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Court of Appeal No. 72416-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant/Plaintiff,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondent/Defendant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA BENTON

BRIEF OF APPELLANT

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I. INTRODUCTION

This is an appeal of an Order on Summary Judgment effectively dismissing defendant Forward Technologies Industries, Inc. ("FTI") from claims arising from the crash of a Cessna 172 aircraft near McMurray, Washington on July 27, 2008, in which plaintiff's decedent, Dr. Virgil V. Becker Jr. was killed.

Appellant Estate of Becker, through its personal representative Jennifer White ("Becker"), brought a wrongful death action against numerous defendants alleging that the accident was caused by loss of engine power due to defects in the engine carburetor. FTI, a Minnesota corporation, manufactured the subject defective carburetor component parts. FTI brought a Summary Judgment Motion, arguing for the first time that Becker's claims were subject to federal preemption. The trial court granted FTI's Motion, holding that federal preemption precluded Becker's claims against FTI. The court did not identify any specific federal law that applied to FTI, nor did it identify any governing standard of care. Becker had pled general federal regulation violations against FTI, and later moved to amend alleging specific federal regulation violations: Becker's motion was denied. Becker's earlier Motion to Amend to add a claim for punitive damages against FTI under Minnesota law had also been denied. Becker appeals all Orders, the denials of associated Motions for Reconsideration,

and the Final Judgment, all with regard to FTI. This appeal only applies to defendant FTI. The other defendants settled with Becker or were otherwise dismissed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that federal regulations impliedly preempt state law standards of care in aircraft product liability actions.

2. The trial court erred in granting summary judgment on the basis of implied field preemption where Becker had pled violations of Federal Regulations against FTI.

3. The trial court erred in denying Becker's motion to amend her Complaint as to FTI to allege specific violations of federal regulations, when identical amendments were allowed for all other parties.

4. The trial court erred in granting summary judgment on the basis of federal preemption when FTI had failed to raise the issue in the pleadings.

5. The trial court erred in denying Becker's motion to amend her Complaint to add punitive damages claims against FTI under Minnesota law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether federal regulations preempt the Washington Product Liability Act (RCW 7.72 *et. seq.)* and establish the standard of care for aircraft product liability actions in Washington? **(No)**

2. If so, whether federal preemption applies to FTI, an unregulated supplier of aircraft component parts? **(No)**

3. If federal preemption applies, what product liability standard of care applies to FTI when there is no specific or pervasive governing federal regulation? **(No regulation applies)**

4. Whether Becker created an issue of material fact by establishing that FTI's defective carburetor float did not comply with federal regulations? **(Yes)**

5. If federal preemption applies, whether Becker had a pleading requirement as to a specific standard of care when first raised by FTI by way of its motion for summary judgment? **(No)** And in any event, if Becker meet that requirement? **(Yes)**

6. If federal preemption has a pleading requirement that Becker did not meet in the Second Amended Complaint, should Becker have been granted leave to file a third amended complaint against FTI, when the same amended complaint was allowed against all other defendants? **(Yes)**

7. Whether FTI waived the affirmative defense of federal preemption when it failed to raise it in the pleadings or a motion under CR 12? **(Yes)**

8. Whether the trial court erred in failing to allow Becker to amend her Complaint to add punitive damages claims against FTI under Minnesota law. **(Yes)**

IV. STATEMENT OF THE CASE

A. Factual Background

1. This lawsuit arises from an aircraft accident caused by manufacturing defects in a component of the aircraft engine's carburetor, the carburetor float, manufactured by FTI.

On July 27, 2008, Brenda Houston was operating a Cessna 172N, registration N75558, that she had rented from Crest Airpark, owner of the aircraft. At approximately 2:00 p.m. the aircraft departed Roche Harbor on a planned flight to Auburn. There were two passengers on board in addition to Ms. Houston: her young daughter, Elizabeth Crews and Dr. Virgil Becker. At approximately 2:39 p.m. the aircraft lost engine power, descended into an area with reduced visibility, and crashed into rising wooded terrain near McMurray, Washington. All on board died.

Following the accident it was discovered that the carburetor float, a critical component part of the carburetor, had leaked and filled with fuel, a condition which the evidence shows caused the engine to quit and the airplane to crash. The carburetor is a component of the engine fuel delivery system.

FTI, a self-described expert in polymer welding and assembly, manufactured the defective carburetor float. CP 262, 342. FTI supplied the subject float to Precision Airmotive ("Precision"), who installed it in the carburetor of the accident aircraft. CP 262, 338. Prior to the subject

accident, there was a known and significant history of many of the same floats manufactured by FTI leaking and failing. CP 264, 369.

2. Facts Germane to Punitive Damages Claim.

a. The carburetor is part of the engine's fuel delivery system.

The MA-4SPA carburetor on the subject aircraft is a critical component of the aircraft engine's fuel delivery system that meters fuel and air into the engine's cylinders for combustion. The fuel/air ratio needs to be precisely combined by the carburetor; if the ratio is too rich or too lean, the engine will not run. When there is too much fuel in relation to air, excessive fuel floods the engine and it ceases producing power sufficient to keep the aircraft airborne. The engine's carburetor component utilizes a float assembly with two floating pontoons that move together inside the carburetor bowl to maintain the correct fuel level for delivery of fuel to the engine. As fuel is consumed by the engine, the fuel level drops allowing the carburetor floats to descend and open a needle valve which allows fuel to fill the bowl, which then raises the floats and shuts off the valve. However, if a float leaks, it becomes heavy and losses buoyancy. This can also cause the pontoon to rub against the side of the carburetor bowl. These conditions can cause the float to fail, resulting in the needle valve failing to close, ultimately flooding the engine. Precision Airmotive

(Precision) manufactured the subject MA-4SPA carburetor. Defendant FTI supplied the subject 30-804 carburetor float to Precision. CP 264.

b. It is uncontested that FTI manufactured carburetor floats, certified that they met specifications, and sold them.

The carburetor float itself consists of three molded parts made of Delrin plastic. The body (part # 30-208) consists of two connected bowl shaped pontoons. The two lids (parts 30-209L and 30-209R) are designed to be sealed on top of each pontoon. The lids must be welded to the float body sufficient to make a complete hermetic seal. In addition, the welding must be performed to keep the design dimensions as specified in the design drawing for the assembled carburetor float, called the 30-804. The hot plate welding technique used to manufacture the 30-804 float is a technically advanced procedure requiring special equipment and trained operators. According to deposition testimony from FTI employees, FTI built the welding machines and tooling to manufacture the 30-804 floats. CP 296. Precision utilized FTI to manufacture the floats because Precision was not confident it could make the floats "with a consistency that was acceptable" because manufacturing the floats was a "difficult process." CP 297.

Precision placed purchase orders with FTI when it needed floats. The common purchase order states in part that FTI must: "*Manufacture* in

accordance with Precision Airmotive drawing(s) and spec(s) referenced above. Certificate of compliance documenting that parts were *manufactured* per drawing, revision, date specifications, test results, etc., is required with each shipment." Appendix A – Purchase Order, CP 298. The finished product, created from three parts, was required to be in full compliance with the drawings and specifications, and became part number, 30-804, according to the design plans and specifications.

From 1997 to 2005 FTI assembled, hot-plate welded, certified, and sold to Precision 31,647 of the 30-804 carburetor floats. CP 289, 323-329. Many of the purchase orders placed by Precision were for orders in the range of 2,000 to 3,000 floats, which would keep Precision's inventory stocked as needed. CP 323-329.

c. It is uncontested that FTI had a long and never-resolved history of manufacturing and selling floats that leaked, that FTI knew that it was not adequately testing floats, and that an adequate test was available and feasible.

At FTI, problems arose immediately with regard to the 30-804 float leaking. The problems began in 1997, and continued, never-resolved, through the next eight years. FTI approved and shipped the subject 30-804 float on June 14, 2000, while aware of the unresolved problems with leaking in the floats it was assembling. CP 343-344, 369, 379, 384, 385.

FTI was not able to produce a reliable leak-free 30-804 with any consistency, and the high leak ratio never met its satisfaction. CP 381. FTI was concerned that the leak problem was never fixed. CP 369. FTI also knew that the prototype tooling had a tendency to wear and cause leaking floats, and FTI was worried about it, but still kept manufacturing, approving, and shipping numerous floats which would leak. CP 348, 356.

Production specifications for the 30-804 floats required that the weld joint be hermetically sealed. CP 365. FTI knew that Precision was relying on FTI to hermetically seal the floats because of FTI's expertise in the plastic welding field. CP 342. Precision's purchase orders required a hermetic weld seal, and dimensional compliance with design drawing specifications. CP 355. Throughout the life of its relationship with Precision, FTI was always checking dimensions, and FTI employee Scott Olson (FTI's Applications Engineer and Inside Sales Manager) would check dimensions with calipers. CP 362. If the floats did not conform to Precision's specifications, FTI knew that they were to be scrapped. CP 350. Despite this, FTI produced numerous leaking floats, referring to them as "leakers". The term "leaker" was commonly used at FTI. CP 346, 379. FTI defined "leaker" as "a float that is leaking at the weld." CP 361. FTI knew that a "leaker" did not meet the hermetically sealed standard that FTI was required to meet. CP 265.

In 1998 FTI took notice that many of the floats welded by FTI were rejected by Precision as leakers, and therefore FTI decided to run its own in-house leak testing. CP 348, 381. The criteria for FTI's leak test came from a service trip that an FTI employee made to Precision, where he observed Precision's form of hot water leak testing. The employee figured the same test would work for FTI. CP 382.

In 2000, (the year the subject accident float was assembled and welded by FTI) FTI's leak test could be performed in a kitchen. The procedure was to take a cake pan full of water, submerge welded floats in the water, place the pan on a hot plate, and visually observe for leaking bubbles. CP 351, 381. An FTI employee described the test as crude and subjective (CP 347, 351) testifying at deposition: "I would never guarantee an operator caught every leaking part." CP 359. FTI knew that the hot water leak test was "very crude," and would only catch "gross leakers," where less than gross leakers escaped detection. CP 347, 381. FTI was aware that its leak test was not very accurate. CP 383.

Since the 1990's, FTI held itself out as an expert in the field of leak test equipment, and was in fact in the business of manufacturing and selling such equipment. CP 348. FTI's vacuum testing was "extremely accurate," "close to 100%." CP 359, 369. In fact, FTI formally proposed such leak test equipment to Precision on two occasions, in 1998 and 1999,

but Precision rejected both proposals. CP 413. FTI could have easily employed extremely accurate leak testing, but chose not to, and continued to manufacture, approve, and sell floats that it knew had high potential to leak.

FTI did not have a product reliability program, a quality assurance program, a product failure analysis program, any product risk assessment procedures, a product tracking program, or a manufacturing review board. CP 342-343. FTI was not concerned about how the parts were performing in the field. CP 373. Despite the high rate of leakers for 8 years, FTI never considered a recall (*id.*), a warning, or other product failure response.

d. It is uncontested that FTI knew that that an aircraft engine could lose power if the floats it manufactured and sold leaked.

FTI knew that the carburetor floats that it was manufacturing and approving were for use on aircraft, and could not be allowed to leak. CP 370, 379. The testimony of FTI's Applications Engineer regarding this issue is shocking:

> Q. But it was a concern that you had, and the problem was never fixed, right?
> A. You know, I was -- it was a concern that I had. And my concern was that we were making them bad parts. They were paying for bad parts. There would be logistic issues. It was a bad situation. So, yes, in that regards I was concerned.
> Q. You were selling them defective floats, right?
> A Correct

Q. Now, let me ask you this: The 30-804 float, do I understand correctly that that was the one that had the biggest issue - -
A. Yes
Q. -- with leakage?
A. Yes.
Q. Okay, How many 30-804 floats did you sell to Precision over the years?
A. Several thousand. [records reflect 31,647]
. . . . .
Q You understood, though, that Precision was selling the Delrin floats that your company welded and they were going onto aircraft engines?
A. Yes.

CP 123-126, *see also,* 369-370 (*emphasis added, objections omitted*).

This FTI engineer, who has rebuilt many carburetors, understood the consequences of a leaking and sinking float. "I know it can affect engine performance." CP 370. He knew it could cause engine flooding and stoppage. CP 360. Though the FTI engineer knew the situation involved a safety issue, he did not care enough to cease mass production of floats with a known high rate of "leakers", testifying: "To me, it's just another plastic widget." CP 370-371. The failure history of FTI's leakers in operating aircraft is also uncontested. Warranty documents reflect that from 1999 through the date of the accident more than 110 floats in the field filled with fuel and failed, many of which caused engine problems and engine failure on aircraft. CP 289. Furthermore, Service Difficulty Reports, available for free on the internet, also reflect a plethora of float

leaks and failures during the relevant time frame. CP 389-391. In November 2007, the Swiss Accident Investigation Board released on the internet Report No. 1970 (published 8 months before the subject accident), addressing the leaking Delrin float problem:

> As investigations of previous accidents or incidents due to engine faults in the air and on the ground and the experience of licensed carburetor servicing companies have shown, the freedom of movement of a float with one side filled with AVGAS is very badly affected by the asymmetrical forces acting on the float linkage. The resulting defective operation of the needle valve prevents the generation of a correct fuel-air mix. As a rule, too much fuel is therefore added to the mixture, leading to a loss of power.
>
> *Leaking plastic floats as the cause of engine faults* have also led to detailed investigations by the Bureau d'Enquêteset d'Analyses (BEA) in France and the Air Accident Investigation Branch (AAIB) in England. They have shown that *this type of float is unsuitable for safe operation in powered flight.*

CP 398 (*emphasis added*).

e. FTI worked closely with Precision to try to resolve the issue of leaks throughout the 8 year period in which FTI was mass producing the 30-804 floats, but to no avail. CP 338, 412. It is uncontested that the subject float did not meet specifications, which caused the float to leak and rub against the carburetor bowl wall.

After the accident, the right carburetor float pontoon was discovered to be completely filled with aviation fuel. Appendix B – Affidavit of Richard H. McSwain, Ph.D, P.E., CP 548, 1276. The leak

occurred in the weld seam. App. B, CP 549, 644. The most likely cause was that when FTI welded the float together, it did not properly align the lid and body, and instead, FTI forced the parts into their holding fixtures during welding, creating both a stress condition prohibited by the plans and specifications, and an out of dimension float. App. B, CP 549-550, 644.

The carburetor floats were designed to be hermetically sealed, and not rub against the carburetor bowl wall. However, the subject float, which was out of dimension, was also found to have rubbed against the carburetor bowl wall. These conditions caused the engine to flood and fail. Appendix C – 6/24/12 Declaration of Donald E. Sommer, P.E., CP 813, Appendix D - 11/2/11 Amended Declaration of Donald E. Sommer, P.E., CP 1276.

The accident signatures also reflect engine failure rather than some other cause. For example the pilot was on the emergency radio frequency (121.5 MHZ) at the time of the accident. The engine and propeller showed no signs of power at impact. App. D, CP 1277. The radar track flight path reveals an engine out glide path, and the accident scene reflects controlled flight into terrain. *Id.*

In short, the subject float should never have been approved and certified by FTI that it met Precision's design plans and specifications.

FTI should not have supplied the out-of-spec float to Precision. Appendix E - Declaration of Paul J. Gramann, Ph.D, CP 645. The defective float manufactured by FTI leaked and rubbed against the carburetor bowl wall, causing N75558's engine to fail resulting in the accident. App. C, CP 813.

B. Procedural History

Becker filed suit against FTI and other defendants on July 23, 2010. The Complaint was amended twice. CP 1-30, 54-82. The estates of the other two decedents, Brenda Houston and her daughter Elizabeth Crews, also filed suit against the same defendants. The two cases were ordered consolidated. CP 49-50. Becker's Second Amended Complaint stated that the carburetor components were not in compliance with government regulations "including the Federal Aviation Regulations (14 CFR et seq)." CP 77. Also, in responses to FTI's interrogatories, Becker affirmatively stated: "The . . . Delrin float, did not meet federal minimum standards." CP 801.

On May 7, 2012, Becker brought a Motion to Amend the Second Amended Complaint to add claims of punitive damages against defendant FTI under Minnesota law on the grounds that FTI's conduct (all of which occurred in Minnesota) manifested "a deliberate disregard for the rights or safety of others" under Minn. Stat.§ 549.20 (2008). Despite Becker's

presentation of extensive evidence in support, the trial court denied the motion because "no prima facie showing [was] made." CP 88-200.

On June 15, 2012, FTI brought a Motion for Summary Judgment arguing that: 1) FTI was beyond the purview of Washington product liability law; 2) FTI was immune from liability under Washington negligence law; and, 3) pursuant to implied federal preemption, the applicable standard of care was not based on Washington state product liability law, but was supplanted by federal regulations, and none of these regulations applied to FTI. FTI raised preemption for the first time in its Motion for Summary Judgment, nearly 2 years into the case, and less than two months before the discovery cutoff. According to FTI, its conduct in manufacturing the defective float was not subject to any legal standard of care. FTI later confirmed "[t]here are no federal regulations . . . that apply to FTI". CP 1123 [1] Becker opposed FTI's preemption argument by citing extensive legal authority that Becker's aviation product liability claims are not subject to implied federal preemption. However, the trial court agreed with FTI:

> . . . the Court Grants Summary Judgment on the grounds that federal aviation law and concomitant federal

[1]FTI intentionally made this conclusive argument opaque in its Motion for Summary Judgment. However, FTI, in opposition to Becker's Motion for Reconsideration, revealed the true impact of its argument: "Allowing Becker to amend his [sic] complaint would be in vain, as there are no federal regulations – either cited by Becker or anywhere else in the Federal Aviation Regulations – that apply to FTI." CP 1123.

> regulations preempt state law standards of care. *Montalvo v. Spirit Airlines,* 508 F.3D. 464, 473 (9th Cir. 2007). As alleged in the Second Amended Complaint, Plaintiffs Claims against FTI are thereby DISMISSED as a matter of law.

CP 666.

It is not clear from the court's Order whether Becker's claims were dismissed based upon a pleading failure, or whether the court held that preemptive federal regulations simply did not apply to FTI, leaving the applicable standard of care unknown. CP 666. Nine days later Becker filed a Motion for Reconsideration seeking clarification of this and other issues, which included a request for leave to amend the Second Amended Complaint as to FTI. CP 798-827. As part of that Motion, Becker submitted the declaration of aviation expert Donald Sommer, P.E., which stated:

> 14 CFR contains the federal regulations governing aviation. In order to lawfully operate civil aircraft in the U.S., the aircraft must be "in an airworthy condition" pursuant to 14 CFR part 91.7. 14 CFR 3.5 defines Airworthy as "the aircraft conforms to its type design and is in a condition for safe operation." Thus, aircraft and their component parts must conform to their approved design and must be in a condition safe for flight. This includes carburetors and their component parts such as carburetor floats.
>
> In this case the carburetor float was not airworthy in that it did not conform to its type design and was not in a condition for safe operation on any aircraft under the federal regulations. It contained a manufacturing defect in the weld seam, created by FTI, which caused it to leak and

> which allowed the carburetor to deliver an inappropriately rich fuel mixture to the engine, causing it to flood and fail. It did not conform to its design requirements which required that the float be impermeable to fuel and not leak.
>
> The subject carburetor float does not meet the requirements of any federal aviation regulation because it leaked. The float contained a manufacturing defect. There is no federal aviation regulation which allows us of this or any defective part on an aircraft.

App. C, CP 812-813.

While the Motion for Reconsideration was pending, Becker filed a Motion to Amend her Second Amended Complaint as to all defendants on August 8, 2012. CP 828-1073. On August 24, 2012, the trial court granted Becker's Motion to Amend against all defendants except FTI. CP 1221-1223, 1224-1225.[2] The court carved out FTI because its "summary judgment was granted and claims dismissed." CP 1225. On August 29, 2012, the trial court denied Becker's Motion for Reconsideration of the summary judgment dismissal of FTI. CP 1397-1389. Becker subsequently filed her Amended Complaint on September 4, 2012.

On August 10, 2012, the company that molded and supplied the float component parts, defendant Synergy Systems, Inc. ("Synergy"), filed

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[2]The trial court signed two orders on the same date relating to the Motion to Amend. The first Order (CP 1221-1223) is based off of the proposed order that FTI submitted with its brief in opposition to Becker's Motion to Amend. The proposed order drafted by FTI contained two alternate (and mutually exclusive) provisions. CP 1222. The trial court did not strike either of these provisions. The second Order is based off of the proposed order submitted by the plaintiffs. CP 1224-1225. Here, the trial court expressly carved out FTI.

a Motion for Summary Judgment that was legally identical to the Motion filed by FTI, claiming that federal preemption barred Becker's claims against Synergy as a supplier. CP 1074-1097. Synergy's Motion began by quoting the ruling of the trial court in granting FTI's Summary Judgment (CP 1074), and continued by arguing that the ruling for FTI constituted issue preclusion. CP 1082. Despite its nearly identical argument and component part supplier status, the trial court denied Synergy's Motion. CP 1422-1423.

Trial was scheduled for February 4, 2012. After some pre-trial motions were considered on February 4 and 5, Becker settled with all remaining defendants except AVCO, whom Becker had obtained a discovery sanction order against. CP 1430-1444. The consolidated cases then went to trial against AVCO. Three weeks later, Becker settled with AVCO during trial. This appeal followed.

V. ARGUMENT

A. Federal Regulations Do Not Preempt State Law Standards of Care In Aircraft Product Liability Actions.

The power of Congress to preempt state law arises from the Supremacy Clause of the U.S. Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State

> shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art.VI, cl. 2.

The Supreme Court has stated that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009).

Three types of preemption exist: express preemption, conflict preemption and field preemption. *See, Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383, 120 L. Ed. 2d 73 (1992). Express preemption is "explicitly stated in the statute's language." *Id.* (citations and internal quotes omitted)." "The Federal Aviation Act [49 U.S.C. §§ 40101 et seq.] has no express preemption clause." *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 808 (9th Cir. 2009).

Conflict preemption and field preemption are both implied. *See, Gade*, 505 U.S. at 98. Conflict preemption arises when "compliance with both federal and state regulations is a physical impossibility." *Id.* (citations omitted). Becker's claim under Washington product liability law does not conflict with any provision of the Federal Aviation Act ("FAA")[3] nor

[3]To maintain continuity with the majority of the decisions discussed in this Brief, "FAA" refers to the Federal Aviation Act. "Administrator" refers to the Administrator of the Federal Aviation Administration.

regulations promulgated under it. FTI's argument relies on implied field preemption. CP 243.

1. Congressional intent for implied field preemption must be "clear and manifest."

Regardless of the type of preemption involved - express, conflict or field - "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992). Because no other political body or administrative agency has the power to preempt, "[C]ongressional intent to supersede state laws must be *clear and manifest*." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65 (U.S. 1990) (*emphasis added*).

Congressional intent for implied field preemption either requires that the subject regulations be "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or state law must "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth*, 555 U.S. at 565 (citations omitted).

The starting point for all preemption cases, especially in areas States have traditionally occupied, begins "with the assumption that the historic police powers of the States were not to be superseded by the

Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (citations omitted). Claims of preemption are addressed with the initial "presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S. Ct. 1671, 1676, 131 L. Ed. 2d 695 (1995). Preemption takes more than the mere existence of a detailed federal regulatory scheme. *See, English*, 496 U.S. at 87.

The Supreme Court stated:

> To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause Jurisprudence.

Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 717, 105 S. Ct. 2371, 2377, 85 L. Ed. 2d 714 (1985).

If there are pervasive regulations governing the specific safety issue involved, then only the state standards of care are preempted, and state law governs the other negligence elements (breach, causation and damages), as well as the remedies. *See Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006 (9th Cir. 2013).

FTI relies on 1958 Federal Aviation Act, Pub.L. No. 85-726, 72 Stat. 731, (codified as amended at 49 U.S.C. §§ 40101-49105) ("FAA"),

as the impliedly preemptive law. Thus, the Act, including amendments are considered in determining Congressional intent.

The FAA was enacted in response to numerous "fatal air crashes between civil and military aircraft operating under separate flight rules." *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 368 (3d Cir. 1999). Replacing the 1938 Civil Aeronautics Act, 52 Stat. 973 (1938), Congress desired to "promote safety in aviation and thereby protect the lives of persons who travel on board aircraft." *Id.* In doing so, Congress delegated to the Administrator of the Federal Aviation Administration ("Administrator") the authority and the duty to "promote safe flight of civil aircraft," including the duty to prescribe "minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers." 49 U.S.C. § 44701(a)(1). As discussed below, many cases historically have rejected preemption based on this provision.

2. The FAA indicates that there is no clear and manifest Congressional intent to fully occupy the field of aviation safety.

Both the FAA itself, as well as subsequent amendments (both accepted, and rejected) indicate that the Congress did not intend for the

FAA to impliedly preempt the field. As recently summarized by the 9th Circuit:

> The FAA includes two important statements indicating a general congressional intent *not* to preempt state-law tort suits against airlines: the savings clause providing that "[a] remedy under this part is in addition to any other remedies provided by law," 49 U.S.C. § 40120(c), and the requirement that airlines maintain liability insurance for injuries and property damage, *id.* § 41112. The latter requirement is important as to the statute's preemptive status, because 'the FAA doesn't create a federal cause of action for personal injury suits'; the liability insurance clause therefore 'can only contemplate tort suits brought under state law.'

Gilstrap v. United Air Lines, Inc., 709 F.3d 995, 1004 (9th Cir. 2013) (*emphasis in original*) (*quoting Martin,* 555 F.3d at 808); *see also, Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 338 (5th Cir. 1995) (A complete preemption of state law in this area would have rendered any requirement of insurance coverage nugatory).

As originally enacted, the FAA did not contain an express preemption provision. However, two subsequent amendments to the FAA added limited express preemption clauses. Though neither amendment applies here, they do reflect Congressional intent not to preempt the entire aviation field. When an express preemption clause exists within a smaller, defined, portion of a statute, an inference can be made that it "forecloses implied pre-emption" in the larger portion. *Freightliner Corp. v. Myrick*,

514 U.S. 280, 289, 115 S. Ct. 1483, 1488, 131 L. Ed. 2d 385 (1995).[4] Examination of these two amendments reveals that when Congress intends to preempt state law in aviation, it does so expressly.

The Airline Deregulation Act of 1978 ("ADA") Amendment contains an express preemption provision entitled "Preemption of authority over prices, routes, and services", which prohibits states from regulating the "price, route, or service" of commercial air carriers. 49 U.S.C. § 41713. The ADA also contains a general "remedies" savings clause: "A remedy under this [ADA] is in addition to any other remedies provided by law." 49 U.S.C. 40120(c). *Freightliner* recognizes that limited express preemption clauses indicate Congress did not intend to preempt other matters. *See, Freightliner,* 514 U.S. at 288.

Second, the 1994 General Aviation Revitalization Act ("GARA") Amendment also contains an express provision: In 1994 Congress enacted GARA, 49 U.S.C. § 40101 note[5], which is an 18 year statute of repose on product liability lawsuits against aircraft and component manufacturers. It states in relevant part:

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[4]*Freightliner* was later clarified by *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869, 120 S. Ct. 1913, 1919, 146 L. Ed. 2d 914 (2000). In *Geier,* the Court recognized that the *Freightliner* reasoning regarding implied preemption did not always apply in situations where *conflict* preemption was at issue. The issue here, implied field preemption, is outside of the *Geier* holding.

[5]Pub. L. No. 103-298, 108 State. 1552 (1994), amended by Act of Pub. L. No. 105-102, § 3(e), 111 Stat. 2204, 2216 (1997).

> no civil action for damages for death or injury to persons . . . arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred . . . after the application limitation period . . .

49 U.S.C. § 40101 note, § 2(a).

GARA's express preemption provision states that it "supersedes any State law to the extent that such law permits a civil action . . . to be brought after . . . [GARA's] limitation period". 49 U.S.C. § 40101 note, § 2(d).

GARA's legislative history reflects the limited applicability of its preemption for aircraft design and manufacturing claims, which sheds light on the fact that Congress did not intend FAA implied field preemption:

> It has also been noted that attempts to preempt State tort law can create procedural and jurisdictional confusion:
> . . . .
> *For all of the foregoing reasons Congress has chosen to tread very carefully when considering proposals such as S. 1458 that would preempt State liability law.*
> ...
> *Based on the hearing record, the Committee voted to permit, in this exceptional instance, a very limited Federal preemption of State law.*
> ...
> Given the conjunction of all these exceptional considerations, *the Committee was willing to take the unusual step to preempting State law in this one extremely limited instance.*

...

> Under the legislation, victims would also continue to be free to bring suit against pilots, mechanics, base operators, and other responsible parties where their negligence or other misconduct is a proximate cause of the accident. *And in cases where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference.*

H.R. Rep. No. 103–525(II) (1994) (*emphasis added*).[6]

The legislative history of GARA thus reflects Congress' recognition and desire that state laws "continue" to "govern" product liability claims against aircraft/component manufacturers for claims within GARA's 18-year repose period, and that federal law will not interfere. *Id.* If Congress thought the FAA preempted state law, there would have been no need to carve out a limited express preemption provision in GARA.

Further evidence of Congressional intent is found in considered but rejected legislation: in this case a proposed 1990 amendment to the FAA. *See, Tyler v. United States*, 929 F.2d 451, 456 (9th Cir. 1991), (*citing* 2A Sutherland Statutory Construction § 48.18 (4th ed. 1984) (Generally, the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment)); *see*

[6]Reprinted in 1994 U.S.C.C.A.N. 1644 (quoting Hon. Harry L. Carrico, Chief Justice of the Supreme Court of Virginia, at Hearings before the House Comm. on Energy and Commerce, Subcomm. on Commerce, Consumer Protection, and Competitiveness, 100th Cong., 1st Sess. 29 (May 5, 1987).

also, Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 305, 53 S. Ct. 350, 355, 77 L. Ed. 796 (1933).

In 1990, Congress considered express preemption under the FAA that would have established a federal product liability standard of care applicable to aircraft manufacturers. S. REP. NO. 101-303, 101st Cong., 2d Sess. 1990. The last draft of the Bill, S.640.RS stated in part:

> PREEMPTION; APPLICABILITY This Act supersedes any State law regarding recovery, under any legal theory, for harm arising out of a general aviation accident, to the extent that this Act establishes a rule of law or procedure applicable to the claim.

Id. at Sec. 4(a)

The Senate Judiciary Committee Report on the proposed amendment stated in part:

> The general aviation industry is one of many industries that are subject to limited Federal safety controls. Further, these minimal Federal safety standards should not be used to negate the responsibility that this industry has to the American public for maintaining safety in its products. The creation of national product liability standards for the general aviation industry is contrary to historical precedent and would establish a dangerous standard to follow.

Id. at III.B.

The rejection of this Bill reflects Congressional intent that the FAA does not preempt aircraft product liability claims.

3. Aviation product liability claims are not preempted.

Courts have rejected federal preemption defenses in defective product liability cases. *See, e.g., Martin v. Midwest Express Holding, Inc.*, 553 F.3d 806, 808 (9th Cir. 2009); *Public Health Trust of Dade County, Fl. v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993); *Lewis v. Lycoming*, 957 F. Supp. 552 (E.D. PA 2013); *See also, Air Transp. Ass'n of Am. v. Cuomo,* 520 F.3d 218 (2d Cir. 2008) ("we have acknowledged that the FAA does not preempt all state law tort actions").[7]

The Ninth Circuit's decision in Martin, which applies in Washington, is directly on point. *Martin* recognized that the defective component part, airstairs on the aircraft, "are not pervasively regulated". *Martin*, 553 F.3d at 812.

> [T]he only regulation on airstairs is that they can't be designed in a way that might block the emergency exits. 14 C.F.R. § 25.810. The regulations have nothing to say about handrails, or even stairs at all, except in emergency landings. No federal regulation prohibits airstairs that are prone to ice over, or that tend to collapse under passengers' weight. The regulations say nothing about maintaining the stairs free of slippery substances, or fixing loose steps before passengers catch their heels and trip. It's hard to imagine that any and all state tort claims involving airplane stairs are preempted by federal law. Because the agency has not comprehensively regulated airstairs, the FAA has not preempted state law claims that the stairs are defective.

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[7] *Dicta* to the contrary contained in the Third Circuit's decision in *Abdullahv. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999), is inconsistent with the overwhelming majority of cases, and has been rejected as mere *dicta* by lower courts in that Circuit. *See, Lewis v. Lycoming*, 957 F. Supp. 2d 552, 557 (E.D. Pa. 2013).

Martin, 553 F.3d at 812.*Martin* concluded: "Because the agency has not comprehensively regulated airstairs, the FAA has not preempted state law claims that the stairs are defective." *Id.*

Thus, under *Martin,* FTI's preemption defense could survive only if its floats are subject to pervasive regulation. They are not, and FTI does not offer a single citation or a scintilla of evidence that they are. Instead, FTI's argument would create an abyss where no standard or legal duty applies to its manufacture of critical aircraft component parts. Put another way, if preemption applies, FTI and all other aircraft component manufacturers could manufacture and distribute defective parts with impunity:

4. Because FTI is not regulated by the FAA's "type certificate" program, exempting it from state products liability laws would not further any federal interest.

As part of the FAA, Congress established an inspection and certification system that allows the Administrator to enforce federal aircraft design standards: A "type certificate" is issued when the Administrator is satisfied that a proposed "aircraft, aircraft engine, propeller, or appliance is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed". 49 U.S.C. § 44704(a)(1). Once the Administrator finds that duplicates of a

type certified aircraft will be produced in conformity with the type certificate, a "production certificate" may be issued. 49 U.S.C. § 44704(c).

All operating aircraft require an effective "airworthiness certificate" 49 U.S.C. § 44711(a)(1), which is issued when the Administrator "finds that the aircraft conforms to its type certificate and, after inspection, is in condition for safe operation ..." 49 U.S.C. § 44704(d)(1). At any time the Administrator may re-inspect a certificated aircraft or engine and may modify, suspend, or revoke the certificates after such an inspection if he finds it necessary for the public interest. 49 U.S.C. § 44709. Only those at the end of the production line, the aircraft manufacturer and engine manufacturer, are required to obtain type certificates for their completed products. Suppliers to the type certificate holders, such as FTI, are not required to be certificated by the Administrator, are not regulated by the Administrator, and do not have to comply with the FAA, nor the regulations promulgated thereunder.

As recognized in *Martin*:

> [I]n the field of aircraft design regulation, the FAA directs only the conditions under which the *government* may grant an aircraft design a "certificate" that permits production; the FAA does not prescribe general standards the manufacturer must follow to exercise reasonable care in designing a safe aircraft.

Martin, 555 F.3d at 814 (Judge Bea concurring) (*emphasis* in original).

Here, defendant AVCO held the type certificate for the subject engine, and Defendant Precision held Parts Manufacturer Authority certificate (PMA) covering the subject carburetor for the engine. CP 240. *As a supplier to Precision, FTI was not required to, and did not, hold any certificates issued by the Administrator.* FTI was not governed by the regulations, and the Administrator could not police nor enforce regulatory compliance against FTI. CP 238, 343. Thus, FTI was an unregulated supplier of component parts. Furthermore, FTI did not cite to a single federal regulation pertaining to the actual design or manufacture of the subject engine, or its carburetor or component parts.

Applying this regulatory framework to the instant case, as in *Martin*, "the FAA has not promulgated relevant regulations describing the particular obligations" to manufacture aircraft parts. *Id.* at 814 (concurring opinion). There are no independent standards to judge safety of carburetor floats, except state law, because floats are not pervasively regulated at the federal level. The only general regulation is that they be airworthy and in a safe condition for flight. CP 812. But this general standard is not pervasive with regard to carburetor floats, nor does the standard conflict with Washington product liability law. Therefore, *Martin*, which is the most recent and more relevant law out of the Ninth Circuit, warrants a holding of no federal preemption.

In sum, the trial court's holding that federal preemption applies to Becker's claims against FTI is erroneous. As set forth above, the actual conduct and language of Congress over the years, has indisputably made clear that Congress has never intended to preempt any design or manufacturing standards applicable to general aviation aircraft and their components.

FTI's claim must fail because it made no showing that "pervasive" federal regulations governed the manufacture of carburetor components by FTI, a non-regulated supplier. *See, Wyeth*, 555 U.S. at 565. There are no specific regulations governing carburetor or carburetor component part design or manufacture. Further, there is no evidence that it was the "clear and manifest purpose of Congress for the FAA to supersede state product liability law in general, and certainly not with regard to carburetor component part manufacturing. Washington product liability law does not conflict with, or obstruct, the FAA. Similar to *Lewis* and *Martin*, Washington product liability law "will only help, not harm, Congress in obtaining its goal of maximum safety." *Lewis* at 559.

B. FTI Violated State and Federal Standards of Care.

Alternatively, even if federal preemption somehow applies, the evidence introduced showed that FTI violated the only *possibly* applicable federal regulations.

As discussed above, when looking at federal preemption in aircraft product liability cases, the focus is on the "relevant and pervasive regulations" with respect to the "allegedly defective part." *See, Martin,* 553 F.3d at 811. Here, with regard to FTI, the defective part is the carburetor float. However, as demonstrated above, there are no specific federal regulations addressing carburetor floats, whether for design, manufacture or performance. CP 812. The only general regulation governing carburetor parts is one that applies to all aircraft parts, which requires that they be airworthy and in a safe condition for flight. CP 812; 14 C.F.R. §§ 3.5, 91.7. Again, this general regulation is not sufficient to create implied field preemption under *Martin.*

Regarding the carburetor component of the engine's fuel delivery system, the only **design** "specification" in the regulations promulgated by the FAA is contained in 14 C.F.R. § 33.5(a), which states: "The fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions." This regulation is obviously nothing more than a minimum performance standard that the carburetor "must perform its intended function" and is far from pervasive. The regulation provides no design "specifications" from

which one could build the "fuel system" (which, for this engine, is the carburetor).

Likewise, there are no **manufacturing** "specifications" set forth in the federal regulations applicable to carburetors. Instead, the federal regulations defer to the design and manufacturing specifications that exist outside of the regulations and are established by the engine manufacturer. These require, as a minimum standard, only that Precision, as the PMA holder, meet the non-regulatory specifications of the engine manufacturer, and otherwise ensure that the carburetor otherwise meets "airworthiness requirements." 14 C.F.R. § 21.303.

There is no dispute that FTI's leaking carburetor float was *not* airworthy, and did not comply with federal regulations because it was *not* safe for flight: the float contained a manufacturing defect in the weld seam, created by FTI, which caused it to leak. App. B, CP 548, App. E, 643-645, App. C, 813.[8]

1. Becker's second amended complaint properly pled violations of federal law.

An alternative reading of the trial court's summary judgment order is that Becker insufficiently plead implied federal preemption. But any

[8]The trial court's Summary Judgment Order might be construed as a decision that FTI's leaking carburetor float was airworthy and safe under the federal regulations. But any such finding was contradicted in the record. CP 812-813. Thus, the Court erred if it based summary judgment on material facts in genuine dispute.

such holding was erroneous because such pleading is not required, and even if it were, Becker pled that FTI and its product did not comply with the "Federal Aviation Regulations."

The 9th Circuit, FTI, and Becker all agree that if implied federal preemption applies, it is *not* by way of a separate federal cause of action, but only relates to the standard of care element in Becker's state law claims. As recognized in *Martin*, "the FAA [Federal Aviation Act] *does not create a federal cause of action for personal injury suits. . .* [It] can only contemplate tort suits brought under state law." *Martin,* 555 F.3d at 808) (emphasis added). FTI agreed in its Motion for Summary Judgment: **"FTI acknowledges that Plaintiffs' state law causes of action remain intact."** CP 246.

This statement shows the inherent contradiction in FTI's position: if the state law claims remained "intact", they could not be dismissed on the theory they were preempted.

FTI did not move under CR 12 to dismiss Becker's state law claims, nor can it seriously claim that Becker inadequately pleaded them. CP 31-47. Becker expressly alleged that FTI was at fault for the manufacture, assembly, testing, sale, and delivery of the defective carburetor float. *Id.* Becker also pled that the carburetor components were not in compliance with government regulations, "**including the Federal**

Aviation Regulations (14 CFR et seq)." CP 77. In addition, in answers to FTI's interrogatories, Becker affirmatively stated: "The . . . Delrin float, did not meet federal minimum standards." CP 801. Indeed, as further discussed below, FTI did not even assert preemption as an affirmative defense in its Answer. CP 31-47.

Therefore, FTI's Motion should have been denied even if federal preemption existed because FTI conceded that the state law claims remained intact and were properly pled. Becker alleged and proved that the leaking float did not meet any federal standard of care. There is no requirement that any specific standard of care be pled. Washington is a notice pleading state. *See, Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008). The Court Rules on pleading only require a "short plain statement of the claim". CR 8. Under implied federal preemption, state law causes of action remain; only the standard of care changes. Therefore, Becker properly pleaded state law claims. Even if federal preemption must be expressly pleaded under implied field preemption, the fact that Becker alleged in her Complaint that the subject parts did not comply with the Federal Aviation Regulations met the standard.

2. The trial court erred in denying Becker leave to amend her Complaint to further address preemption.

Assuming there is a specific federal preemption pleading requirement, the trial court also erred by not granting Becker leave to amend her Complaint under Washington Civil Rule 15 to plead federal preemption with any needed clarity. A trial court's denial of a motion to amend is reviewed for an abuse of discretion. *Karlberg v. Otten*, 167 Wn. App. 522, 529, 280 P.3d 1123, 1127 (2012).

The amendment of pleadings is allowed liberally under CR 15:

> "Leave to amend a pleading should be freely given when justice so requires. This rule serves to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party."

Chadwick Farms Owners Ass'n v. FHC, LLC, 139 Wn. App. 300, 313, 160 P.3d 1061, 1067 (2007) *aff'd in part, rev'd in part,* 166 Wash. 2d 178, 207 P.3d 1251 (2009).

Where a motion to amend is brought after an adverse order of summary judgment, the trial court may consider timeliness and futility when determining whether to grant the motion. *Doyle v. Planned Parenthood of Seattle–King County,* 31 Wn. App. 126, 130–31, 639 P.2d 240 (1982). "'The touchstone for denial of an amendment is the prejudice

such amendment would cause the nonmoving party.' In determining prejudice, a court may consider undue delay and unfair surprise as well as the futility of amendment." *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889, 155 P.3d 952, 960 (2007) (*citing Caruso v. Local Union 690 of Int'l Bhd. of Teamsters,* 100 Wn.2d 343, 350, 670 P.2d 240 (1983)), *aff'd sub nom. Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 210 P.3d 308 (2009).

Allowing Becker to amend her Complaint would have created no undue delay or surprise to FTI, who itself failed to raise federal preemption as an affirmative defense as required; only to raise it nearly two years after the case was filed, and one month before the discovery cutoff. Indeed, Becker's Third Amended Complaint (which leave to file was allowed as to all other defendants but not defendant FTI), alleged nothing more than additional federal standards.[11] CP 829.

C. FTI Waived The Defense Of Preemption.

The trial court also erred by allowing FTI's preemption argument in the first place. FTI raised federal preemption for the first time in its Motion for Summary Judgment: this was too late. The United States Supreme Court has stated that federal preemption is an affirmative

[11]As already discussed, an argument by FTI that such amendment would be futile only highlights the absurdity of FTI's preemption argument as a whole. *See,* p. 50.

defense. *See, Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2430, 96 L. Ed. 2d 318 (1987); *see also, Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 912 (6th Cir. 2007) ("'[F]ederal preemption is an affirmative defense upon which the defendants bear the burden of proof' " (quoting *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005)).[12]

In Washington, "affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties." *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522, 540 (1996), *as amended on denial of reconsideration* (Mar. 14, 1996) (*citing Bernsen v. Big Bend Elec. Coop.*, 68 Wn. App. 427, 433–34, 842 P.2d 1047 (1993). A party shall affirmatively plead any matter constituting an avoidance or affirmative defense. CR 8(c). Thus, "[a]ny matter that does not tend to controvert the opposing party's prima facie case as determined by applicable substantive law should be pleaded[.]" *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91, 95 (2000) (Finding that defendant waived affirmative defenses by failing to plead them) (*internal citations omitted*).

Washington Civil Rule 8(c) and Federal Rule of Civil Procedure 8(c) follow each other nearly word for word. *See,* Appendix F -

[12]Courts differentiate between preemption defenses which are jurisdictional and preemption defenses which only change the law to be applied.

Comparison of CR 8(c) and Fed. R. Civ. P. 8(c). Both the Federal and State versions of Rule 8(c) require that a party set forth affirmatively any other matter constituting an avoidance or affirmative defense. CR 8(c), Fed. R. Civ. P. 8(c).

Both the 9th Circuit and local Federal trial courts have addressed the issue of waiver: "[a]voidance defenses such as federal preemption are waived if not raised in the pleadings." *Schneider v. Wilcox Farms, Inc.*, No. C07-1160JLR, 2008 WL 2367183, at *2 (W.D. Wash. June 6, 2008) (Defendants failed to assert federal preemption as an affirmative defense in their answer.)[13] (*citing, Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996); *DIRECTV, Inc. v. Barrett,* 311 F.Supp.2d 1143, 1146-47 (D.Kan. 2004); *see* Fed.R.Civ.P. 8(c); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1271, 1278 (3d ed. 2004)).

> In general, any matter not in issue under a simple denial of allegations in the complaint is an "affirmative defense" and must be specifically pleaded as such in the answer. An affirmative defense is an assertion raising new facts and arguments that, if true, would defeat the plaintiff's claim, even if the allegations in the complaint are true.

[13]Citation to Federal Trial Court Order made pursuant to GR 14.1(b) and FRAP 32.1(a). Attached as Appendix G.

Kopp v. Reardan/Edwall Sch. Dist. No. 009, No. CV-07-216-LRS, 2009 WL 774122, at *1 (E.D. Wash. Mar. 19, 2009)[14] (*citing, Saks v. Franklin Covey Co.,* 316 F.3d 337, 350 (2nd Cir. 2003).

Other courts have also recognized that federal preemption by the FAA is an affirmative defense which is waived unless raised in a defendant's pleading. *Martin v. E. Airlines, Inc.*, 630 So. 2d. 1206, 1208 (Fla. Dist. App. 1994) (court's finding that the preemption defense was waived was "fuelled" by the fact that defendant waited years after the filing of the complaint, and after the statute of limitations had expired to bring the motion for summary judgment); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 721 F. Supp. 1185, 1186 (D. Colo. 1988) (defendant waived preemption by not raising it in its answer; only allowed to argue preemption after moving to amend and on a finding of no prejudice to the plaintiff).

Washington courts have not yet addressed the issue of waiver of federal preemption head on. However, at least one court has listed federal preemption along with other affirmative defenses. *See, Schneider v. Snyder's Foods, Inc.*, 95 Wn. App. 399, 401, 976 P.2d 134, 136 (1999). FTI did not plead preemption as an affirmative defense in its Answer nor assert it in a 12(b) motion. CP 31-47. By waiting nearly two years until the

[14] Citation to Federal Trial Court Order made pursuant to GR 14.1(b) and FRAP 32.1(a). Attached as Appendix H.

eve of the discovery cutoff, FTI's delay prejudiced plaintiff. This unjust application of the rules is furthered when allowing FTI to plead preemption long after the time to do so expired, and then by not allowing Becker to amend her pleadings to compensate for the trial court's error in application of law.

D. Becker Should Have Been Granted Leave to Amend Her Complaint to Include Punitive Damages Against FTI.

In addition to reversing the grant of summary judgment and remanding for further proceedings, this Court should vacate the trial court's dismissal of Becker's claim for punitive damages. Before the preemption issues came before the trial court, the court also erred in denying Becker's earlier Motion to Amend to include claims for punitive damages under Minnesota Law against FTI. The proposed amendment simply conformed to the evidence uncovered by Becker as the litigation progressed: FTI's engineer Scott Olson knew that Precision Airmotive's testing was inadequate, and that FTI was sending "Leakers" to Precision that would be put in aircraft. Instead of taking action, FTI did nothing: "To me, it's just another plastic widget." CP 370-371. This callous behavior is precisely what punitive damages are designed to remedy.

Minnesota courts review a denial of a motion to amend to include punitive damages under a *de novo* standard. *See, Jensen v. Walsh,* 623

N.W.2d 247, 249 (Minn. 2001); *Swanlund v. Shimano Indus. Corp.,* 459 N.W.2d 151, 155 (Minn. App. 1990) ("We therefore review de novo the trial court's determination that the facts presented could not support an award of punitive damages. This rule is especially applicable where... the trial court could make no credibility determinations...), *review denied* (Minn. Oct. 5, 1990).

1. Minnesota law allows punitive damage claims against Minnesota corporations.

Minnesota Statute § 549.20 (2008) allows punitive damages when a defendant's conduct shows "deliberate disregard for the rights or safety of others," and when a defendant deliberately acts with indifference (or conscious disregard) to the high probability of injury to the rights or safety of others. Minn. Stat. § 549.20 (2008). Procedurally, a plaintiff's initial complaint in Minnesota cannot seek punitive damages. Minn. Stat. § 549.191 (2008). After filing the suit, a party may make a motion to amend the pleadings to claim punitive damages. *Id.* Under the Minnesota statute, Becker's allegations needed only reach a *prima facie* evidentiary standard to amend under Minnesota law. *Id.* If the court finds *prima facie* evidence in support of the motion, it **must** allow the plaintiff to amend. *Id.* (At the hearing on the motion, if the court finds prima facie evidence in support of

the motion, the court *shall* grant the moving party permission to amend the pleadings to claim punitive damages.)

2. Washington allows application of Minnesota's punitive damage law against FTI, a Minnesota corporation.

Washington Courts recognize the availability of punitive damages against a foreign corporation when they are available in the foreign corporation's state, and the subject conduct occurred there. *See, Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 583, 555 P.2d 997 (1976); *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 148, 210 P.3d 337, 342 (2009).

Singh is directly on point. In that case, the plaintiff underwent a routine heart bypass surgery in Washington when the heart monitor malfunctioned and burned his heart, causing him to later require a heart transplant. *Id.* at 140, 141. The heart monitor was developed in California by a California corporation. The monitor had a history of failure but the defendant manufacturer, who was aware of the defect, failed to correct it or warn users. *Id.* The Court of Appeals, in affirming the trial court, held that California law, which allows punitive damages against California corporations, applies to the California manufacturer when the conduct occurs there because California has the greater interest in deterring such conduct within its borders, against California companies. *Id.* at 147, 148.

Therefore California punitive damage law applied even though the ultimate accident and cause of action arose in Washington.[15]

As in *Singh*, the conduct of FTI occurred in FTI's home state of Minnesota, and its product, which it delivered to Precision in Washington, ended up causing the subject aircraft accident in Washington. The tortious acts and omissions of FTI occurred in Minnesota. FTI assembled, welded, approved, and made all of its decisions regarding the floats in Minnesota. CP 96-97. FTI did not proffer evidence to the contrary. CP 209. Minnesota is where FTI was aware of the significance of the dangers of carburetor float leaks, problems, failures, and defects, but knowingly chose not take any action despite such knowledge, similar to *Singh*. *Id.* Minnesota is also where FTI knowingly assembled defective safety critical aviation carburetor floats, which it knew would end up being used on aircraft, with the potential for engine failure; exactly what occurred in this case. *Id.*[16]

3. Becker met the *prima facie* showing required for pleading punitive damages.

All that is required for a pleading under the Minnesota punitive damages law is *prima facie* evidence of punitive conduct. Minn. Stat. §

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[15]Washington allows for issue-specific choice of law analysis, known as dépeçage. *See, Singh*, 151 Wn.App. at 143. The law of a different jurisdiction can apply to one or more of the claims in a case. *Id.*

[16]Minnesota punitive damages has been applied in other jurisdictions. *See e.g., Homer v. Guzulaitis*, 567 N.E.2d 153, 158 (Ind. Ct. App. 1991).

549.191 (2008). "A plaintiff need not demonstrate an entitlement to punitive plaintiff damages *per se,* but only an entitlement to allege such damages." *Freeland v. Fin. Recovery Servs., Inc.*, 790 F. Supp. 2d 991, 994 (D. Minn. 2011) (*citing, Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1008 (D. Minn. 2003)). On a showing of that entitlement, "a Court shall grant a Motion to amend to allege punitive damages if it finds prima facie evidence in support of the motion.'" *Berczyk,* 291 F. Supp. 2d 1008, (*citing, Bunker v. Meshbesher*, 147 F.3d 691, 696 (8th Cir. 1998)). "Under Minnesota law, 'prima facie' does not refer to a quantum of evidence; rather, prima facie evidence is that evidence which, if unrebutted, would support a judgment in that party's favor. "*Freeland,* 790 F. Supp. 2d 994 (D. Minn. 2011) (*internal citations omitted*). In determining whether a party has made a prima facie showing, the Court does not make any credibility determinations or consider challenges to the moving party's evidence. *Id.*[17]

Becker clearly met her *prima facie* standard by presenting the trial court with more than sufficient evidence supporting her punitive damage

[17]An actual award of punitive damages under Minnesota Law requires that plaintiff meet a "clear and convincing" standard. *Freeland*, 790 F. Supp. 2d 991, 995. "The clear-and-convincing standard is satisfied when "the evidence is sufficient to permit the Jury to conclude that it is 'highly probable' that the defendant acted with deliberate disregard to the rights or safety of others." *Id.* (*internal citations omitted*).

claim. Most of the evidence came from the depositions of FTI's own employees, which established that FTI knew it was selling defective floats that were being installed on aircraft. CP 369-370. Mr. Olson, FTI's Applications Engineer and Inside Sales Manager, was concerned that FTI was making bad parts, selling bad parts, and that those bad parts were being installed on aircraft. CP 369-370. Olson acknowledged: "It was a bad situation". CP 369. Yet, FTI did nothing to stop its practice of defectively welding and approving carburetor floats. FTI knowingly continued to supply defective floats for seven years without a fix, without a change in quality assurance and without any type of post-sale warning.

Olson testified:

Q. You were selling them defective floats, right?
A Correct
...
Q You understood, though, that Precision was selling the Delrin floats that your company welded they were going onto aircraft engines?
A. Yes.

CP 370.

Olsen went on, "I know it can affect engine performance." CP 370. Olson knew it could cause engine flooding and stoppage. CP 360. This attitude caused accidents, and deaths: from 1999 through the date of the accident more than 110 floats in the field filled with fuel and failed, many of which caused engine problems and engine failure on aircraft. CP 289.

FTI was the welding expert and assembled the final float product. App. E, CP 642-646. Dr. Paul J. Gramann, an expert witness for Becker, submitted a declaration stating that "FTI should have known that their practice of building floats with misaligned parts would result in failed weld-seams when the parts were put into service." App. E, CP 644. Further Dr. Gramann opined that "FTI should have known that if it built floats with misaligned parts, the float may eventually leak even after passing FTI's own leak test and Precision Airmotive's leak test." *Id.* Knowing, as it did, that it could not reliably meet the acknowledged and known hermetically sealed requirement, FTI chose to continue to manufacture, approve, and sell floats that were "leakers" that it knew were being used in general aviation aircraft. FTI also manufactured leak test equipment that would have detected nearly 100% of the leakers, but refused to use it, instead continuing to approve and sell leakers. CP 369. Dr. Gramann compared the measurements of the subject float to the specifications for the float and opined that FTI should have been aware of the out of tolerance condition after it welded the subject float. App. E, CP 645. Dr. Gramann further testified that production documents for the float did not require Precision Airmotive to check each float to determine whether it met specifications, nor could Precision check the weld quality after the float was welded by FTI. *Id.* Dr. Gramann stated: "FTI was solely

responsible for determining whether each 30-804 met design dimensions and specification" and "FTI should have never sent the subject float to Precision." *Id.* Despite this, the trial court denied Becker's Motion. The trial court hand-wrote "...DENIED. No prima facie showing made." CP 231-232. This ruling was contrary to the evidence before the court, and contrary to the mandatory amendment language in the Minnesota statute.

VI. CONCLUSION

Becker requests that the Court reverse the trial court's Order Granting Summary Judgment to FTI, and hold that federal law does not preempt state law standards of care in aircraft product liability actions. In the alternative, Becker requests that this Court reverse the trial court's Order Granting Summary Judgment to FTI, and find that: (1) Becker properly pleaded violations of federal law, and/or; (2) FTI waived the affirmative defense of federal preemption by not raising it in the pleadings.

In the second alternative, Becker requests that this Court reverse the trial court's Order Granting Summary Judgment to FTI, and allow Becker to file an Amended Complaint to allege more specific violations of federal law against FTI.

In addition to the above, Becker requests that the Court reverse the Order of the trial court denying Becker's Motion to Amend to Include

Punitive Damages Against FTI, and remand with instructions that Becker be given leave to file an Amended Complaint against FTI with claims for punitive damages under Minnesota Law.

Respectfully submitted this 13th Day of February, 2015.

AVIATION LAW GROUP, PS

By: _____

Robert F. Hedrick, WSBA No. 26931
James T. Anderson III, WSBA No. 40494

Attorneys for Plaintiff/Appellant
Estate of Virgil V. Becker, Jr.

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that the foregoing and following documents were served upon the interested parties, on the date signed, and in the manner indicated, below, and were also filed Washington Court of Appeals, Division 1:

1. Brief of Appellant

Melissa O'Loughlin White Cozen O'Connor 1201 3rd Avenue, Suite 5200 Seattle, Washington 98101-3071 *Attorneys for Defendants AVCO Corporation*	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile (X) Via U.S. Mail (X) Via E-mail ( ) Via E-Service
Francis S. Floyd Floyd, Pflueger & Ringer, P.S. 200 West Thomas Street, Suite 500 Seattle, Washington 98119 *Attorneys for Defendant Forward Technologies Industries, Inc.*	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile (X) Via U.S. Mail (X) Via E-mail ( ) Via E-Service

Signed this 13th day of February, 2015, at Seattle, Washington

James T. Anderson III

Appendix A: Precision Airmotive Purchase Order to FTI (CP 298).

02-02-99 08:48 PRECISION AIRMOTIVE

PRECISION

AIRMOTIVE CORPORATION

ACCESSORIES / PARTS
3220 100TH ST. SW #E
EVERETT, WASHINGTON 98204
(425) 353-8181 - FAX (425) 353-8992
FAA REPAIR STATION NO. PS2R745N

PURCHASE ORDE

OUR P.O. NUMBER MUST APPEAR ON ALL INVOICES, PACKAGES, PACKING SLIPS AND CORRESPONDENCE.

PURCHASE ORDER NO.	PAGE
54132	1

P.O. DATE	ORDER TYPE	CHANGE / CANCEL
02-02-99	RESALE	02-02-9

024080
FORWARD TECHNOLOGY IND., INC.
13500 COUNTY RD 6
MINNEAPOLIS, MN 55441

FAX: 612-559-4738
PHONE: 612-557-5518

SHIP TO

PRECISION AIRMOTIVE
3220 100TH STREET SW #E
EVERETT WA 98204

BUYER	PAYMENT TERMS	ACKNOWL.	CONFIRM	F.O.B.	SHIP VIA	COLL. PPD.
TOMME	NET 30	YES	YES		UPS 972-100	

LINE	QTY. ORDERED BLANKET TYPE	U/M	OUR ITEM NUMBER / DESCRIPTION	YOUR ITEM NUMBER	UNIT PRICE / ADJUSTED DATE	EXTENDED PRICE	CHANGE / CANCEL
			SPECIAL INSTRUCTIONS 1) PRECISION TO SUPPLY 2) 30-208, 30-209L, 30-209R 3) SETUP-$420.00 4) WELD - $4,950.00 5) 9 DAYS AT $550/DAY				
001	3,000	EA	S9671 30-804SP501--F FLOAT, SEMI-FINISHED **SPECIAL COMMENTS** THIS PURCHASE ORDER IS SUBJECT TO THE TERMS AND CONDITIONS OF YOUR NON-DISCLOSURE AGREEMENT WITH PRECISION AIRMOTIVE CORPORATION DATED 4-18-97. YOU MAY USE THE REFERENCED DRAWING ONLY IN PERFORMANCE OF THIS PURCHASE ORDER. MANUFACTURE IN ACCORDANCE WITH PRECISION AIRMOTIVE DRAWING(S) AND SPEC(S) REFERENCED ABOVE. CERTIFICATE OF COMPLIANCE DOCUMENTING THAT PARTS WERE MANUFACTURED PER DRAWING, REVISION, DATE, SPECIFICATIONS, TEST RESULTS, ETC., IS REQUIRED WITH EACH SHIPMENT. (NO BLANKET TYPE STATEMENTS ACCEPTABLE). FIRST ARTICLE INSPECTION REPORT IS REQUIRED WITH FIRST SHIPMENT. PROTECTIVE PACKAGING REQUIRED FOR ALL SHIPMENTS. NO FOREIGN MANUFACTURES. **INSPECTION REQUIRED** 3000 DELIVERY DATE 03-15-99		1.790	5370.000	

EXEMPT NO. 1-059-486

PRECISION AIRMOTIVE CORPORATION

X Tomme Blankenship
AUTHORIZED SIGNATURE

*** 5370.000
TOTAL EXTENDED PRICE

COMMENTS

Terms & Conditions: For suppliers other than original Mfg. All aircraft parts must be genuine PMA/FAA certified parts. Vendor must be able to furnish Certification if requested. All parts are subject to Precision Airmotive Corp. acceptance inspection.

FTI0000159
PLEASE ACKNOWLEDGE PROMPTLY

VENDOR

Appendix B: Affidavit of Richard H. McSwain, Ph.D., P.E. (CP 547-550).

AFFIDAVIT OF RICHARD H.
McSWAIN, PH.D., P.E.

STATE OF FLORIDA)
) ss.
County of Escambia)

BEFORE ME, the undersigned authority, duly authorized to take acknowledgements, personally appeared Richard H. McSwain, Ph.D., P.E., after being duly sworn, deposes and says that:

1. I am a Consulting Materials Engineer and Principal Engineer with McSwain Engineering, Inc. in Pensacola, Florida. I have a Bachelor of Science in Materials Engineering, a Master of Science in Materials Engineering, and a Doctor of Philosophy in Materials Science and Engineering. My Curriculum Vitae is attached hereto, as Exhibit 1. I am submitting this affidavit based on my personal knowledge and experience.

2. I have been employed in materials engineering and materials failure analysis continuously since 1977.

3. I am currently a registered professional engineer in the state of Florida by examination in both metallurgical engineering and mechanical engineering. I am also a registered professional engineer in the state of Alabama.

4. I was a materials engineer and supervisory materials engineer with the U.S. Navy with responsibilities for investigating crashes of fixed and rotary wing aircraft, preparation of inspection procedures, and materials engineering laboratory support to naval aircraft rework.

5. During my career with the U.S. Navy and in my own firm, I have analyzed thousands of failures in both metallic and non-metallic components.

6. My laboratory has extensive materials failure analysis capability with state-of-the-art optical microscopes, two environmental chamber scanning electron microscopes, x-ray microanalysis, Fourier Transform Infrared microanalysis, and materials testing equipment. My laboratory was designed to facilitate the inspection and analysis of failed and accident-related components.

7. I have been retained by the plaintiffs in the case Estate of Brenda Houston, et al. v. Avco Corporation, et al. to provide materials engineering, failure analysis, and engineering investigation services.

8. The subject accident, which occurred on July 27, 2008, involved a Cessna 172N, N75558, S/N 17267807, which crashed while maneuvering near McMurray, Washington.

9. The subject Cessna 172N was equipped with a Lycoming O-320-H2AD engine, S/N L-4858-76, and an overhauled Precision Airmotive MA-4SPA carburetor, P/N 10-5217, S/N PAM 241217.

10. The subject Precision Airmotive MA-4SPA, P/N 10-5217, carburetor was installed on the subject engine on June 20, 2001, and had 2,665 hours of operation at the time of the accident.

11. The subject Precision Airmotive MA-4SPA carburetor, P/N 10-5217, was equipped with a Precision Airmotive Advanced Polymer (Delrin) float, P/N 30-804.

12. Precision engineering drawings show that the Float Body, P/N 30-208 (Exhibit 2), and the Float Lid, P/N 30-209 (Exhibit 3), are to be assembled by welding the lid onto the body. Critical dimensional requirements were specified for the assembled float on the Precision Airmotive Advanced Polymer (Delrin) Float Assembly drawing, P/N 30-804 (Exhibit 4).

13. The subject Precision Airmotive Advanced Polymer (Delrin) float, P/N 30-804, was assembled by joining the float plate to the float body using hot plate welding by Forward Technologies Industries, Inc. (FTI) under contract with Precision Airmotive. A Precision Airmotive purchase order with Forward Technologies Industries, Inc. for float welding is attached as Exhibit 5. The Precision Airmotive purchase order stated, "MANUFACTURE IN ACCORDANCE WITH PRECISION AIRMOTIVE DRAWING(S) AND SPEC(S) REFERENCED ABOVE." The Precision Airmotive parts listed on the contract to be hot plate welded were the P/N 30-208 float body and P/N 30-209 lids. Hot plate welding is a plastic part assembly technique which utilizes heating induced melting of the plastic components followed by contact pressure to join the parts.

14. Laboratory examination of the subject Precision Airmotive MA-4SPA, P/N 10-5217, carburetor revealed that the right pontoon of the Precision Airmotive Advanced Polymer (Delrin) float was filled with fuel to a near-full condition. Laboratory examination also revealed that the leak point on the pontoon was at the hot plate welded joint between the float lid and the float body.

15. Fuel leakage into the Precision Airmotive Advanced Polymer (Delrin) float is a critical failure mode. Precision Airmotive warranty claims for the Precision Airmotive MA-4SPA carburetor show that fuel in one pontoon of the Precision Airmotive Advanced Polymer (Delrin) float, P/N 30-804, can cause an engine malfunction (Exhibit 6).

16. The Federal Aviation Administration, the Swiss Confederation Aircraft Accident Investigation Bureau, the Swiss Federal Office of Civil Aviation, and Precision Airmotive have all recognized that fuel leakage into a Precision Airmotive Advanced Polymer (Delrin) float pontoon can lead to engine malfunction (Exhibit 7).

17. I have reviewed the Motion for Summary Judgment filed by Forward Technologies Industries, Inc. which claims that Forward Technologies Industries, Inc. only provided a service to Precision Airmotive in performing the hot plate welding of the subject float lid to the float body and did not manufacture the subject float.

18. The hot plate welding of the subject float lid to the float body was an assembly step for the float apart from which the float would not have been a functional part. The reference book *Fundamentals of Modern Manufacturing: Materials, Processes and Systems* (Exhibit 8) states: "Manufacturing processes can be divided into two basic types: (1) processing operations and (2) assembly operations." It further states: "An assembly operation joins two or more components in order to create a new entity, which is called an assembly, or sub-assembly, or some other term that refers to the joining process (for example, a welded assembly is called a weldment)." The reference book *Plastics Failure Guide: Cause and Prevention* (Exhibit 9) in Section 5.8 Secondary Operations, states: "Many products are not ready for the marketplace until a variety of secondary operations are performed following the manufacture of the part. Some of the major secondary operations are joining methods (heat fusion or welding, ultrasonic sealing, adhesive bonding), surface treatment or decorating (painting), printing, cutting or punching to size and shape, machining, and assembly of components by snap fit and other methods." The reference book *Plastic Part Technology* (Exhibit 10) in Chapter 10, "Assembly of Plastic Parts" states: "Most plastic parts are attached, in some manner, with other plastic or nonplastic parts to form an assembly." It further states: "Finally, the assembly process should maximize the functionality of the plastic material and the design." Thus, it is clear that Forward Technologies Industries, Inc. performed a critical step in the manufacturing of the subject welded Precision Airmotive Advanced Polymer (Delrin) float assembly.

19. The successful welding of the subject-type Precision Airmotive Advanced Polymer (Delrin) float lid to the Precision Airmotive Advanced Polymer (Delrin) float body requires that the two components be correctly manufactured to the dimensions specified in the engineering drawings to achieve a successful bond. The subject float leaked at the seam that was hot plate welded by Forward Technologies Industries, Inc.

20. Forward Technologies Industries, Inc. was tasked under purchase order with Precision Airmotive to produce a sealed float that would undergo hydrostatic testing by Precision Airmotive per Precision Airmotive Engineering Specification

PES-4495 (Exhibit 11). Forward Technologies Industries, Inc. depositions revealed that some float lids and float bodies did not properly fit for the hot plate welding assembly process. In these cases, Forward Technologies Industries, Inc. would mechanically force the defectively manufactured float components to fit during the hot plate welding process, resulting in trapped residual stresses. The reference book *Joining of Plastics: Handbook for Designers and Engineers* (Exhibit 12) states in Section 2.1 Avoiding Part Distortion, "The most common problem encountered in plastic part assembly is parts that do not fit together properly. In most cases, this problem is due to parts that are distorted or out of tolerance." Also, in Section 10.1.3 Disadvantages, "3. *Stresses* The process can cause stresses in the bond area that result in stress cracks." Thus, the trapped residual stresses in the subject-type Precision Airmotive Advanced Polymer (Delrin) welded pontoon could result in a float passing leak testing by Precision Airmotive and subsequently leaking while in-service as a result of the improper assembly.

21. The quality of the weld (and trapped residual stresses) in the subject failed Precision Airmotive Advanced Polymer (Delrin) float P/N 30-804 could not be non-destructively determined by Precision Airmotive after assembly by Forward Technologies Industries, Inc. Precision Airmotive relied on Forward Technologies Industries, Inc. to properly weld the float per the Precision Airmotive Float Assembly drawing P/N 30-804 and the float assembly welding purchase order.

STATE OF FLORIDA)
) ss
COUNTY OF ESCAMBIA)

The foregoing instrument was sworn to and acknowledged before me this 2nd day of July, 2012, by Richard H. McSwain, Ph.D., P.E., who is personally known to me.

RUTH HELEN CUTTING
MY COMMISSION # EE 113991
EXPIRES: August 23, 2015
Bonded Thru Notary Public Underwriters

RICHARD H. McSWAIN, PH.D, P.E.

My Commission Expires: August 23, 2015

(SEAL)

Commission No. EE 113991

Ruth Helen Cutting

Appendix C: 6/24/12 Declaration of Donald E. Sommer, P.E. (CP 811-813).

THE HONORABLE MONICA BENTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiff,

vs.

AVCO CORPORATION, et al.,

Defendants.

Case No. 10-2-26593-7 SEA

DECLARATION OF DONALD SOMMER

PAUL THOMAS CREWS, as Personal Representative of the ESTATE OF BRENDA HOUSTON, and as Personal Representative of the ESTATE OF ELIZABETH CREWS, and in his individual capacity,

Plaintiff,

vs.

AVCO CORPORATION, et al.,

Defendants.

Case No. 10-2-26602-0 SEA

I, DONALD SOMMER, declare:

1. I am President and owner of Aeroscope, Inc., Broomfield, Colorado. Aeroscope, Inc. is involved in forensic engineering, computer modeling, and failure analysis of airframes, engines and aircraft systems. I am a mechanical engineer with FAA pilot ratings as an Airline Transport Pilot, Commercial Pilot, Flight Instructor, Ground Instructor, and Airframe and Powerplant Mechanic. I also hold an FAA Inspection Authorization. My

engineering experience includes mechanical and hydraulic systems design and testing, instrumentation, design and production of new products and sub-components, and failure analysis. I have over 16,000 hours as pilot in command of aircraft of all types, including jet and piston engine aircraft. I have owned and operated aircraft maintenance facilities and business aircraft. I have conducted numerous aircraft accident investigations and reconstructions, wreckage inspections, and consulted in many aircraft accident cases. I have used the federal aviation regulations (14 CFR) throughout my career, and have a working understanding of them.

2. I have been employed by the Plaintiffs as an aviation consultant to investigate the crash of N75558 near McMurray, Washington on 27 July 2008. The Curriculum Vitae attached as Exhibit A to this Affidavit is a true and correct record of my qualifications.

3. There are no specific federal regulations or standards governing carburetor component part design, manufacture or operation. One general regulation, 14 CFR 33.35, provides in part:

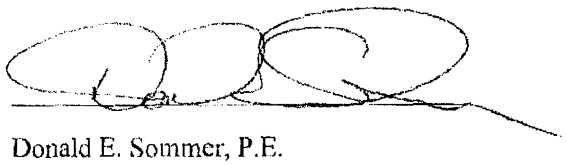
   (a) The fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout the complete operating range of the engine under all flight and atmospheric conditions.

   An earlier version of this is found at Civil Aviation Regulation (CAR 13.110(a)).

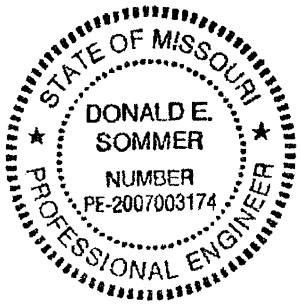
4. The accident flight was being conducted under 14 CFR 91. 14 CFR contains the federal regulations governing aviation. In order to lawfully operate civil aircraft in the U.S., the aircraft must be "in an airworthy condition" pursuant to 14 CFR part 91.7. 14 CFR 3.5 defines *Airworthy* as "the aircraft conforms to its type design and is in a condition for safe operation." Thus, aircraft and their component parts must conform to their approved design and must be in a condition safe for flight. This includes carburetors and their component parts such as carburetor floats.

5. In this case the carburetor float was not airworthy in that it did not conform to its type design and was not in a condition for safe operation on any aircraft under the federal regulations. It contained a manufacturing defect in the weld seam, created by FTI, which caused it to leak and which allowed the carburetor to deliver an inappropriately rich fuel mixture to the engine, causing it to flood and fail. It did not conform to its design requirements which required that the float be impermeable to fuel and not leak.
6. The subject carburetor float does not meet the requirements of any federal aviation regulation because it leaked. The float contained a manufacturing defect. There is no federal aviation regulation which allows use of this or any defective part on an aircraft.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 24 day of July, 2012, at Broomfield, Co.



Donald E. Sommer, P.E.



Appendix D: 11/2/11 Declaration of Donald E. Sommer, P.E.
(CP 1275-1283).

THE HONORABLE PATRICK OISHI
NOVEMBER 4, 2011 AT 11:00 AM
WITH ORAL ARGUMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ESTATE OF VIRGIL VICTOR BECKER, JR., by its Personal Representative, Jennifer L. White, Plaintiff, vs. AVCO CORPORATION; PRECISION AIRMOTIVE LLC; VOLARE CARBURETORS LLC; MARVEL-SCHEBLER CARBURETORS LLC; TEMPEST PLUS MARKETING GROUP LLC; AERO ACCESSORIES, INC.; FORWARD TECHNOLOGIES INDUSTRIES, INC.; SYNERGY SYSTEMS, INC.; CACHMERE MOLDING, INC.; CREST AIRPARK, INC.; and ESTATE OF BRENDA L. HOUSTON, by its Personal Representative PAUL THOMAS CREWS, Defendants.	Case No. 10-2-26593-7 SEA
PAUL THOMAS CREWS, as Personal Representative of the ESTATE OF BRENDA HOUSTON, and as Personal Representative of the ESTATE OF ELIZABETH CREWS, and in his individual capacity, Plaintiff, vs. AVCO CORPORATION; PRECISION AIRMOTIVE LLC; VOLARE CARBURETORS LLC; TEMPEST PLUS MARKETING GROUP LLC; AERO ACCESSORIES, INC.; FORWARD TECHNOLOGIES INDUSTRIES, INC.; CACHMERE MOLDING, INC.; and CREST AIRPARK, INC. Defendants.	Case No. 10-2-26602-0 SEA **AMENDED DECLARATION OF DONALD SOMMER IN SUPPORT OF PLAINTIFFS' JOINT RESPONSE IN OPPOSITION TO DEFENDANT AUBURN FLIGHT SERVICE'S MOTION FOR SUMMARY JUDGMENT**

LANDYE BENNETT BLUMSTEIN LLP
Attorneys at Law
1300 SW Fifth Avenue, Suite 3500
Portland, Oregon 97201
503.224.4100
503.224.4133 facsimile

I, DONALD SOMMER, declare:

1. My name is Donald E. Sommer. I am the president and primary owner of Aeroscope, Inc. of Broomfield, Colorado, which is involved in forensic engineering and failure analysis of airframes, engines and aircraft systems. I have a mechanical engineering degree from the University of Michigan; I am a registered professional engineer; I am an FAA licensed airframe and powerplant (A&P) mechanic with inspection authorization (IA); I am an experienced pilot with airline transport, commercial, ground instructor and certified flight instructor ratings for many different types of aircraft; and have for many years served and testified as an expert in aircraft accident reconstruction and failure analysis, aircraft and pilot performance, and aircraft instrumentation systems and testing, and I have investigated numerous accidents which have been attributed to malfunctions and failures of aircraft carburetors, all of which qualify me to render these preliminary opinions in this matter I have been retained by plaintiff's counsel as an expert in this case, and to reconstruct the accident and determine the cause of the July 27, 2008 crash of the Cessna 172 aircraft registered as N75558 ("the aircraft" or "the subject aircraft") near McMurray, Washington. My Curriculum Vitae is attached as Exhibit A and the listing of items I have reviewed is attached as Exhibit B.

2. I have also reviewed the motion for summary judgment filed by defendant Auburn Flight Services (Auburn), and its supporting materials. Auburn ignores all of the substantial evidence establishing that the cause of this accident was a sudden loss of engine power, stemming from a failure in its carburetor component.

3. Inspection of the carburetor of the subject aircraft revealed that one of its Delrin float pontoons was almost completely filled with fuel. Further inspection at McSwain Engineering, Inc. revealed markings indicative of the float rubbing against the carburetor bowl wall. Inspection of the surrounding area where installed revealed blue staining caused by the dye used in aviation fuel, including staining on the weld seam of the float. These stains are indicative of excessive fuel flow through the engine fuel system which would result in an

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extremely rich fuel/air mixture being delivered to the cylinders of the engine. This excessively rich fuel/air mixture is what is expected during operation of an engine equipped with a carburetor whose Delrin float has leaked, filling with fuel and having the float rub against the wall of the carburetor float bowl wall. Impact signatures on the aircraft propeller indicate that there was little to no rotational movement of the propeller at the time of impact. This fact was confirmed in deposition testimony of the Lycoming investigator[1] and indicates complete power failure of the engine. The subject accident occurred 5 minutes after the aircraft initiated a climb from an altitude of approximately 1,600 to approximately 3,000 feet and then suddenly began a descent until impacting terrain at approximately 2,200 feet.

4. The aircraft was equipped with a Lycoming O-320-H2AD engine. The MA-4SPA carburetor component of the engine's fuel delivery system has had a long history of failures and defects which include leaking floats, loose bowl attachment screws and other design flaws. The fuel absorption/sinking float issue has resulted in several float material changes over the years, with each newly introduced float material itself proving defective and prone to fuel absorption/leaking, up to and including the Delrin float on the subject aircraft's engine. The Delrin float also was too large for the carburetor bowl, violated the design requirements for float-bowl clearance that had long been established for these carburetors, and was prone to float-to-bowl rubbing and sticking. The Delrin floats were plagued with problems including failure of the weld seam between the lid of the float pontoon the float body which allowed fuel to enter and fill the pontoon and with rubbing of the float against the wall of the float bowl. There are many instances in the field of both the carburetor float being filled with fuel and float sticking resulting in engine failure. These SDRs are a good historical indication of problems in the field and have been used in the past for analysis. Several of these have been reviewed in this case and are applicable.[2]

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[1] Deposition testimony of Mark Platt, 28 July 2011, Page 42

[2] Moffett deposition Exhibit 94

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5. My investigation of this accident is ongoing. However, based on the evidence discussed above and my analysis of the aircraft flight track, weather data, information about the pilot, Brenda Houston, and analysis of the physical evidence, it is my opinion that the accident was caused by a sudden loss of engine power when the aircraft was being flown in Visual Meteorological Conditions (VMC) approximately one minute before impact with terrain, as a result of the carburetor flooding.

6. Analysis of the radar data and weather information is ongoing, however even at this preliminary stage all data indicates that the aircraft was not flown into Instrument Meteorological Conditions (IMC) prior to the sudden loss of engine power, contrary to what Auburn suggests in its motion.

7. Auburn's motion discusses the weather and alleged flight conditions encountered by the accident aircraft. The closest weather reporting station to the accident site was located at the Arlington, Washington airport which had an operational AWOS (automated weather observing system). This system was reporting weather every 20 minutes. The automated weather observations for the time period leading up to and immediately after the time of the subject crash indicate a steady improvement in both surface visibility and cloud formations with dissipation of clouds and elimination of some layers. Analysis of the flight path of the subject aircraft shows at least eight (8) turns and an increase in altitude which is indicative of an aircraft which is flying in a manner so as to maintain separation from clouds to stay within VMC.

8. Auburn is incorrect when it contends in its papers that the aircraft violated Visual Flight Rules (VFR) minimums, including when the aircraft was flying over the Arlington Airport. Instead, the evidence shows Auburn erroneously used weather information recorded well before the time of the accident and the weather was actually improving during this period of time.

9. There was also nothing dangerous, improper, or even concerning about Ms. Houston attempting the flight in VMC that day and attempting to maintain flight in VMC. As

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explained above, the weather conditions were improving. Moreover, Ms. Houston was a professional airline pilot, flying for United Airlines out of Seattle-Tacoma International Airport, with substantial experience flying in IMC. Ms. Houston could have easily contacted the controlling ATC facility and obtained an IFR clearance if maintaining VFR weather conditions became a problem. That she did not switch to IFR, or otherwise communicate any concern with the weather, is evidence that she was able to maintain the aircraft in VMC conditions prior to the engine failure. Analysis of the weather further supports that the aircraft did not enter into any clouds prior to the engine failure.

10. Auburn had performed the most recent annual inspection of the subject aircraft on March 24 to 31, 2008. An annual inspection must be performed by an Airframe and Powerplant mechanic (A&P) holding an FAA-issued Inspection Authorization (IA). The annual was signed-off by Auburn's Director of Maintenance, and an IA holder, Gregory Woodruff, whose deposition was taken in this matter on October 14, 2011.

11. Auburn had a duty in accordance with Federal Air Regulations to inspect the aircraft and return the aircraft to service in an airworthy condition. 14 CFR § 43.15(a)(1) states that each person performing an inspection, such as the annual performed on the subject aircraft, shall "Perform the inspection so as to determine whether the aircraft, or portion(s) thereof under inspection, meets all applicable airworthiness requirements".

12. 14 CFR § 3.5 defines the term "Airworthy" as "the aircraft conforms to its type design and is in a condition for safe operation."

13. Woodruff was not specifically familiar with 14 CFR § 3.5,[3] even though this is the one and only section of Title 14 which provides a definition of the term "Airworthy". Woodruff did agree, however, that an annual inspection requires the IA to make sure the aircraft is airworthy, which means in a condition for safe operation.[4]

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[3] Deposition testimony of Gregory Woodruff, 14 October 2011, Page 71

[4] Deposition testimony of Gregory Woodruff, 14 October 2011, Page 72

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503.224.4133 (facsimile)

14. Lycoming, as the engine manufacturer, uses outside manufacturers to supply numerous parts and components used in the manufacturer of the engine and these components and parts are recognized as being part of the type certificated engine. Specifically, the MA-4SPA carburetor is the only component specified on the Type Certificate for the subject engine to be used in the fuel delivery system. Lycoming, as the engine manufacturer, maintains design control of the carburetors used on their engines and the design specifications for the carburetors used on each specific engine model is proprietary to Lycoming.

15. Aircraft, engine and component manufacturers will often issue service publications, including service bulletins, service information letters and service advisories which may contain information specific to an airframe, engine or component. Many of these service publications will not be addressed in Airworthiness Directives for the FAA but may still reflect safety of flight issues which need to be addressed to ensure that the aircraft is maintained in a condition which will ensure safe operation. The engine manufacturer's carburetor supplier, Precision Airmotive, issued Service Information Letter (SIL) MS-11 on 21 September 2005, revised on 29 September 2005 which affected the MA-4SPA carburetor as installed in the subject aircraft advising that a new solid foam material float with part number 30-864 was available. A true and correct copy of SIL MS-11 is attached as Exhibit C.

16. The carburetor supplier issued SIL MS-12 on 24 February 2006 advising of the potential of improper carburetor operation due float issues including fuel leaking into the float. Corrective action stated that the carburetor "should be removed and sent to a qualified repair station for inspection and repair." A true and correct copy of SIL MS-12 is attached as Exhibit D.

17. The carburetor supplier then issued Mandatory Service Bulletin MSA-13 on January 30, 2008, two months prior to the completion of the annual inspection of the subject aircraft. MSA-13 stated in reference to the Delrin floats, as installed in the subject carburetor, that there was a "possibility of leaks through the welded seam. This allows a portion of the float

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to fill with fuel and thereby reduce the buoyancy of the float, which could lead to flooding or poor idle performance." MSA-13 also stated that in some cases "there was no operational difficulties at all." MSA-13 stated the carburetor should be inspected within 30 days and at 30 day intervals until the float was updated to the new solid foam float, part number 30-864, offered by the carburetor supplier. Finally, MSA-13 stated that if the engine was over the manufacturer's recommended TBO, the float should be replaced with the new 30-864 float. A true and correct copy of MSA-13 is attached as Exhibit E.

18. The carburetor supplier issued Mandatory Service Bulletin MSA-14 on 7 February 2008. MSA-14 stated the carburetor should be inspected for evidence of fuel stains and for security of the float bowl to the throttle body and the associated attaching screws and locktab washers. A true and correct copy of MSA-14 is attached as Exhibit F.

19. The engine manufacturer had not provided the flying community or the FAA with any information as to the true danger associated with using any carburetor equipped with the Delrin floats. However, the testimony of Woodruff reflects his awareness of the long history of issues with this carburetor supplier's carburetor product line in the past. Consequently, he should have at least researched the carburetor supplier's publications and advised the aircraft owner of and recommended compliance with the above-mentioned publications, which reflect potential safety issues, particularly for someone familiar with the MS-4SPA carburetor's long history of problems. However, he did not even consult them. Had the inspections recommended and mandated by these carburetor supplier service publications been performed, and the actions required by them been taken, the defective floats should have been replaced and there would have been no failure of the carburetor nor an associated power loss by the engine. Notably, as the engine was beyond its manufacturer's recommended TBO, following MSA-13 would have resulted in the hollow and defective Delrin float, found after the accident to be filled with fuel, being replaced with the new solid foam float.

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20. However, Auburn, as a matter of its ordinary practice, does not check any service bulletins that were not referenced by or attached to FAA issued Airworthiness Directives during annual inspections, and followed the same practice during its annual inspection of the subject aircraft.[5] Therefore Auburn not aware of this safety information, even though Auburn did regular maintenance on a fleet of 6 Piper Warriors that all contain Lycoming O-320 engines, as the subject aircraft did.

21. Auburn does not subscribe to any service which provides manufacturer service bulletins other than that which is required by status as a Cirrus Service Center which only provides service bulletins applicable to and issued by Cirrus Aircraft. As a result of this lack of information, Auburn does not consult any service bulletins into their maintenance unless required by AD or specifically requested by the customer.[6] A maintenance operation such as Auburn should advise the customer of any pertinent maintenance publications, not the other way around.

22. Several of the aforementioned carburetor supplier-issued service bulletins were deemed as "mandatory" by the supplier. Woodruff pays no mind to this description if the service bulletin is not associated with an AD, and instead likens the "mandatory" service bulletin to "an order for a sandwich."[7] This testimony of Auburn's Director of Maintenance is a perfect example of the dangerous and negligent attitude, behavior and operational philosophy of Auburn.

23. In summary, Auburn failed to exercise reasonable and ordinary care to ensure the subject aircraft was in airworthy condition and this failure was a contributing cause of the subject crash. A reasonably careful aircraft maintenance facility and IA mechanic, under these circumstances, should have ensured that the aircraft was in an airworthy condition before signing it off.

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[5] Deposition testimony of Gregory Woodruff, 14 October 2011, Page 59

[6] Deposition testimony of Gregory Woodruff, 14 October 2011, Page 45

[7] Deposition testimony of Gregory Woodruff, 14 October 2011, Page 47-

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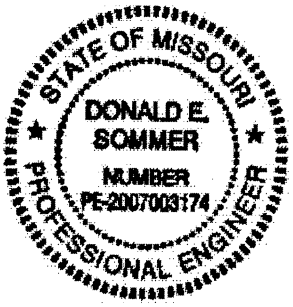
24. The two logbook entries dated 6/5/08 and 7/22/08 involve "changed oil, replaced filter", "replaced landing lights", and "inspected seat tracks". These are procedures that do not involve checking and complying with carburetor service bulletins, and they have nothing to do with, nor do they somehow supersede Auburn's responsibilities for its own annual inspection of the subject aircraft.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 2nd day of November, 2011, from Providence, RI.



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Appendix E: Declaration of Paul J. Gramann, Ph.D (CP 642-646).

THE HONORABLE MONICA BENTON
JULY 13, 2012 AT 9:00 AM
WITH ORAL ARGUMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ESTATE OF VIRGIL VICTOR BECKER, JR., by its Personal Representative, Jennifer L. White, Plaintiff, vs. AVCO CORPORATION, et al., Defendants.	Case No. 10-2-26593-7 SEA **DECLARATION OF PAUL J. GRAMANN, Ph.D. IN SUPPORT OF PLAINTIFFS RESPONSE IN OPPOSITION TO DEFENDANT FORWARD TECHNOLOGIES INDUSTRIES MOTION FOR SUMMARY JUDGMENT**
PAUL THOMAS CREWS, as Personal Representative of the ESTATE OF BRENDA HOUSTON, and as Personal Representative of the ESTATE OF ELIZABETH CREWS, and in his individual capacity, Plaintiff, vs. AVCO CORPORATION, et al., Defendants.	Case No. 10-2-26602-0 SEA

I, PAUL J. GRAMANN, declare:

1. My name is Paul J. Gramann. I am the president of The Madison Group: PPRC, of Madison, Wisconsin, which is involved in providing consulting services, technical expertise and innovative technology to the plastics industry. I have a Doctorate in Mechanical Engineering from the University of Wisconsin-Madison, specializing in the failure analysis of plastic and rubber components, processing of polymers, and design of

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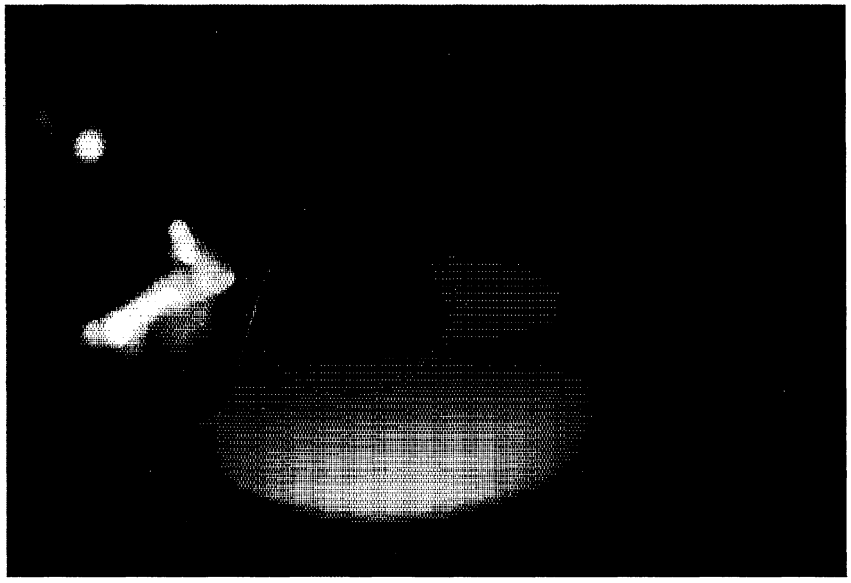
plastic parts. I am an Adjunct Assistant Professor at the University of Wisconsin-Madison, Mechanical Engineering Department. I am on the Editorial Board of the Journal of Plastics Technology, Past-Chair of the Failure Analysis and Prevention Group of the Society of Plastic Engineers, and Past-Chair of the Thermoset Division of the Society of Plastics Engineers. I have for many years served and testified as an expert in plastics failure cases, which, along with my education, qualify me to render these preliminary opinions in this matter. I have been retained by counsel for plaintiff Becker as an expert in this case to analyze the carburetor float at issue in the July 27, 2008, crash of the Cessna 172 aircraft registered as N75558 near McMurray, Washington. My Curriculum Vitae is attached as Exhibit A and the listing of items I have reviewed is attached as Exhibit B.

2. Inspection of the subject 30-804 float reveals that one float pontoon is almost completely full of liquid:



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According to the engineering diagrams and specifications for the 30-804, the float pontoon should be hermetically sealed, so as not allow any fuel or water to enter the pontoon chamber. Further inspection of the subject 30-804 float indicates that it is also not in dimensional compliance with engineering diagrams and specifications.

3. It is my opinion that the subject float leaked at the weld-seam where Forward Technologies (FTI) welded the float lid and body together when it manufactured the subject 30-804 float.

4. I have reviewed the deposition testimony of FTI employees Jim Nelson and Scott Olson. Based on that testimony, my review of the engineering diagrams and specifications, measurements taken of the subject float, and my inspection of the subject float, it is more likely than not that the actions of FTI contributed to the leak in the subject float.

5. Depositions of the employees reveal that FTI routinely forced out-of-dimension parts (float lids and bodies) into the welding machine before welding. When FTI then welded the lids onto the bodies, it created stresses in the finished 30-804 float. In plastics, these stresses act over time on the finished float as the individual parts try to deform to their original shape. Eventually, the deformation may cause the parts to separate at the weld seam.

6. FTI held itself out as an expert in plastic welding. As such, FTI should have known that their practice of building floats with misaligned parts would result in failed weld-seams when the parts were put in service. The leak testing methods employed by FTI were inadequate to ensure that the 30-804 float it was manufacturing was hermetically sealed. FTI deposition testimony indicates that it based their leak testing on that of Precision Airmotive. FTI should have known that if it built floats with misaligned parts, the float may eventually leak even after passing FTI's own leak test and Precision Airmotive's leak test.

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7. FTI was also required to produce parts within the dimensional tolerances outlined by the engineering diagrams. I have compared the measurements of the subject float with those on the specifications, and the float is out of dimensional tolerance in several areas. This condition indicates that the float was misaligned during welding, and thus subject to a defective weld which could leak. As such, FTI should have become aware of the out of tolerance condition after it welded the subject 30-804 float, and the float should have been rejected. Instead, FTI certified to Precision that it was in dimensional compliance. PES-4495 does not require Precision to confirm or determine whether each 30-804 sent by FTI meets its design dimensions. Therefore, FTI was solely responsible for determining whether each 30-804 met design dimensions and standards.
8. According to Precisions PES-4495, FTI was to weld the subject float lid to body with "a 65% minimum overlap of walls at weld." On the subject float, it appears likely that in the most likely area of the leak (area of blue staining) this overlap minimum has not been met. Since the weld cannot be fully inspected after completion (one cannot see the entire inside line of the weld, and much of the outside weld is covered by flash), Precision could not check the entire weld quality, and must rely on FTI's certification that it met the design specifications, and is hermetically sealed.
9. From a safety standpoint, FTI's manufacturing processes and controls were below the standard of care in the industry. FTI should have known that its practices would lead to leaking floats in the field. Further, FTI had a duty to understand how its products were being used, and that a leaking float could cause an aircraft crash. As a polymer assembly and welding expert, FTI had a duty to investigate the testing being done at Precision Airmotive and to make sure that the testing being done was adequate to ensure that defective floats did not make it onto the aircraft.
10. FTI should have never sent the subject float to Precision.

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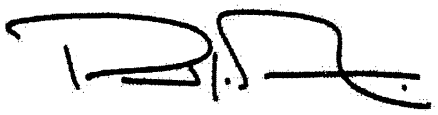
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 2nd day of July, 2012, at Madison, Wisconsin.



Paul J. Gramann, Ph.D

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Appendix F: Comparison of Washington CR 8(c) and Fed. R. Civ. P. 8(c)

Comparison of Washington CR 8(c) and Fed. R. Civ. P. 8(c)

(emphasis underlined)

Wash. Super. Ct. Civ. R. 8(c)	Fed. R. Civ. P. 8(c)
(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.	**(c) Affirmative Defenses.** **(1)** ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: • accord and satisfaction; • arbitration and award; • assumption of risk; • contributory negligence; • duress; • estoppel; • failure of consideration; • fraud; • illegality; • injury by fellow servant; • laches; • license; • payment; • release; • res judicata; • statute of frauds; • statute of limitations; and • waiver. **(2)** ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

Appendix G: *Schneider v. Wilcox Farms, Inc.*

2008 WL 2367183
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Bernadette SCHNEIDER, et al., Plaintiffs,
v.
WILCOX FARMS, INC., et al., Defendants.

No. C07-1160JLR. | June 6, 2008.

ORDER

JAMES L. ROBART, District Judge.

***1** This matter comes before the court on Defendants' motion for summary judgment (Dkt.# 18). Defendants argue that Plaintiffs cannot prove the necessary elements of a Washington Consumer Protection Act ("CPA") violation and that, in any event, federal preemption and state-law preclusion defeat the CPA claim. Defendants also contend that Plaintiffs' other claims lack merit. In addition to responding to the merits of these arguments, Plaintiffs (1) move for a Federal Rule of Civil Procedure 56(f) continuance so they may collect additional evidence and (2) contend that Defendants waived the affirmative defense of federal preemption by failing to plead it. The court agrees that ruling on Defendants' summary judgment motion at this time would be premature and that Defendants failed to plead the affirmative defense of federal preemption. The court therefore DENIES Defendants' motion for summary judgment (Dkt.# 18) with leave to renew their motion by filing it after July 7, 2008; GRANTS Plaintiffs' request under Rule 56(f) to conduct further discovery; and GRANTS Defendants' Rule 15(a)(2) request for leave to amend their Answer to include federal preemption as an affirmative defense.

1. Rule 56(f)

Plaintiffs move for a Rule 56(f) continuance. "Rule 56(f) requires affidavits setting forth the particular facts expected from the movant's discovery." *Brae Transp., Inc. v. Coopers & Lybrand,* 790 F.2d 1439, 1443 (9th Cir.1986); *see* Fed.R.Civ.P. 56(f); *see also* 28 U.S.C. § 1746 (providing that a properly prepared declaration is admissible in federal court with the same effect as an affidavit). Plaintiffs "must show how additional discovery would preclude summary judgment and why a party cannot immediately provide 'specific facts' demonstrating a genuine issue of material fact." *Mackey v. Pioneer Nat'l Bank,* 867 F.2d 520, 523-24 (9th Cir.1989).

Plaintiffs state that they have not yet had sufficient time to obtain final expert opinions about certain matters-such as the health benefits of the different kinds of Omega 3 fatty acids-as well as evidence about the impact of Defendants' conduct on other members of the public. (Resp.(Dkt.# 24) at 13; McDermott Decl. (Dkt.# 24-1) ¶ 15.) The court agrees because this evidence is central to their theory of liability and there is no indication that Plaintiffs have been dilatory in collecting it. In this purported class action, Plaintiffs contend, among other things, that Defendants' eggs contain a kind of Omega 3 fatty acid that has few health benefits and that consumers have been misled into believing that a harmful product is beneficial. (First Am. Compl. (Dkt. # 4) ¶¶ 1-22.) The deadline for disclosing expert testimony is July 7, 2008, and the deadline for the completion of discovery is September 12, 2008. (*See* Stip. to Am. Case Sched. (Dkt.# 23) at 1.) Granted additional time for discovery, Plaintiffs could conceivably demonstrate a genuine issue of material fact with respect to their claims. [1]

1 The court emphasizes, however, that it here makes no determination about whether Plaintiffs actually will demonstrate a genuine issue of material fact or whether a purported class should be certified. The court finds only that Plaintiffs are permitted additional time to conduct discovery to address the issues raised in Defendants' summary judgment motion.

***2** The court GRANTS Plaintiffs' motion under Rule 56(f) to conduct additional discovery. Plaintiffs state that they could respond adequately to a motion for summary judgment filed after July 7, 2008, (Resp. at 13), and the court will hold them to this assertion, absent extraordinary circumstances, because they now know exactly what aspects of their case Defendants are attacking. The court DENIES Defendants' motion for summary judgment with leave to renew their motion by filing it after July 7, 2008. The motion should be noted for consideration consistent with Local Rule W.D. Wash. CR 7(d).

2. Federal Preemption

Although Defendants argue that Plaintiffs' CPA claim is federally preempted, (Mot. at 11-15), they failed to assert federal preemption as an affirmative defense in their Answer. [2] Avoidance defenses such as federal preemption are waived if not raised in the pleadings. *See, e.g., Brannan*

v. United Student Aid Funds, Inc., 94 F.3d 1260, 1266 (9th Cir.1996); *DIRECTV, Inc. v. Barrett,* 311 F.Supp.2d 1143, 1146-47 (D.Kan.2004); *see* Fed.R.Civ.P. 8(c); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1271, 1278 (3d ed.2004). Nevertheless, the court GRANTS Defendants' request for leave to amend their Answer to include federal preemption as an affirmative defense. *See* Fed.R.Civ.P. 15(a)(2).

2 Contrary to Defendants' suggestion, their assertion of "primary jurisdiction" was not sufficient to put Plaintiffs on notice about an affirmative defense of federal preemption. Outside of the labor context considered in *San Diego Bldg. Trades Council v. Garmon* and its progeny, "primary jurisdiction" refers to a doctrine of abstention rather than of preemption, i.e., "it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 199 (1978) (citation and internal quotation marks removed); *see Boyes v. Shell Oil Prods. Co.,* 199 F.3d 1260, 1266 (11th Cir.2000) ("Abstention ... under the primary jurisdiction doctrine is rarely, if ever, appropriate when federal law preempts state law."). The difference is exemplified in Defendants' decision to move for summary judgment on the issue of federal preemption without referring to the primary jurisdiction doctrine.

End of Document

Appendix H: *Kopp v. Reardan/Edwall Sch. Dist. No. 009*

2009 WL 774122
Only the Westlaw citation is currently available.
United States District Court,
E.D. Washington.

Jeannie M. KOPP, a married woman, Plaintiff,
v.
REARDAN/EDWALL SCHOOL DISTRICT NO. 009, Defendant.

No. CV-07-216-LRS. | March 19, 2009.

Attorneys and Law Firms

Louis Rukavina, III, Louis Rukavina PS, Michael Bradley Love, Paine Hamblen Coffin Brooke & Miller, Spokane, WA, for Plaintiff.

Michael E. McFarland, Jr, Evans Craven & Lackie PS, Spokane, WA, for Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, IN PART

LONNY R. SUKO, District Judge.

*1 **BEFORE THE COURT** is the Defendant's Motion For Summary Judgment (Ct.Rec.25) and the Plaintiff's Motion To Strike Defendant's Defenses And Affirmative Defenses (Ct.Rec.35). Telephonic oral argument was heard on March 12, 2009. Michael B. Love, Esq., argued on behalf of Plaintiff. Michael E. McFarland, Esq ., argued on behalf of Defendant.

I. BACKGROUND

This case was removed from Lincoln County Superior Court based on federal question jurisdiction. In her First Amended Complaint, Plaintiff Jeannie M. Kopp asserts five claims against Defendant Reardan/Edwall School District: 1) failure to accommodate the Plaintiff's disability in violation of the Washington Law Against Discrimination (WLAD), RCW 49.60 et seq., by denying her request for leave; 2) intentional discrimination against the Plaintiff on the basis of disability, in violation of the WLAD, by denying Plaintiff's request for leave and subsequently terminating her employment; 3) retaliatory and wrongful discharge in violation of public policy in that Defendant retaliated against Plaintiff for raising concerns about matters in the workplace, and/or for asserting her rights to take medical leave, and by terminating her for exercising her rights as a union member to file a grievance and be represented by either union or legal counsel; 4) denying Plaintiff's leave request in violation of both Washington's Family Leave Act (WFLA)and the federal Family Medical Leave Act (FMLA); and 5) failure by Defendant to designate Plaintiff's leave as pursuant to the FMLA and to notify her of the same.

Defendant moves for summary judgment on all of Plaintiff's claims, asserting Plaintiff was not "disabled;" that even if she was "disabled," she was not denied a reasonable accommodation; that the Defendant had a legitimate, nondiscriminatory reason for not renewing Plaintiff's contract with the school district; that the Defendant was not "discharged," but rather her contract was not renewed for reasons that were not retaliatory or wrongful; Plaintiff received all of the leave to which she was entitled under the WFLA and the FMLA; and failure to designate Plaintiff's leave as pursuant to the WFLA or the FMLA does not give rise to liability under either Act.

II. DISCUSSION

A. Motion To Strike

Plaintiff asserts Defendant's motion for summary judgment should be denied because it is premised on defenses and affirmative defenses which were not asserted in Defendant's "Answer" to Plaintiff's Complaint. [1]

1 This was the "Answer" (Ct.Rec.4) filed on January 7, 2008 in response to Plaintiff's original complaint which had been filed in Lincoln County Superior Court and then was removed here by the Defendant. With leave of the court, Plaintiff filed a First Amended Complaint on September 10, 2008 (Ct. Rec. 19 and 20), but it appears Defendant has never filed an "Answer" specifically in response to the First Amended Complaint.

Fed.R.Civ.P. 8(b)(1) requires that in general, in responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it, and (B) admit or deny the allegations asserted against it by the opposing party. Fed.R.Civ.P. 8(c) requires that in responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.

In general, any matter not in issue under a simple denial of allegations in the complaint is an "affirmative defense"

and must be specifically pleaded as such in the answer. An affirmative defense is an assertion raising new facts and arguments that, if true, would defeat the plaintiff's claim, even if the allegations in the complaint are true. *Saks v. Franklin Covey Co.,* 316 F.3d 337, 350 (2nd Cir.2003). The test for determining whether a defense is "affirmative" or "avoidance" in nature is whether it would bar a right to recovery "even if the general complaint were more or less admitted to." *Wolf v. Reliance Standard Life Ins. Co. .,* 71 F.3d 444, 449 (1st Cir.1995). This also includes matters on which, as a matter of substantive law, defendant usually has the burden of proof if the case goes to trial. An "affirmative" defense for pleading purposes is a matter upon which the defendant bears the burden of proof or which does not controvert plaintiff's proof. *Brunswick Leasing Corp. v. Wisconsin Central, Ltd.,* 136 F.3d 521, 530 (7th Cir.1998).

***2** It appears to the court that the assertions made in Defendant's motion for summary judgment are in issue based on Defendant's simple denial of the allegations in Plaintiff's complaint. Hence, those assertions are not "affirmative" or "avoidance" defenses. Those assertions go directly to Plaintiff's *prima facie* case under the WLAD which she has the burden of proving (i.e., that she was "disabled;" that the Defendant failed to reasonably accommodate any such disability), as well as her burden of proving under the common law that she was discharged in violation of public policy, and her burden under the WFLA and the FMLA of proving that Defendant "interfered" with exercise of leave.

It is true that with regard to the WLAD claim, a defendant-employer bears the burden of proving that an otherwise reasonable accommodation would be an undue hardship to the employer's business. If the employer fails to reasonably accommodate the limitations of a disabled employee, such failure constitutes discrimination unless the employer can demonstrate such an accommodation would be an undue hardship to the employer's business. *Snyder v. Medical Serv. Corp.,* 98 Wash.App. 315, 326, 988 P.2d 1023 (1999). As a matter of substantive law under the WLAD, a defendant has the burden of proof with regard to "undue hardship" and so this is in the nature of an "affirmative" or "avoidance" defense. Here, the Defendant school district did not plead "undue hardship" as an affirmative defense. That said, the court fails to see that Defendant has specifically asserted it as a defense in its summary judgment papers. The Defendant's argument is that Plaintiff was not disabled, and even if she was, that she was fully and reasonably accommodated because she was given 16 weeks of leave (partly paid and partly unpaid). Defendant does not contend it denied leave because it would have caused "undue hardship." It says it granted the leave, even though it created a "hardship" for the school district. (See pp. 12–13 of Defendant's Memorandum Of Authorities at Ct. Rec. 27: "Ms. Kopp's extended leave essentially created a hardship to the District due to shortage of trained staff and the District's expenditure of funds to pay for training that Ms. Kopp was supposed to do").

In any event, for reasons discussed *infra,* the court is granting summary judgment to the Defendant on the Plaintiff's WLAD reasonable accommodation claim, thus rendering moot any issue as to whether it was incumbent upon the Defendant to plead "undue hardship" as an affirmative defense.

Plaintiff's Motion To Strike Defendant's Defenses And Affirmative Defenses will be denied.

B. Summary Judgment

1. Fed.R.Civ.P. 56 Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.,* 521 F.2d 1129 (9th Cir.), *cert. denied,* 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975). Under Fed.R.Civ.P. 56, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Semegen v. Weidner,* 780 F.2d 727, 732 (9th Cir.1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect the outcome of the suit under the governing law. *Anderson,* 477 U.S. at 248.

***3** The moving party has the initial burden to prove that no genuine issue of material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Matsushita,* 475 U.S. at

587. Nonetheless, summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual disputes regarding other elements of the claim. *Celotex,* 477 U.S. at 322–23.

2. WLAD Disability Discrimination

Under the WLAD, it is unlawful for an employer to discriminate against any person in the terms or conditions of employment or discharge any employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(2) and (3). If the employer fails to reasonably accommodate the limitations of a disabled employee, such failure constitutes discrimination unless the employer can demonstrate such an accommodation would be an undue hardship to the employer's business. *Snyder,* 98 Wash.App. at 326, 988 P.2d 1023.

A *prima facie* case of failure to reasonably accommodate a disability under the WLAD includes: (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality. *Davis v. Microsoft Corporation,* 149 Wash.2d 521, 532, 70 P.3d 126 (2003). The burden is on the employee to present a *prima facie* case of discrimination, including medical evidence of disability. *Pulcino v. Federal Express Co.,* 141 Wash.2d 629, 642, 9 P.3d 787 (2000). Only when the employee meets this burden, does the burden of proof shift to the employer to show that it had a legitimate, non-discriminatory reason for its adverse employment action against the employee.

a. Was Plaintiff Disabled?

Defendant contends Plaintiff's inability to handle the stress and anxiety caused by working for Dwight Cooper, the principal of the Reardan Elementary School, did not render her "disabled" to perform the essential functions of head cook at the school. Defendant contends Plaintiff experienced no more than "situational anxiety" over her encounter with Cooper.

***4** RCW 49.60.040(25)(a) defines "disability" as "the presence of a sensory, mental, or physical impairment that ... (i)[i]is medically cognizable or diagnosable; or (ii)[e]xists as a record or history; or (iii)[i]s perceived to exist whether or not it exists in fact." "A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter." RCW 49.60.040(25)(b). An impairment must have "a substantially limiting effect upon the individual's ability to perform her job" and "medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the effect that it would create a substantially limiting effect." RCW 49.60.040(25)(d)(i) and(ii). "[A] limitation is not substantial if it has only a trivial effect." RCW 49.60.040(e).

Based on the deposition testimony of Plaintiff's treating physician, Laurie Summers, M.D., (Ex. C to Ct. Rec. 34), the court finds there is a genuine issue of material fact whether Plaintiff had a "disability" that substantially limited her ability to perform her job as head cook at the Reardan Elementary School during the 2004–05 school year. This disability was either entirely emotional in nature, or a combination of emotional and physical problems (i.e., chest pain).

Dr. Summers acknowledged that with regard to Plaintiff's February 22, 2005 visit, her (the doctor's) chart note revealed that the reason for releasing Plaintiff from work was "stress" only. (Dep. at p. 42, 9 P.3d 787). This was in accord with a work release note she wrote for the Plaintiff on that date. (Ex. A to Ct. Rec. 29). At that time, there was no mention of rib pain, right upper quadrant pain, and no discussion of cardiac symptoms. (Dep. at p. 42, 9 P.3d 787). Subsequent work release notes that Dr. Summers wrote for the Plaintiff, up until April 2005, made no mention of any physical problems. (Ex. A to Ct. Rec. 29). It was not until April of 2005 that Dr. Summers mentioned any physical problems the Plaintiff was experiencing. (Dep. at pp. 27–28, 9 P.3d 787). In a note dated April 15, 2005, Dr. Summers recommended Plaintiff be off work through the end of the 2004–05 school term for "medical reasons." (Ex. A to Ct. Rec. 29). Dr. Summers did not release the Plaintiff to return to work until August 2005, long after the school district had already informed Plaintiff it would not be renewing her contract for the 2005/2006 school year. (Dep. at p. 42, 9 P.3d 787). A work release note from Dr. Summers, dated August 3, stated Plaintiff could return to work August 8, 2005, without restrictions. (Ex. A to Ct. Rec. 29).

At her deposition (Ex. B to Ct. Rec. 34 at p. 107, 9 P.3d 787), Plaintiff testified that on April 15, 2005, that even without the stress and anxiety arising from her interactions with Mr. Cooper, she still would have requested leave because Dr. Summers was putting her through extensive testing at the time (presumably cardiac evaluations).

b. Was The Plaintiff Reasonably Accommodated?

***5** Plaintiff does not argue that a reasonable accommodation would have been for her to work under a supervisor other than Mr. Cooper. Plaintiff does not dispute that asking for a different supervisor would not have been a reasonable accommodation. Rather, Plaintiff contends the reasonable accommodation she should have been provided was a medical leave of absence beyond her WFLA and FMLA entitlement of 12 weeks of unpaid leave (RCW 49.78.220(1) and 29 U.S.C. Section 2612(a)), and without loss of employment for the 2005–06 school year.

In a letter to Superintendent Skip Berquam dated April 15, 2005, Plaintiff requested that the school district grant her a leave of absence for the remainder of the 2004–05 school year due to "medical reasons." In that letter, Plaintiff also advised that "[i]t is my intention to return to my job as Head Cook for the 2005–2006 school year, unless for medical reasons I am unable to." (Ex. A to Ct. Rec. 29). Superintendent Berquam responded in a letter dated April 21, 2005, in which he advised the Plaintiff that the school district's Board of Directors had denied her request for a leave of absence for the remainder of the 2004–05school year. Berquam noted that leaves of absences are to be granted "only when they shall not have an undesirable impact upon the educational program or business operations of the district." He also thanked the Plaintiff for her time with the district and wished her well in her future endeavors, indicating that Plaintiff's contract would not be renewed for the following school year (2005–06). (Ex. F. to Ct. Rec. 34). It is undisputed that Plaintiff was a "classified employee" of the school district who was statutorily limited to one year employment contracts. RCW 28A.300.400. "Classified employees" are to be given notice at least two weeks prior to the end of the school year as to whether they will be hired for the upcoming school year. This is done by way of the employee being provided a "Notification of Reasonable Assurance."

The school district contends Plaintiff was reasonably accommodated because she received the exact accommodation she requested, that being medical leave. Indeed, Plaintiff acknowledges that Defendant "treated her leave as a medical disability ... treating it as leave for a serious health condition under FMLA." After February 17, 2005, Plaintiff did not work another day for the school district during the 2004–2005 school year. It is undisputed that on or about March 15, 2005, she exhausted her sick and vacation pay and was thereafter on unpaid leave status, although the district continued to pay all of her benefits until the end of the school year. The school district asserts that because Plaintiff was only statutorily employed for a period of one school year (2004–05), its duty to accommodate the Plaintiff applied only to that year, and not to the subsequent school year (2005–06).

The court finds that assuming Plaintiff had a "disability," it was a temporary disability which no longer existed by August 2005 when Dr. Summers released the Plaintiff to return to work without restrictions. The Defendant school district reasonably and fully accommodated this disability by allowing Plaintiff to take a total of 16 weeks unpaid leave from mid-February 2005 to the end of the school year in mid-June 2005. Defendant paid all of Plaintiff's school benefits until the end of the school year. The Plaintiff received the precise accommodation she requested: a leave of absence through the end of the school year. The court notes that in her April 15, 2005 letter requesting such leave, Plaintiff did not request that she be guaranteed employment for the 2005–06 school year. Although Plaintiff stated she intended to return during the 2005–06 school year, she apparently recognized that as a "classified employee," she was not guaranteed employment beyond the current school year (2004–05).

***6** Since Defendant reasonably accommodated Plaintiff's disability during the 2004–05 school year, Defendant will be awarded judgment on Plaintiff's WLAD claims. The non-renewal of Plaintiff's employment for the 2005–06 school year was not related to Plaintiff's "disability." If anything, it was related to Plaintiff's use of leave, as discussed below.

3. Wrongful Discharge In Violation of Public Policy

The Washington Supreme Court has recognized that a claim for wrongful discharge in violation of public policy may arise when an employer discharges an employee for reasons that contravene a clear mandate of public policy. *Korslund v. DynCorp Tri–Cities, Servs., Inc.*, 156 Wash.2d 168, 178, 125 P.3d 119 (2005). This cause of action was initially recognized as an exception to the terminable-at-will doctrine and has since been extended to employees who are dischargeable only for cause, including those who may be covered by a collective bargaining agreement. *Id.* The discharge may be either express or constructive. *Snyder v. Med. Serv. Corp.,*

145 Wash.2d 233, 238, 35 P.3d 1158 (2001). Plaintiff must prove: (1) the existence of a clear public policy; (2) that discouraging the conduct in which the employee engaged would jeopardize the public policy; and (3) that the public policy linked conduct caused the dismissal. *Korslund,* 156 Wash.2d at 178, 125 P.3d 119. The employer can defeat the cause of action by offering an overriding justification for the employee's dismissal. *Id.*

The school district had the right not to renew Plaintiff's employment for the 2005–06 school year for any reason, so long as the reason was a legal one. RCW 28A.400.300. The WFLA and the FMLA prohibit adverse employment action against an employee for taking leave under these Acts. RCW 49.78.300 and 29 U.S.C. Section 2615.

It is undisputed that Plaintiff misrepresented to Cooper what the Plaintiff had been told by Kim Johnson of the Lincoln County Health Department regarding the use of disposable trays and utensils, and the use of raw hamburger. (See Plaintiff's Statement of Facts Nos. 21–34 which are uncontroverted by the Defendant). Plaintiff contends, however, that contrary to the school district's representation, this "honesty" and "character" issue was not the sole reason for non-renewal of her employment contract for the 2005–06 school year, but rather was a pretext for the same, that pretext being retaliation for her use of leave.

Plaintiff contends there is a genuine issue of material fact whether her employment contract was not renewed for an illegal reason. She points to Cooper's February 18, 2005 memo which was intended to memorialize his February 16 conversation with Plaintiff. Plaintiff notes that the memo itself explains that the intent of Cooper's meeting with the Plaintiff, and of the the memo, was "not disciplinary or punitive in nature, rather I hope you will be aware of the concerns and, where appropriate, comply with the directions or expectations I provide you." (Ex. E to Ct. Rec. 34). Plaintiff also points to deposition testimony from Cooper in which he acknowledged that although he basically told Superintendent Berquam in a conversation on or about February 18, 2005, that he did not think the Plaintiff should be renewed for following school year, no decision was made at that time as to whether Plaintiff would be renewed. (Ex. A to Ct. Rec. 34 at pp. 82–83).

*7 Cooper and the Plaintiff met again on April 19, 2005. It is undisputed that at the time of this meeting, Cooper was aware of the request the Plaintiff had made to the school board for a leave of absence for the remainder of the 2004–05 school year. Cooper advised Plaintiff he was going to recommend the school board deny her request for leave. At the April 19 meeting, Cooper suggested that Plaintiff should resign and advised her that if she did not resign, he would give her a negative evaluation for the 2004–05 school year. Cooper told Plaintiff that if she did resign, her evaluation would not be negative and that he would remove his February 18, 2005 memorandum from the Plaintiff's file. Plaintiff refused to resign. She signed the February 18, 2005 memorandum, indicating completion of the process, but specifically noted her disagreement with the content of the memo. (Ex. E to Ct. Rec. 34). Plaintiff notes that the April 21, 2005 letter from Superintendent Berquam, denying her request for leave, mentioned nothing about Plaintiff's honesty, character or job performance as reasons why Plaintiff would not be retained for the following school year (2005–06). (Ex. F to Ct. Rec. 34).

Although Cooper and Berquam assert in their deposition testimony that it was Plaintiff's honesty, character and job performance which was the sole reason for not renewing the Plaintiff's employment contract, the documentary record is silent on that issue and therefore, the court finds a jury could reasonably infer that issue was not the sole reason for the non-renewal of Plaintiff's employment contract. Plaintiff notes that her 2002–03 and 2003–04 appraisal reports from Cooper were entirely satisfactory.[2] On May 4, 2005, Plaintiff met with Cooper for an annual performance evaluation for the 2004–05 school year. In that appraisal report, two areas were marked as unsatisfactory, those being "The Support Person as a Professional," and "Working Relationship and Communication with other Personnel, Administration and Students." The "Recommendation For Improvement" section of the report recounted the issue concerning Plaintiff's misrepresentation of what she had been told by Ms. Johnson of the Lincoln County Health Department. Plaintiff refused to sign this report. (Ex. G to Ct. Rec. 34). Plaintiff filed a grievance against the school district on May 27, 2005. On June 2, the grievance was denied on the basis that it was untimely, but the district agreed that Plaintiff's negative evaluation dated May 4 would be rewritten. Consequently, on June 9, 2005, Cooper prepared another appraisal report. On this report, the same two areas were marked as unsatisfactory, although this time in the "Recommendation For Improvement" section, there was no mention of the incident involving Ms. Johnson. Instead, it stated that Plaintiff had not satisfactorily fulfilled two of her responsibilities, those being preparing daily main dish or

bake breads and desserts from scratch, and not incorporating USDA commodities into menus, thereby costing the district more money. Plaintiff did sign this appraisal report indicating "completion of the process, but not necessarily agreement" with the evaluation. (Ex. I to Ct. Rec. 34).

2 It was not until his February 18 memo that Cooper put into writing the other things he did not like about Plaintiff's past job performance, including not baking from scratch, not using up things before they went to waste, and not trying to serve non-meat meals on Friday, as opposed to other days of the week.

***8** Apparently, Plaintiff wrote a letter to the school district on June 21, 2005 requesting a medical leave of absence. Superintendent Berquam responded by way of a letter dated June 22 recounting what had transpired, but as Plaintiff notes, there was no mention of the Lincoln County Health Department issue. (Ex. L to Ct. Rec. 34). [3]

3 The Superintendent's letter indicates that it was during a May 4, 2005 meeting with Plaintiff that he advised her she would not be renewed for the 2005–06 school year.

The fact Plaintiff does not dispute that she misrepresented to Cooper what she had been told by Ms. Johnson, combined with the fact that the district was not obligated to renew Plaintiff's employment contract for the 2005–06 school year, certainly are factors indicating there was no "discharge," and that the failure to renew the contract was not wrongful. That said, the court finds the Plaintiff has produced sufficient evidence to raise a genuine issue of material fact that the honesty issue was not the sole reason for non-renewal of the contract, but that the district was not pleased with Plaintiff's prolonged leave of absence during the 2004–05 school year (16 weeks), a leave of absence which the district effectively treated as a medical leave of absence. Furthermore, a jury could reasonably infer that Cooper's willingness to not give the Plaintiff a negative evaluation and to pull the February 18, 2005 memorandum from her file, in exchange for her resignation, indicates the honesty issue was not the sole reason for not renewing Plaintiff's contract.

The court will deny summary judgment on Plaintiff's claim for wrongful discharge in violation of public policy.

4. WFLA and FMLA Causes of Action

As discussed *supra,* Plaintiff was not denied medical leave. She received such leave from February 18, 2005 through June 10, 2005, a total of 16 weeks, approximately four of which was paid leave (February 18 to March 15), and approximately twelve of which was unpaid leave (March 16 through June 10). Although there is no cause of action for denial of leave, Plaintiff does have a cause of action arising from her taking of leave.

Because there is a genuine issue of material fact whether Defendant, in violation of public policy, retaliated against Plaintiff for taking leave under the WFLA and FMLA by not renewing her employment contract, it follows that there is a genuine issue of material fact whether Defendant "interfered" with Plaintiff's rights under those Acts. It is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the Acts. RCW 49.78.300(1)(a) and 29 U.S.C. Section 2615(a)(1). Employers cannot use the taking of FMLA leave as a negative factor in employment actions. *Bachelder v. America West Airlines, Inc.,* 259 F.3d 1112, 1124 (9th Cir.2001), citing 29 C.F.R. Section 825.220(c). [4] In order to prevail on an "interference" claim, a plaintiff must prove by a preponderance of the evidence that her taking of WFLA and FMLA protected leave constituted a negative factor in the adverse employment action taken against her. *Id.* at 1125. While it is true, as Defendant points out, that the mere fact Plaintiff was on leave did not preclude the school district from exercising its statutory right not to renew Plaintiff's employment for the following school year, the Defendant still could not fail to renew based on an impermissible, illegal reason, such as because the Plaintiff exercised her statutory rights to take leave.

4 The anti-retaliation and anti-discrimination provisions of 29 U .S.C. Section 2615(a)(2) and (b), and RCW 49.78.300(1)(b) and (2), "[b]y their plain meaning ... do not cover visiting negative consequences on an employee simply because [s]he has used ... leave." *Bachelder,* 259 F.3d at 1124.

Apparently, there are no published Washington decisions involving a cause of action brought pursuant to RCW 49.78.300 of the WFLA. The WFLA, however, appears to be identical to the FMLA and so it is reasonable to believe there are no substantive differences between the two Acts.

***9** The "Fifth Cause of Action" stated in Plaintiff's First Amended Complaint is that Defendant's failure to designate Plaintiff's leave as leave pursuant to the WFLA and the FMLA, and the failure to provide Plaintiff with written notice of the same, constitute "interference" with Plaintiff's WFLA and FMLA rights. Defendant notes that neither WFLA or

the FMLA contain such requirements, and federal regulations concerning FMLA no longer require employers to provide written notice that requested leave is to be designated as FMLA leave.[5] Defendant cites a number of decisions (i.e., *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 940 (8th Cir.2000)),which have rejected FMLA claims against an employer for failure to designate leave as FMLA leave and give notice of the same to an employee. What is critical is whether an employee is afforded the 12 weeks of leave guaranteed by the FMLA and in the captioned matter, Plaintiff received that amount of leave and more.

5 The former 29 C.F.R. Section 825.208 stated that "[i]n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section."

Plaintiff makes no attempt to rebut Defendant's argument that as a matter of law there is no WFLA or FMLA claim against an employer for failure to designate leave as FMLA leave, and provide notice to the employee of such designation. Accordingly, the court will grant summary judgment for the Defendant on this aspect of the Plaintiff's WFLA and FMLA claims.

III. CONCLUSION

For the reasons stated above, Plaintiff's Motion To Strike (Ct.Rec.35) is **DENIED.**

For the reasons stated above, Defendant's Motion For Summary Judgment (Ct.Rec.25) is **GRANTED in part** and **DENIED in part.** It is **GRANTED** with regard to: 1) Plaintiff's WLAD claims because Plaintiff was reasonably accommodated for the 2004–05 school year; and 2) that aspect of Plaintiff's WFLA and FMLA claims regarding designation and notification of leave. The motion is **DENIED** with regard to Plaintiff's common law cause of action for wrongful discharge in violation of public policy, and statutory causes of action under WFLA and FMLA for "interference" with Plaintiff's exercise of leave. There is a genuine issue of material fact whether Defendant declined to renew Plaintiff's contract for the 2005–06 school year because of her taking of WFLA and FMLA leave during the 2004–05 school year. In other words, the issue is whether the Defendant, although affording Plaintiff a reasonable accommodation for the 2004–05 school year, nevertheless retaliated against her for that accommodation by not renewing her employment contract for the 2005–06 school year.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and provide copies to counsel.

Parallel Citations

28 NDLR P 244

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