave the Federal Aviation Administration the authority to establish minimum standards 'for the design, material, construction, quality of work, and performance of *aircraft engines*, and propellers.'" *Becker*, 192 Wn. App. at 74 (quoting 49 U.S.C. § 44701(a)(1)).

The *Becker* Court acknowledged that Congress does not intend to supplant or supersede state law. *Id.* The Court conservatively reasoned that the "comprehensiveness of federal law in a field and 'pervasiveness of the regulations' are 'indications of preemptive intent.'" *Id.* at 75 (quoting *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007)). To that end—and to advance the goal of uniform standards in the field of aviation safety—the Court first considered whether the FAA regulations "evidence a desire to occupy a field completely" *i.e.*, to the exclusion of state law. *Id.* (quoting *Montalvo*, 508 F.3d at 470-71).

With respect to the carburetors floats welded by a noncertified contractor such as FTI, the Court's analysis turned on whether the federal regulations were pervasive *in the specific area. Becker,* 192 Wn. App. at 75 (citing *Ventress v. Japan Airlines*, 747 F.3d 716, 721 (9th Cir.), *cert. denied*, 135 S. Ct. 164 (2014); *Martin ex re. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 809 (9th Cir. 2009)). The Court found the Ninth Circuit's decision in *Martin* "instructive" because its analysis narrowly focused on whether an airplane's allegedly defectively designed stairs (*i.e.*, stairs containing only one handrail) were pervasively regulated. *Becker*, 192 Wn. App. at 75-76.

The *Martin* court found only one regulation regarding stairs, and concluded that the airline stairs were not pervasively regulated. '"Because the agency has not comprehensively regulated airstairs, the FAA has not preempted state law claims that the stairs are defective.'" *Becker*, 192 Wn. App. at 76 (quoting *Martin*, 555 F.3d at 812). In contrast to *Martin*, "where federal regulations had 'nothing to say about handrails, or even stairs at all,'" the *Becker* Court found at least fourteen detailed federal regulations "focused on performance and safety standards for engine fuel systems, including the carburetor and its component parts." *Id.* at 76 (quoting *Martin*, 555 F.3d at 812). This is not surprising, since the FAA issues a "type certificate" to an airplane manufacturer—here defendant Avco—when an engine is '"properly designed and manufactured."' *Id.* at 70-71 (quoting 49 U.S.C. § 44704(a)(1)).

The *Becker* Court explained that a "type-certified product (e.g., an engine) often includes component parts (i.e., a carburetor) purchased from outside suppliers." *Becker,* 192 Wn. App. at 71. The Code of Federal Regulations requires a certificate holder, such as defendant Avco, to "establish procedures for ensuring the quality and conformity of all components integrated in the certified product." *Id.* (citing 14 C.F.R. § 21.137). After the type certificate is issued (here, to Avco), the "certificate holder may seek a production certificate authorizing the holder to

manufacturer a duplicate of the certified product." *Id.* (citing 49 U.S.C. § 44704(c)).

Here, the airline's engine contained a carburetor built by defendant Precision Airmotive Corporation, a "parts manufacturer approval" (PMA) holder. *Becker,* 192 Wn. App. at 69. The Court of Appeals explained that Precision obtained its PMA from the FAA and "built the carburetor and its component parts, including the float." *Id.* Notably, Precision *developed* the subject carburetor float (which helps maintain the appropriate fuel level in the carburetor) and the FAA *approved* it. *Id.* Precision then delivered the float's plastic component parts to FTI to weld. *Id.* FTI completed its work and returned the welded floats to Precision. "Precision independently tested every float it installed in a carburetor or sold as a replacement part." *Id.* at 72. "As a PMA holder, Precision was required to ensure that 'each PMA article conforms to its approved design and is in a condition for safe operation.'" *Id.* at 71 (quoting 14 C.F.R. § 21.316(c)).

Becker erroneously insists that FTI manufactured,[2] produced and distributed the subject carburetor floats. (*See* Pet. at 2, 4) To the contrary, FTI's involvement in the engine fuel system was limited to welding the float

[2] Becker's reference to FTI as a "manufacturer" is disingenuous. In appellate briefing, FTI vigorously disputed that it was a "manufacturer," much less a product seller. *See* Resp. Br. at 36-42. The Court of Appeals expressly declined "to reach FTI's alternative arguments that it is not a product seller manufacturer under Washington's Product Liability Act." *Becker*, 192 Wn. App. at 83-84.

components for Precision. FTI did not "produce" or "distribute" any components of the float; it simply contracted with Precision to weld the components together according to Precision's instructions. Clerk's Papers ("CP") at 1966:17-1967:11, 1983:13-15, 1989:23-1990:1, 1996:9. The components were molded by Synergy Systems and Cashmere Molding, Inc., who were also named in the lawsuit. CP at 54, 360.

Based on this intricate and highly regulated process, the Court of Appeals correctly concluded that because federal regulations "pervasively regulate an airplane's engine fuel system, including its carburetor and component parts, implied preemption precludes applying a state law standard of care to Becker's claims." *Becker,* 192 Wn. App. at 79. Those federal regulations include, but are not limited to those delinated in *Becker*, 192 Wn. App. at 76-79.

The Court's decision that federal regulations and codes impliedly preempt the field is sound. It does not involve a "significant question" of law under the state or federal Constitution, nor does Becker seek discretionary review under this test. *See* RAP 13.4(b)(3). The Supreme Court should decline review.

For the first time, Becker discusses *Lewis v. Lycoming*, 957 F. Supp. 2d 552 (E.D. Pa. 2013) and urges this Court to focus on foreign authority, instead of Ninth Circuit cases. (*See* Pet. at 15) *Lewis* is not helpful because

it is premised on the *manufacturing* and *design* of aircraft components. Here, FTI was neither a manufacturer nor a designer. And the Court of Appeals declined "to reach FTI's alternative arguments that it is not a product seller or manufacturer under Washington's Product Liability Act." *Becker*, 192 Wn. App. at 83-84. Second, the Pennsylvania District Court spent the bulk of its decision interpreting the scope of two cases within its circuit, *Abdullah v. American Airlines*, 181 F.3d 363 (3rd Cir. 1999) and *Elassaad v. Independence Air, Inc.*, 613 F.3d 119 (3rd Cir. 2010). The *Lewis* court stated that "[n]either case addressed whether federal law preempts the standard of care in actions involving the design or manufacture of aircraft or aircraft components." *Lewis,* 957 F. Supp. 2d at 558.

Unlike *Becker*, the *Lewis* court determined that a few sections of the Code of Federal Regulations addressed "fuel delivery systems generally," but not the design and manufacture of a specific component part. *Id.* at 559. Pennsylvania's analysis of federal field preemption does not supplant the Ninth Circuit's decisions, and is not pertinent to FTI, who is neither a manufacturer nor a designer.

Becker's petition for discretionary review does not explain how her case raises "an issue of substantial public interest." RAP 13.4(b)(4). Instead, she takes contradictory and confusing positions. She argues on one hand that FTI engaged in "specific violations of federal regulatory

standards" (Pet. at 7), then opines that "there were no specific regulations regarding defective carburetor floats." (Pet. at 8) She presents an issue for review: "do the Washington state standards of care parallel the federal standards of care" (Pet. at 4), but then fails to address the issue.

Becker accuses the Court of Appeals of "eviscerating" Congressional intent (Pet. at 16), but blatantly ignores the Court's well-considered analysis of Congress's intent. S*ee Becker*, 192 Wn. App. at 74-75. Despite the pervasiveness of federal regulations governing an engine's fuel system, including its carburetor (*see id.* at 76-79), Becker contends that there is "federal regulatory silence." (Pet. at 16). None of her contradictory and puzzling arguments pass the threshold tests governing consideration of discretionary review under RAP 13.4(b).

Becker also engages in speculative hyperbole, stating that the *Becker* decision "endangers aviation safety by shielding manufacturers" not formally regulated within the FAA. (Pet. at 16). First, FTI vigorously argued that it was not a product manufacturer.[3] And the Court of Appeals declined to reach this alternative argument. *Becker*, 192 Wn. App. at 83-84. But as the Court of Appeals opined, "[n]o one disputes that Becker was able to pursue manufacturing defect claims against both Avco, the type

[3] *See* Court of Appeals Resp. Br. at 36-42.

certificate holder for the engine, and Precision, the PMA holder for the carburetor." *Becker*, 192 Wn. App. at 81. Becker strategically ignores the fact that Precision used its own test specification and "independently tested every float it installed in a carburetor or sold as a replacement part." *Id.* at 72.

Becker further opines that the Court of Appeals' decision "prejudices victim's rights to recover for injuries caused by defective aircraft products in Washington." (Pet. at 16) This comment disregards and is belied by her own recovery in this case—her settlements with other parties, including the engine manufacturer, Avco, during her trial. *Becker*, 192 Wn. App. at 73. Becker faults Precision for filing for bankruptcy, but this is not an issue for appellate review, and has no bearing on her claim against FTI.

Finally, without any factual or legal support, she speculates that the *Becker* decision "interferes" with "certified manufacturers' subrogation, contribution, and indemnity claims against at-fault suppliers." (Pet. at 16). Arguments unsupported by legal authority should not be considered on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

This sort of conjecture is belied by the contractual terms that governed the contracts among Avco, Precision, FTI, Synergy Systems and Cashmere Molding. Becker states that these parties enjoy "blanket immunity." (Pet. at 16) This is incorrect. *See Becker*, 192 Wn. App. at 70 n.2 (""Under FAA regulations, an engine manufacturer can be held liable for defects in the carburetor by virtue of being the type certificate holder of the engine"') (quoting Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money is Gone, That is Permanent, Irreparable Damage to You,"* 42 STETSON L. REV. 457, 480 n.169 (2013) (citing 14 C.F.R. §§ 21.11-21.55)).

Under the specific facts of this case, justice was served and Becker's petition for discretionary review should be denied.

2. The Court of Appeals correctly affirmed that FTI did not waive its federal preemption defense, and that Becker's motion for leave to amend was untimely.

Ignoring the criteria of RAP 13.4(b), Becker contends that the trial court and Court of Appeals erred by allowing FTI to pursue its federal preemption defense at the summary judgment stage. (Pet. at 19) Becker argues that FTI waived the defense by failing to plead it. The Court of Appeals acknowledged that "if a failure to plead an affirmative defense under CR 8(c) 'does not affect the substantial rights of the parties, the noncompliance will be considered harmless.'" *Becker*, 192 Wn. App. at 82

(quoting *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975)). "[T]the rule's policy is to avoid surprise and affirmative pleading is not always required." *Bickford v. City of Seattle*, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001); *see also Becker*, 192 Wn. App. 82.

Becker failed to establish that she was surprised or prejudiced by FTI's affirmative defense. She never objected in her summary judgment opposition or in oral argument. Nor did she express surprise. In fact, Becker *extensively briefed* the issue of field preemption. CP 278-84; *Becker*, 192 Wn. App. at 82. The Court of Appeals held that "[a]ny objection to a failure to plead an affirmative defense is 'waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense.'" *Becker*, 192 Wn. App. 82 (quoting *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975))). Because raising the affirmative defense for the first time in a motion for summary judgment did not affect "the substantial rights of the parties," the Court of Appeals deemed it harmless. *Becker*, 192 Wn. App. at 82 (citing *Mahoney*, 85 Wn.2d at 100-01).

After FTI was dismissed from the case, Becker moved for leave to amend her complaint to allege specific violations of federal law against FTI, which the trial court denied and the Court of Appeals affirmed. *Becker*, 192 Wn. App. at 82-83. Becker contends that the respective courts erred, but

does not explain how the purported error triggers review under RAP 13.4(b). (*See* Pet. at 19-20)

Becker's motion for leave to amend was untimely and futile, as Becker had several years to assert specific federal regulations against FTI but waited until after FTI was dismissed to do so. *Becker*, 192 Wn. App. at 83-84. Further, FTI demonstrated that all the regulations Becker sought to assert against FTI did not apply and, therefore, the amendments would have been futile. The trial court properly denied Becker's post-dismissal motion for leave to amend, and the Court of Appeals correctly affirmed that denial. *See Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 890, 155 P.3d 952 (2007) ("When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.") (internal quotation omitted).

VII. CONCLUSION

Becker's petition for discretionary review should be denied because the unanimous, underlying opinion neither conflicts with Supreme Court decision nor other decision of the Court of Appeals. Her petition does not raise a significant issue of law under the federal or state Constitution and does not involve an issue of substantial public interest. The Court of

Appeals' decision is fair and grounded on well-established case law. Discretionary review should be denied.

Dated this 19th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sopheary Sanh, hereby certify that I filed the foregoing with the Court of Appeals, Division I, and served same upon the following counsel of record via U.S. mail, email and/or legal messenger below:

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DATED this 6th day of April, 2016 at Seattle, Washington.

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