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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, Nancy A. Becker,

Appellant/Plaintiff,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Respondent/Defendant.

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

REPLY OF APPELLANT

Robert F. Hedrick, WSBA No. 26931
James T. Anderson, WSBA No. 40494
AVIATION LAW GROUP, P.S.
1420 5th Avenue, Suite 3000
Seattle, WA 98101
Telephone: (206) 464-1166

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

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I. STATEMENT OF REPLY

No appellate court in Washington has allowed what FTI requests: to hold that no standard of care applies to FTI for its defective product. To avoid liability, FTI seeks to slip through self-invented cracks between legal theories:

FTI argues that the affirmative defense of federal preemption applies – but that it is not subject to the federal regulations under which it seeks shelter. FTI argues that it did not waive the preemption defense by waiting until summary judgment to assert it – but then argues that Becker should be barred from amending her Complaint to meet FTI's challenge.

FTI argues that it is not a manufacturer or seller of the 30-804 float under the WPLA – but simultaneously ignores that it assembled and sold the subject float to Precision, and would in any event be liable under ordinary negligence.

Stuck with the damaging testimony by its own employees that they knew FTI's defective products were likely being installed on general aviation aircraft where they could fail and cause fatal crashes – FTI argues that there is no *prima facie* evidence to support a claim for punitive damages under Minnesota law, even though the law requires that the court disregard challenges to the moving parties' evidence.

Of course, FTI's involvement with the carburetor floats goes well

beyond simple welding. FTI was the only entity that manufactured (and sold) the 30-804 float. Overall, FTI was responsible for ensuring that each float met the design specifications. Appendix A - Precision Airmotive Purchase Order to FTI, CP 298. This included assembly, welding, weld inspection, conducting a hermetic seal check, and certifying compliance with specifications. App. A- CP 298, Appendix I - Declaration of David Hoeppner, Ph.D., P.E., 530-531. As heat welding can cause the float's plastic component parts to deform from their original shape (and reduce stress integrity), FTI also had to ensure and certify that each float was dimensionally within specifications. App. A - CP 298, Appendix E - Declaration of Paul J. Gramann, Ph.D, 644-645. As the experts in polymer welding and testing, only FTI, not Precision, could confirm specification compliance for the 30-804 float, and FTI's failure allowed the subject 30-804 to end up on the accident aircraft. App. E - CP 645.

FTI's claim that Precision was responsible for leak testing is not a defense for its own defective product. FTI had a duty to investigate the testing being performed at Precision, and to make sure that testing was adequate. App. I - CP 531, App. E - CP 645. FTI knew that Precision's crude leak testing was inaccurate and unacceptable. App. E - CP 644. Meanwhile, FTI had superior leak testing methods and equipment - which it refused to use. App. I - CP 530.

FTI's claim that it had no knowledge that Precision was using its defective floats on aircraft is also implausible; in its brief, FTI confirms that "FTI knew that Precision intended to use the floats as components of carburetors on general aviation aircraft." Resp. Br. at 6.

Critically, FTI fails to dispute the following: (1) only FTI, and no other entity, assembled, certified, and sold the 30-804 subject carburetor float; (2) the subject float did not comply with the requisite specifications that FTI agreed to meet; (3) FTI certified that the subject float met specifications when it did not; (4) the subject float contained manufacturing defects caused by FTI; (5) the subject float was not safe for use on aircraft; and, (6) the subject float did not meet any standard of care under federal law, state law, or even pursuant to FTI's own contract.

II. ARGUMENT

A. By Failing To Cite Any Specific Federal Regulations, Let Alone Pervasive Regulations, FTI Has Not Met Its Burden For Preemption.

As the party seeking implied FAA preemption, FTI has the burden to establish that specific pervasive regulations show the requisite Congressional intent to preempt the specific area involved. "There is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption." *Inlandboatmen's Union of the Pac. v. Dep't of Transp.*, 119 Wn. 2d 697, 702, 836 P.2d 823,

827 (1992) (citations omitted); *See also, Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 625, 78 L.Ed.2d 443 (1984); *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2128–29, 68 L.Ed.2d 576 (1981).

FTI recognizes that with regard to FAA preemption in the area of aircraft product liability, *Martin*[1] correctly clarified *Montalvo's*[2] expansive holding. *See,* Resp. Br. at 23. "*Martin* held that since "airstairs" were not pervasively regulated, the FAA did not preempt state law." *Id.* FTI relies on the specific analysis and holding in *Martin.*

> Airstairs are not pervasively regulated; the 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.

Martin, 555 F.3d at 812.

Martin recognized that for FAA implied preemption, the pervasive regulation requirement looks to regulations covering the specific product

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[1] *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009)
[2] *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007)

at issue, and not overall general regulations covering the aircraft or airframe. *Id.* at 811. *Martin* held that one regulation covering airstairs did not constitute pervasive regulations sufficient for implied preemption. *Id.* at 812. Consistent with the focus of regulations on the defective product at issue, i.e. airstairs in *Martin*, the focus here is regulations covering carburetor floats.

FTI's application of *Martin* is flawed because FTI, who has the burden to establish pervasive regulations, has failed to cite any specific regulations that apply to carburetors or carburetor floats. Instead, FTI cites three all-encompassing subparts of 14 CFR: parts 21 and 33 and part 13 of the Federal Registry, which contain hundreds of regulations, none of which specifically mention or apply to carburetor floats, which is the focus area of pervasive regulation. Even if there were one such regulation, *Martin* expressly holds that a single regulation does not constitute pervasive regulation. This void of regulation cannot establish Congressional intent to preempt. As recognized in *Martin*, "when the agency issues 'pervasive regulations' in an area . . . the FAA preempts all state claims in *that* area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable." *Id.* at 811 (*emphasis in original*).

B. FTI Lacks Standing To Assert The Defense Of Preemption Where It Claims That It Is Not Subject To Federal Regulations.

FTI claims that it has "never held" any FAA certificates. Resp. Br. at 8. FTI also claims that it did not have any regulatory responsibilities under the federal regulations. *Id.* at 9; and at 36 fn. 19 (as an unregulated entity, FTI does not have to meet regulatory standards.) Thus, even if the federal regulations did contain a standard of care for carburetor float manufacturing and performance, according to FTI, such regulations would not apply to it. As a result, FTI is not subject to a federal standard of care, and cannot claim that the FAA requires it to manufacture by one standard of care while state law requires another.

As an unregulated entity, FTI lacks standing to assert federal preemption as a defense. The 9th Circuit has stated that a party cannot invoke the protection of preemption without being subject to it. "Unlike the Cheshire Cat, one cannot have the smile of preemption without the stripes of participation." *Miller v. Rite Aid Corp.*, 504 F.3d 1102, 1106 (9th Cir. 2007) (internal citation omitted) (federal preemption does not apply to a party outside of ERISA Act). The Washington State Supreme Court is in accord: Even in schemes where the act in question provides the sole remedy for violations (i.e., ERISA), only a party subject to the act in question has standing to invoke preemption under that act. *See, W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn. 2d 54,

65, 322 P.3d 1207, 1212 (2014). A party not subject to the obligations under the federal act has no standing to invoke its protection, and is simply subject to state law. *Id.*

Not one of the more than 10 preemption cases cited by FTI involve preemption (or even claims of preemption) for non-regulated entities such as FTI. In fact, all FAA cases involve claims of preemption involving FAA certified and regulated entities such as airlines and aircraft manufacturers. FAA implied preemption is invoked to establish the standard of care for parties regulated by federal law. By claiming FAA federal preemption, FTI is alleging that federal regulations set the standard of care--but not for FTI. Resp. Br. at 9. This is absurd.

After taking the position that federal preemption precludes the application of Washington law to set the standard of care, and then claiming federal regulations do not apply, FTI then attempts to fill the standard of care void by suggesting that its only legal obligations are exclusively commercial in nature, existing "only within a business relationship context." Resp. Br. at 9. In other words, FTI claims that the standard of care for product liability claims brought in Washington by injured Washington residents is set by FTI's business contract with Precision. FTI fails to cite any legal support for this untenable position. Extensive discussion on this point is not warranted; however, even if the

contract between FTI and Precision did set the standard of care, there is still no dispute that FTI's subject 30-804 float did not meet its own contractual specifications. App. E - CP 645.

C. FTI Waived The Affirmative Defense of Federal Preemption By Failing To Plead It.

FTI argues that state courts "follow the federal analysis only if [they] finds its reasoning persuasive." Resp. Br. at 18.[3] But FTI cites no case law where Washington courts have diverged from the 9th Circuit or Local Federal District courts in their application of CR 8(c). Indeed, Washington courts often look to their federal analogues in interpreting affirmative defenses under 8(c). *See, e.g., Winans v. W.A.S., Inc.*, 52 Wn. App. 89, 108, 758 P.2d 503, 514 (1988) *aff'd,* 112 Wn. 2d 529, 772 P.2d 1001 (1989); *Mahoney v. Tingley*, 85 Wn. 2d 95, 100, 529 P.2d 1068, 1071 (1975).

Unable to demonstrate any reason why a Washington court would not follow the federal courts in holding that choice-of-law preemption is an affirmative defense that is waived unless pleaded, FTI then argues that a

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[3] FTI also misstates the facts and the law when it argues that *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014), precludes this Court's consideration of FTI's waiver. Resp. Br. at 17. Even if Becker had not assigned error to the denial of the reconsideration of the trial court's Order on FTI's Motion for Summary Judgment, "[t]he technical failure to assign error on appeal does not waive an issue that is clearly argued in the briefs." *SentinelC3,* 181 Wn.2d, at FN 4. It is therefore the issue is the focus of the Court's inquiry – not the assignment of error. *Id.* Becker assigned error to the Court's denial of reconsideration. App. Br., at 1. In addition, Becker discussed her reconsideration motion at length in her Brief. App. Br. at 16-17

liberal construction of CR 15(b) should allow it to argue the affirmative defense of federal preemption for the first time on summary judgment. FTI's argument should be disregarded. CR 15(b) applies to situations in which a party expressly or impliedly consents to the trial of certain issues that were not in the pleadings by allowing the introduction of evidence without objection. By its own terms CR 15(b) does not allow a defendant to raise the affirmative defense of federal preemption for the first time in a summary judgment motion. To hold otherwise would be to render the requirement of pleading affirmative defenses useless. None of the cases cited by FTI allowed such an amendment.[4]

Likewise, FTI cannot invoke the affirmative defense of federal preemption by a general "incorporation by reference" of other defendants' pleadings in its Answer. There is no reason why FTI could not have pled federal preemption as an affirmative defense in its Answer. Instead, FTI misleads the court by arguing that that it "explicitly incorporated the affirmative defenses of AVCO and Precision." Resp. Br. at 19. FTI's "explicit" incorporation actually states: "FTI incorporates any applicable affirmative defense or other defense asserted by any other Defendant in this action." CP 2487, ¶ 12.20. This "incorporation" is far from "explicit",

[4] If the court allowed FTI's preemption defense under CR 15(b) – it should have allowed a full response, and subsequent amendment if needed, by Becker. *See,* CR 15(b); *MacCormack v. Robins Const.*, 11 Wn. App. 80, 83, 521 P.2d 761, 762 (1974)

and is impossible to determine which of the numerous defenses of the numerous other defendants in the suit that FTI intended to incorporate.[5] "Although inexpert pleading has been allowed under the civil rules, insufficient pleading has not. A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Williams v. W. Sur. Co.*, 6 Wn. App. 300, 304-05, 492 P.2d 596, 599 (1972) (citing, *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Becker had no notice that FTI was asserting the non-pled affirmative defense. It makes sense that defendant AVCO, an FAA certified engine manufacturer (who is subject to federal regulation), might raise federal preemption as an affirmative defense. FTI however, is not so certified or regulated. Indeed, it is unprecedented to have FTI seek a defense by regulations which it also claims do not apply to it. FTI should have specifically pled the defense in order to put Becker on notice, which would have allowed Becker to move to strike the defense early in the litigation and/or move to amend her complaint. It is procedurally improper to raise federal preemption as an affirmative defense by way of summary judgment motion, and then claim after-the-fact that preemption was pled

[5] Likewise, FTI's argument that its discovery requests should have put Becker on notice of its intended affirmative defense is wholly unsupported. No case requires Becker to anticipate what unpled affirmative defense FTI should have raised in its Answer by interpreting FTI's discovery requests.

by incorporation by reference to other defendant's answers. Becker should not have to search other parties' pleadings and amended pleadings to try to figure out which affirmative defenses are being raised by FTI. By failing to plead federal preemption, FTI waived its right to assert it.

(For reference, a flowchart of Becker's preemption treatment is attached as Appendix J).

D. The WPLA Applies To FTI's Manufacture Of The Defective Float

Under the Washington Product Liability Act, RCW ch. 7.72 ("WPLA"), manufacturers are strictly liable for manufacturing defects resulting in unsafe products. RCW §7.72.030(2)(a). FTI is a both a "manufacturer" and "product seller" under the plain language of the statute.

Contrary to FTI's assertion, the definition of "manufacturer" is not exclusive to "product sellers" but rather, explicitly only "includes" them. RCW 7.72.010(2). *Avlonitis v. Seattle Dist. Court*, 97 Wn. 2d 131, 138, 641 P.2d 169, 173 *amended,* 97 Wn. 2d 131, 646 P.2d 128 (1982) ("Statutes should not be interpreted in such a manner as to render any portion meaningless, superfluous or questionable."). Moreover, the definition makes clear that the conditions upon which the WPLA deems an entity to be a "product seller" should be "include[d]" as a manufacturer

depending on whether the seller is engaging in the activities a manufacturer would engage in.

Certainly, in the case of a manufacturing defect, the manufacturer—not the product seller—causes the defect. *See, Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 946-47, 247 P.3d 18 *review denied,* 172 Wn 2d 1007, 259 P.3d 1108 (2011) (*internal citations omitted*). By specifying the activities that would in essence transform a mere seller into a "manufacturer" the WPLA indeed makes clear the essence of "manufacturer" is the entity that "designs, produces, makes, fabricates, constructs, or remanufactures" "the relevant . . . component part of a product."[6]

It is undisputed that the 30-804 float is a "product" or a "component part of a product" and that FTI manufactured it. No other party made the 30-804. FTI claims it is not a manufacturer, yet FTI is the entity that caused the manufacturing defects in the subject 30-804. App. E - CP 644-645. These facts, which must be taken in light most favorable to Becker, establish that FTI is a manufacturer.

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[6] This also fits with the plan language meaning of manufacturer. "To determine the plain meaning of an undefined term, [courts] may look to the dictionary." *Garrison v. Wash. State Nursing Bd.,* 87 Wn.2d 195, 196, 550 P.2d 7 (1976). *See also HomeStreet, Inc. v. State, Dept. of Revenue*, 166 Wn. 2d 444, 451, 210 P.3d 297, 300 (2009). In that regard, BLACK'S LAW DICTIONARY (9th ed. 2009) defines "manufacturer" quite consistently with the WPLA's outline of activities that make one "include[d]" within the definition of a manufacturer – "[a] person or entity engaged in producing or assembling new products."

In addition to being a manufacturer, FTI was also a "product seller" because it was the sole and exclusive source of supplying and selling the 30-804 to Precision for more than eight years, and was paid for assembling, welding, and certifying more than 30,000 30-804 floats. CP 289, 323-329. The basic elements of a sale were all met: Precision placed "Purchase Orders" to FTI for the 30-804 floats, and FTI fulfilled those orders by assembling, welding, certifying, and shipping the floats to Precision; Precision then paid FTI for the finished floats. App. A - CP 298.

In addition, FTI does not fall under the "service provider" exception because it is not a "provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider". RCW §7.72.010(1)(b).

The "service provider" exception has been construed to apply to contractors who provide educational, architectural, engineering and inspection services, licensed contractors, and doctors or hospitals whose sale of products are incidental to their rendering of professional medical services. *See, e.g., Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1,* 124 Wn.2d 816, 822 n. 1, 881 P.2d 986 (1994) (educational services); *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 856, 999 P.2d 1264, 1267 (2000) (government contractor); *McKenna v. Harrison Mem'l Hosp.*, 92 Wn. App. 119, 126, 960 P.2d 486, 487 (1998) (hospitals

and surgeons).

All of these cases applying the "service provider" carve-out share the following: (1) a provider of professional services utilizing or selling products within the legally authorized scope; (2) an incidental product rather than a primary product.

FTI assembled a completed component part, which was not only capable of delivery, but was actually delivered as a component part for introduction into commerce. The 30-804 floats FTI supplied to Precision were items of intrinsic value, and not sold separately as part of "professional services" within a "professional practice".

The only case cited by FTI for support, *Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 76 P.3d 1205 (2003), is inapposite. As recognized by the Court of Appeals, Division III, Anderson could not prove that the Ti-Ply did anything to cause the roof to fail, (*Id.* at 260, 76 P.3d at 1210), nor was Anderson able to prove that the design plans were not followed. Anderson also did not claim that the Tri-Ply was the manufacturer under the WPLA. *Id.*

In contrast, here, FTI manufactured the float, and the failure at the weld seam caused the float to leak. Unlike *Anderson Hay*, Becker claims FTI is the manufacturer, and there is certainly nothing to suggest that the float was incidental to FTI's business: it *was* FTI's business, and the

primary purpose of its relationship with Precision. Taking the facts in light most favorable to Becker, FTI is a "product seller".

Last, even if the WPLA does not apply, summary judgment should not have been granted because the WPLA does not preempt negligence claims when the defendant is not a manufacturer or product seller. *See, Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn. 2d 248, 262, 978 P.2d 505, 512 (1999); *Bostwick v. Ballard Marine, Inc.*, 127 Wn. App. 762, 772-73, 112 P.3d 571, 576-77 (2005). Therefore, even if FTI somehow fell outside the purview of the WPLA as not being a "manufacturer" or "product seller", and/or qualifying for the "service provider" exception, FTI would still be liable for under Becker's claims for negligence. CP 25, App. I - 528-532, App. E - 642-646.

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

1. Minnesota courts review a denial of leave to amend to plead punitive damages under a *de novo* standard.

Choice of law issues are determined on an issue-by-issue basis, and Minnesota Law controls the application of punitive damages against FTI. In its brief, FTI misapplies the "most significant" relationship test and ignores the concept of dépeçage, previously addressed by Becker in her Brief. App. Br. at 45, FN. 15. "Where a conflict exists, Washington courts decide which law applies by determining which jurisdiction has the most

significant relationship *to a given issue*." *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 143, 210 P.3d 337, 340 (2009) (*emphasis added*). The relevant scope of inquiry for the "most significant relationship" is defined by the issue under consideration – in this case – claims solely against FTI under a Minnesota punitive damages statute. Therefore, FTI's listing of "facts" applicable to the whole case (some of which are invented), is misplaced. Resp. Br. at 44. For example, FTI states that "aircraft was overhauled in 2001 by a Washington corporation."[7] Even if the overhauler was a Washington corporation, the fact has no bearing on whether the Minnesota punitive damages should apply to FTI, a Minnesota corporation, which assembled, welded, approved, and made all of its decisions regarding the floats in Minnesota. CP 96-97. FTI has not proffered evidence to the contrary. CP 209.

Minnesota procedure prevents procedural unfairness by requiring that a plaintiff who is claiming punitive damages reserve pleading those damages until after the initial filing of her complaint. See App. Br. at 43-44. The trial court is then required to allow amendment on presentation of *prima facie* evidence in support of the amendment. In doing so, the trial court makes no credibility determinations and cannot consider challenges

[7] This is a misstatement of fact on two points: First, the engine of the accident aircraft, not the whole aircraft was overhauled in 2001. 2001 is when FTI's defective float was installed in the aircraft. Second, the engine was not overhauled in Washington and the overhauler was not a Washington Corporation. *See,* CP 58 at ¶ 2.13.

to the moving party's evidence and review is *de novo*. *Id.* at 45-46. Likewise, when a Washington trial court makes no credibility determinations, review is properly *de novo*. *See, Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 339, 858 P.2d 1054, 1076 (1993). FTI's brief is backward: the trial court should not determine the standard of review for a motion to amend before determining the choice of law issue. Choice of law issues are reviewed *de novo*. *See, Erwin v. Cotter Health Centers*, 161 Wn. 2d 676, 691, 167 P.3d 1112, 1119 (2007).

2. Becker met the *prima facie* standard required to amend her pleadings to include punitive damages against FTI.

The testimony of FTI employees Scott Olson and Jim Nelson more than adequately fulfills the requirement for *prima facie* evidence that FTI deliberately acted with indifference (or conscious disregard) to the high probability of injury to the rights or safety of others. *See,* Minn. Stat. § 549.20 (2008).

FTI argues Becker "grossly distorts" Mr. Olson's testimony. This simply is not the case: the depositions of FTI employees establish that FTI knowingly and continuously supplied defective floats for seven years without a fix, without a change in quality assurance, and without any type of post-sale warning. The quotes cited by FTI show nothing more than

practiced ignorance on the part of the deponent.[8] The burden is on FTI to show the absence of a dispute regarding material facts. It cannot challenge facts by establishing inconsistencies in its own witnesses' testimony. *See, Grange Ins. Ass'n v. MacKenzie*, 103 Wn. 2d 708-709, 716, 694 P.2d 1087, 1092 (1985) (en banc).

Dr. Paul J. Gramann, a chemical/polymer field expert retained by Becker, stated: "FTI should have never sent the subject float to Precision." App. E - CP 645. Dr. David Hoeppner, Becker's corporate response to product failure expert, opined that "[With the history of a high failure rate in its floats] FTI should have never entered into, nor continued, production of the 30-804 for Precision until it could manufacture a reasonably safe product." App. I - CP 530. In addition, FTI acknowledged that it had superior leak test equipment which it chose not to use, reflecting its knowledge that leaking floats would end up in the field. *Id.*

The cases cited by FTI in fact add weight to Becker's argument. In, *Swanlund v. Shimano Indus. Corp., Ltd.*, 459 N.W.2d 151 (Minn. Ct. App. 1990), the court found that "A single incident of a defectively manufactured product is insufficient to support a finding of willful

[8] For example, where counsel objected before his client could answer, Mr. Olson testified that he did not know where the tens of thousands of carburetor floats FTI sold went. CP 143. However, when Mr. Olson answered before counsel could interject, the truth came out: "Q. You understood though, that Precision was selling the Delrin floats that your company welded than they were going on to aircraft engines? A. Yes." CP 126.

indifference to the safety of others." *Id.* at 155. In this case, we have hundreds of defective floats causing numerous engine failures and deaths. Likewise, in *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896 (Minn. Ct. App. 2009), the plaintiff presented no evidence to the court that the defendant had any knowledge of the possibility of injury to the plaintiff. *Id.* at 904. In contrast, the depositions of FTI employees and the declarations of two expert witnesses establish that FTI knew that its leaky floats were ending up in aircraft. [9]

F. The Commissioners' Denial of FTI's Motion to Dismiss Should Be Affirmed Because Becker AND AVCO Timely Filed Their Notices Of Appeal.

This Court should affirm the ruling of Commissioner denying FTI's Motion to Dismiss: "Under the circumstances of this case, I conclude that Becker's appeal filed within 30 days of the August 1, 2014 'Final Judgment' is timely." *Spindle* (Ruling) at 10-11. FTI presents no additional or new argument that was not presented to the Commissioner. Instead, FTI continues to argue for an interpretation of the rules that would result in confusion, piecemeal litigation, and games-playing within the bar.

The procedural history surrounding this matter is summarized neatly in

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[9] FTI's citation to *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552 (Minn. 1996), is likewise misplaced. *Stroud* is a medical malpractice case, relying on a specific Minnesota malpractice statute. *Id. at* 556. It is completely inapplicable to the case before this court. In any event, Becker's expert opinions fulfil the expert requirements set out in *Stroud.*

the Commissioner's Order Denying FTI's Motion to Dismiss. *Spindle* (Ruling) at 2-5. In short, Becker sued 13 defendants, including FTI, in her Second Amended Complaint, (the operative pleading with respect to FTI). With the exception of FTI, most defendants settled and all were eventually dismissed throughout the three-year plus contentious course of litigation, which had more than 900 filings in the trial court, and hundreds more filings with the specially appointed discovery master.

One of the defendants, the Estate of Houston (the Pilot's estate), was dismissed on June 29, 2014. The language in that dismissal states that it only applies to claims against one party, and reserves "to plaintiff all plaintiff's rights of action, claims, and demands against any and all other parties other than the [pilot's estate]." CP 1768-1770. After the dismissal of the Pilot's Estate, the dismissals of two defendants, Premier Aircraft Engines and Synergy Systems remained without prejudice, and AVCO Corporation's cross claim against the pilot's estate was left unaddressed. In addition, a Motion for Reconsideration of the Order Denying Becker and AVCO's Motion to Withdraw Orders was still pending before the Court. CP 1756–1765. The signed Order dismissing the Pilot's estate was sent by the Court only to the two interested parties, Becker and the Pilot's estate.

Therefore, on July 21, 2014, Becker served a Notice of Final Judgment on all parties. CP 1771–1773. On August 1, 2014, the Court entered the

Final Judgment: "IT IS HEREBY ORDERED: 1. Final Judgment is ENTERED in this matter, and all claims with regard to all parties are dismissed..." CP at 1774–1778. The Final Judgment was served on all parties to the litigation, whether they were dismissed years earlier or whether they still had motions or claims pending before the Court. *Id.* Becker's timely Notice of Appeal was filed on August 28, 2014.[10]

FTI subsequently brought its Motion to Dismiss – arguing that the Final Judgment was not a final judgment, but that the Pilot's Estate Dismissal was the final judgment. This position is inconsistent with CR 54(b), RAP 2.2(d), and the language in the Pilot's Estate Dismissal itself. CP 1768-1770. The Commissioner subsequently asked for comment from AVCO on the question that if Becker's appeal was untimely, so would be AVCO's. *Spindle,* Nov. 10, 2014 Letter from Commissioner to Becker, AVCO, and FTI. Becker and AVCO both fully briefed the issue before the Commissioner.[11]

1. Only the Final Judgment complied with CR 54(b), RAP 2.2(d), and CR 54(f)(2).

A final judgment is *required* in a multi-party, multi-claim, action in accordance with CR 54(b) and RAP 2.2(d). Notice of presentation of a

[10] Likewise, defendant AVCO Corporation subsequently filed a timely Notice of Appeal five days later. CP 1779-1782; Court of Appeals No. 72510-6-I.
[11] Becker incorporates her prior submissions to the Court on this matter, as well as AVCO's submissions to the Court by reference.

final judgment is to be served on all parties via CR 54(f), within the time specified in CR 54(e). A final judgment adjudicates all of the claims, rights and issues in a case. CR 54(b). The provision for a final judgment ensures that all parties are provided notice of their right to appeal.

Becker and AVCO's compliance with the court rules underlines *why* those rules are in place: before the entry of the Final Judgment, issues in the case remained unresolved, rendering appeal as to all issues impossible. A final judgment was required to allow an appeal, and to ensure that notice was given to all parties.

Instead, FTI asks the Court to disregard the text of the rules in this very complex case. In addition, FTI would have the Court disregard an Order that, by its own terms, did not address all of the claims in the action, and now somehow infer that it has the operative effect of exactly the opposite of what it says. Even FTI is forced to concede the fact that the language of the Order Dismissing the Pilot's estate does not contain the language for a final judgment. *See,* Resp. Br. at 49-50.

In addition, a final judgment must follow the notice of presentation rules to have operative effect as such. *See,* CR 54(f); *Burton v. Ascol*, 105 Wn. 2d 344, 352, 715 P.2d 110, 115 (1986) (*en banc*) ("Failure to comply with the notice requirement in CR 54(f)(2) generally renders the trial court's entry of judgment void." (*Citing, City of Seattle v. Sage*, 11 Wn.

App. 481, 482, 523 P.2d 942, 944 (1974)).

If the Order Dismissing the Pilot's Estate were held *ex post facto* to be the final judgment in this case, then all parties to the case would prejudiced by the lack of notice of presentation.

2. Unresolved issues in the case required a final judgment.

There also remained an unresolved Motion for Reconsideration of a Stipulated Order to Withdraw signed by both Becker and AVCO. *Id.* This outstanding motion remained unresolved until the Final Judgment was entered by the trial court, thereby clearing the way for an appeal. This fact alone is enough to deny FTI's request.[12]

Rule of Appellate Procedure 1.2(a) requires interpretation of the rules to promote justice and facilitate the decision of cases on the merits. RAP 1.2(a) By the plain language of the rules a party may appeal from the final judgment in a proceeding. RAP 2.2(a)(1). Experienced appellate counsel for defendant AVCO, Melissa White, summarized the effect that FTI's interpretation would have on appellate practice if adopted:

> I've been handling appeals in this court as a law clerk and outside for 18 years, and I've never heard of appeals... moving forward this way. If FTI's motion is granted, that is contrary to Rule 54 and everything I've ever seen in all of the appeals I've had. For whatever that's worth, Your

[12] Synergy Systems was dismissed without prejudice from the action. CP 1685-1689. Becker could have pursued claims against Synergy at any time up until the Final Judgment.

> Honor, is that we – appellate practice will change fundamentally if the rule is as FTI has asked.

Transcript of December 12, 2014 Hearing Before Commissioner Kanazawa, at p. 11, ln. 15-21. (Transcript attached as Appendix I).

As only the final judgment complied with CR 54(b), RAP 2.2(d) and CR 54(f)(2), and there remained unresolved issues requiring a final judgment, the Commissioner's denial of FTI's motion should be affirmed.

III. CONCLUSION

The trial court's granting of FTI's motion for summary judgment should be reversed, and Becker should be allowed to amend to claim punitive damages against FTI.

Respectfully submitted this 26th Day of May, 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. Reply Brief of Appellant

Melissa O'Loughlin White Cozen O'Connor 999 3rd Avenue, Suite 1900 Seattle, Washington 98104 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 26th day of May, 2015, at Seattle, Washington

James T. Anderson III

Appendix I: Declaration of David Hoeppner, Ph.D., P.E. (CP 528-532)

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 DAVID W. HOEPPNER 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, DAVID W. HOEPPNER, declare:

1. My name is David W. Hoeppner. I am a Professor at the University of Utah in the Department of Mechanical Engineering. I am also the Director of the Quality and Integrity Design Engineering Center. I have a Doctorate from the University of Wisconsin-Madison, specializing in Materials Engineering, Applied Mechanics, Fatigue and Fracture Mechanics, Statistics and Probabilities. I specialize in Mechanical

Engineering with an emphasis in Materials Engineering, Engineering Mechanics, Materials Behavior, Reliability and Quality issues in design, production, field experience, and remedial response. I have for many years served and testified as an expert in design and manufacturing reliability and quality cases, which along with my education qualifying 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 July 27, 2008, crash of the Cessna 172 aircraft registered as N75558 near McMurray, Washington. And more specifically to consider issues related to the carburetor and its 30-804 float. My Curriculum Vitae is attached as Exhibit A and the listing of items I have reviewed is attached as Exhibit B.

2. FTI witnesses have testified that FTI had no plans to ensure the reliability of their products in the field. Mr. Olson testified that FTI did not have a product reliability program, a quality assurance program, nor a product failure analysis program, any product risk assessment procedures, nor a product tracking program, and no manufacturing review board. (Olson Dep. at pp. 31, 33, 34) FTI's failure to implement any type of meaningful quality assurance program fell below the industry standard of care, and was not that of a reasonable manufacturer performing the same procedures. These concepts are explained below:

3. Precision Airmotive initially approached FTI (who were experts in hot-plate polymer welding) to manufacture hot-plate welding machines so that Precision could themselves manufacture the 30-804 float in-house. However, the very technical nature of hot-plate welding was too difficult for Precision to handle, so Precision deferred to FTI's expertise. FTI then agreed to manufacture the 30-804 floats for Precision (including the 30-804) at its facility, and sold the completed floats to Precision. As far as I can tell, FTI was the only manufacturer of 30-804 floats at any time during its life from approximately 1997 to

2005. Apparently during this time period FTI sold and sent to Precision more than 30,000 30-804 carburetor floats.

4. Despite FTI's expertise in this area, the 30-804 floats had a high failure rate in testing and in the field throughout its life. Though FTI was aware of the problems that arose starting in 1997 with regard to leaking, FTI continued to manufacture and sell defective floats to Precision for 7 more years. During that time FTI was not able to produce a consistently reliable nor reasonably safe 30-804 float. With this history, FTI should have never entered into, nor continued, production of the 30-804 for Precision until it could manufacture a reasonably safe product.

5. My review of the deposition testimony of Olson and Nelson indicates that FTI had quality control issues related to leaking beginning with the first batch of floats sent to Precision in 1997, and these issues were never resolved. (Olson at 36-37, 140; Nelson, 14, 35, 39) The evidence also reflects that FTI knew that it was sending floats to Precision that were out of specification. FTI routinely "forced" out-of-dimension parts into their hot-plate welding machine and then welded them together. FTI knew that this practice could result in leaking floats.

6. FTI also had superior leak test equipment which it proposed, but never implemented. This reflects FTI knowledge that Precision's leak test equipment was not catching many of its defective leaking floats, which it knew, or should have known, were ending up on aircraft in the field.

7. As an expert in the area of plastics, FTI should have known that if parts were forced into the welding machine and then welded, that the resulting finished floats would then have internal stresses on them. Those internal stresses would act throughout the life of the float, as the parts that comprised the finished float tried to "relax" and return to their original shape. A simple analogy would be akin to putting a lid on a warped Tupperware

container: The container body will always try to pull away from the lid and return to its warped shape. In the case of the 30-804 float, the lid and body would always be pulling against the weld. Eventually, a hole or permeability may develop in the weld seam, compromising the hermetic seal required by the plans and specifications, and allow fuel to flood the float pontoon.

8. Especially in light of its expert knowledge, FTI had a duty to fully understand how the floats were being used in the field, and had an affirmative duty to investigate the failure rates of the 30-804 floats in service. FTI should have taken steps to interact with Precision Airmotive to determine failure rates in actual use. FTI also should have warned Precision that floats might pass testing at FTI and Precision, and then fail in the field, a condition of which FTI was, and certainly should have been, aware of.

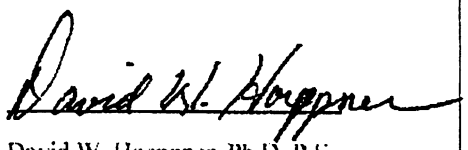
9. If FTI felt that Precision would, or could not issue adequate warnings to the end users of the product, then FTI should have attempted to warn ultimate users of its product, and could have at least notified the FAA, or demanded recall action.

10. The duty to track failures and warn Precision became even more critical when Precision rejected FTI's proposals for more accurate leak testing equipment. These proposals show that FTI knew that Precision's testing was substandard. Combined with FTI's particular knowledge of the material properties of plastics, FTI should have asked for records sufficient to conduct Quality Assurance analysis. Precision possessed records reflecting a significant history of 30-804s failing in the field, including causing aircraft engine failure. Similar information was also available on the internet by way of free Service Difficulty Reports.

11. FTI took the float lids and bodies and assembled them into a completed float. FTI assembled tens of thousands of them over an eight year period. This is the essence of what a manufacturer does -- mass assembly of a completed product

12. FTI's actions and omissions described above fell below the standard of care as a manufacturer or welder in the industry.

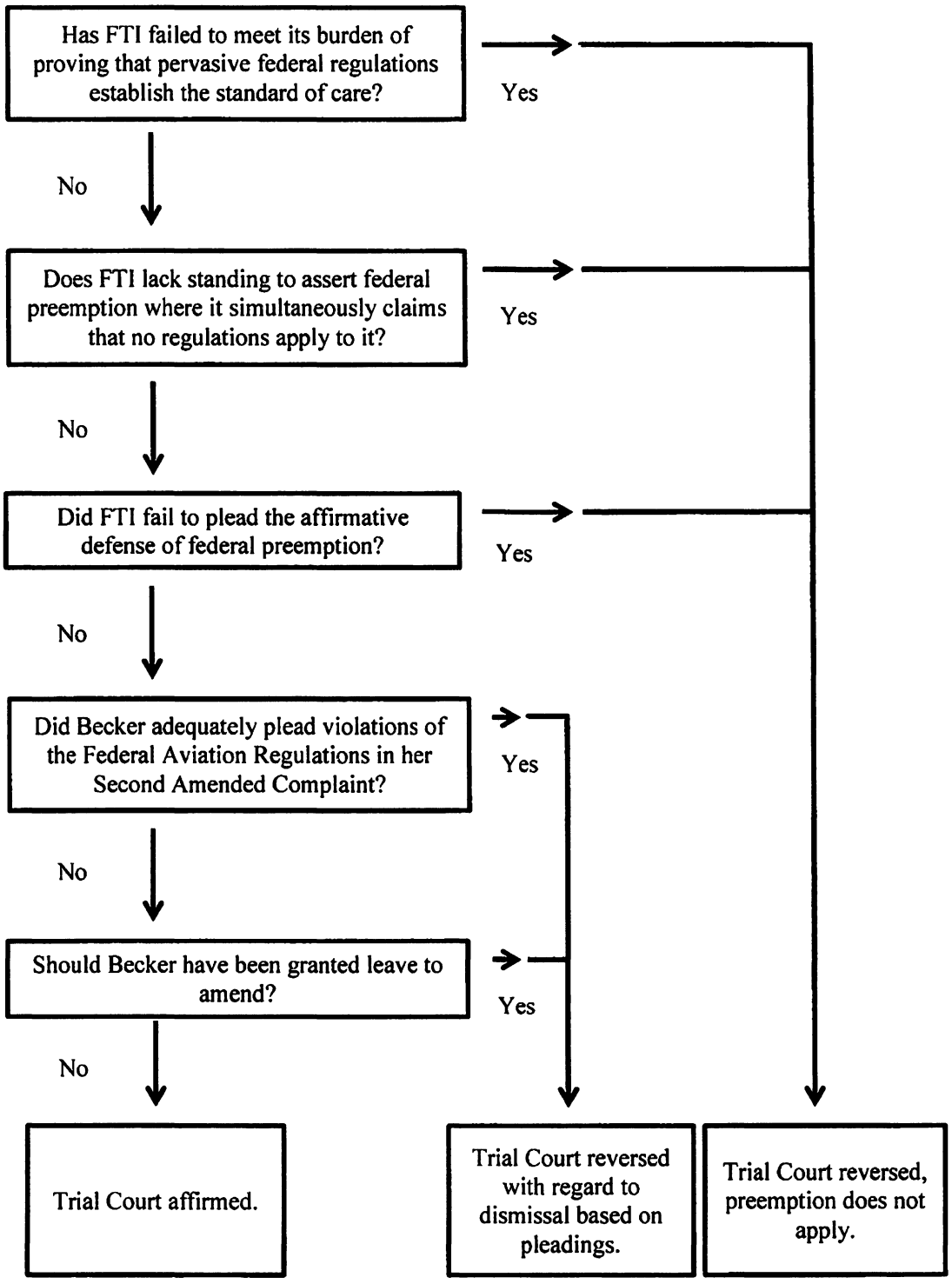
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 29 day of June, 2012, at Salt Lake City, Utah.



David W. Hoeppner, Ph.D. P.E.

Appendix J: Preemption Analysis Flow Chart

Appendix J: Federal Preemption Treatment



Appendix K: Transcript of December 12, 2014 Hearing Before Commissioner Kanazawa

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION I

ESTATE OF VIRGIL VICTOR)
BECKER, JR.,)
Appellant,)
vs.) Appeal No. 72416-9-I
FORWARD TECHNOLOGIES)
INDUSTRIES, INC.,)
Respondent.)

MOTION

Commissioner Masako Kanazawa Presiding

December 12, 2014

Transcribed by: Angela Dutenhoffer, CET-842
Reed Jackson Watkins
Court-Certified Transcription
206.624.3005

A P P E A R A N C E S

On Behalf of Becker Estate:	JAMES ANDERSON Aviation Law Group PS 1420 Fifth Avenue, Suite 3000 Seattle, Washington 98101-2393
On Behalf of Forward Technology:	DOUGLAS K. WEIGEL Floyd, Pflueger & Ringer PS 200 West Thomas Street Suite 500 Seattle, Washington 98119-4296
On Behalf of AVCO Corporation:	MELISSA O'LOUGHLIN WHITE Cozen O'Connor 999 Third Avenue, Suite 1900 Seattle, Washington 98104-4028

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COMMISSIONER KANAZAWA: Okay. In re Estate of Becker. Okay. Good morning. So this is a motion to dismiss by Forward Technology.

Counsel, are you ready to proceed?

MR. WEIGEL: Yes, I am, Your Honor.

Madam Commissioner, may it please the Court, my name is Doug Weigel, and I represent Forward Technology. We're here on Forward Technology's motion to dismiss untimely appeal. I'd like to reserve two minutes, please.

COMMISSIONER KANAZAWA: Yes. Oh, sorry.

MR. WEIGEL: Oh, that's okay.

Forward Technology was one of many defendants that was sued by the Estate of Becker arising out of a July 2008 plane crash. The incident resulted in three fatalities. Among the defendants in the Becker action was the Estate of Brenda Houston. Ms. Houston was the pilot of the plane when it crashed. Becker alleged that the crash was caused by engine failure related to a defective carburetor.

However, recognizing that all the defendants in the case would be asserting pilot error, Becker also asserted a claim against the pilot to the extent that Ms. Houston may have negligently operated the plane.

COMMISSIONER KANAZAWA: Okay. I am pretty familiar with

the proced- -- what procedurally happened, unless I have some specific questions. Actually, can you address the -- you know, the piecemeal nature of this motion to dismiss? There are multiple defendants and some were dismissed without prejudice. And does this Court have to address the statute of limitations' issues in determining your motion to dismiss?

MR. WEIGEL: We don't believe there's anything to decide on the statute of limitations issues. We believe that's clear-cut. And the reason it's clear-cut -- let me go through this starting a little bit further back.

After all -- the initial complaint was filed. An amended complaint was filed bringing in certain defendants. These were the -- what I'll call the Marvel Schebler defendants. Those defendants were subsequently dismissed with prejudice.

A second amended complaint was filed bringing in two more parties. And we've attached the second amended complaint to our motion.

COMMISSIONER KANAZAWA: Is there anything different from the original complaint process, the second complaint with respect to those two defendants, Premier Aircraft and Synergy Systems?

MR. WEIGEL: Synergy was part of the original complaint.

COMMISSIONER KANAZAWA: Um-hmm.

MR. WEIGEL: There's nothing that was changed, to my

knowledge, between the original complaint and the first and second amended complaint with regard to Synergy Systems.

Auburn Flight Services and Premier Aircraft were added in the second amended complaint. And the date that that occurred was on May 10, 2011.

COMMISSIONER KANAZAWA: What about the 2011? And, then, what about the third amended complaint?

MR. WEIGEL: So to understand the third amended complaint, I need to put it into a little bit of context. FTI filed a motion for summary judgment dismissal in this case based on federal field preemption. We said that only federal standards applied. The complaint was alleging state law to our causes of action.

In response to that, plaintiffs amended -- filed -- or filed a motion to amend their complaint. They wanted to then assert both state claims and federal claims as an end run around Forward Technology's motion for summary judgment. No new parties were added. Nothing was changed with regard to the allegations concerning either Synergy Systems or -- well -- or the parties that were added in the second amended complaint. All that was added was an allegation that certain federal standards applied. And that was in direct response to Forward Technology's motion for summary judgment.

So we believe that if the Court is going to entertain the

statute of limitations issue, that it's a nonissue because the operative complaint is the second amended complaint. To the extent the discovery rule applies, the third amended complaint doesn't reflect any newly discovered information. It simply represents a tactical shift by the plaintiffs in direct response to a motion that Forward Technology filed.

COMMISSIONER KANAZAWA: Okay.

MR. WEIGEL: So in terms of the piecemeal argument, Becker controlled the litigation throughout. These, with the exception of Forward Technology and with the exception -- the first party dismissed was Cashmere Moldings. Cashmere was dismissed on an unopposed motion for summary judgment. So Plaintiff Becker assented to their dismissal. All the other parties were voluntarily dismissed by Becker but for Forward Technology. Forward Technology is the only party that got out on a contested motion for summary judgment.

COMMISSIONER KANAZAWA: What about the AVCO, the motion for reconsideration? Was it pending at the time of the Houston dismissal?

MR. WEIGEL: Our response to the commissioner's request for briefing on that issue suggests that the Court doesn't need to get to that issue because of the appeal that's pending in the related Crews matter. But if the Court does get to that issue, we don't believe that that motion for reconsideration was still pending because we believe that

that motion was extinguished by the order of dismissal entered by Becker back in 2013 to which, to my knowledge, AVCO did not object.

So if they felt they had some outstanding claim with regard to the Court's failure to enter the stipulated order to vacate the discovery sanction orders, they should have raised it at that time. So we don't believe that that claim was pending.

The fourth loose-end argument that Becker makes concerns AVCO's cross-claim against the Estate of Houston. And if the Court looks at the sanction orders that were entered and steps back and sees what happened at trial, you'll see that there is no cross-claim. That cross-claim is extinguished by the sanctions order, and here's why: The order -- well, it was a -- it was on a -- on a contempt -- a motion for contempt in discovery sanction. And this discovery sanction that Plaintiff Becker was asking for was that AVCO be precluded from asserting any liability defense. So all liability defenses would be extinguished by the sanction order. The order resulted in the following sanction: All of the plaintiffs' allegations in their respective operative complaints against Defendant AVCO -- and it actually says "Lycoming" in the order, but AVCO-Lycoming are used interchangeably.

COMMISSIONER KANAZAWA: Is that the February 15th, 2013?

MR. WEIGEL: This is February 5, 2013.

COMMISSIONER KANAZAWA: February 5. Okay.

MR. WEIGEL: This is, I believe, the second day of trial. I think the motion was heard on the first day, and they -- it was entered on the second day of trial.

All the plaintiffs' allegations in their respective operative complaints against Defendant AVCO are deemed admitted and all of AVCO's defenses, if any, are stricken. The trial court ordered, among other things, that this Court will not instruct the jury on any comparative fault of the aircraft pilot -- aircraft's pilots, and said it would be prejudicial to Plaintiff Crews to ask the jury to compare the negligence or liability of the acts of AVCO to those of Plaintiff Crews, given the discovery violations in this case.

Under the Court's discovery sanction order of February 5, 2013, there was no longer any claim -- any cross-claim back against Crews. That was effectively terminated and extinguished by the discovery sanctions order. So we don't believe that that's a claim that existed either.

Becker, in their response, says, you know, we're not -- we shouldn't be required to be soothsayers to figure out, you know, when claims were resolved. It's very complicated. There are a lot of parties. But the reality of the situation is that Becker knew exactly who was still in the

case. The last remaining party, but for Houston, was dismissed back in July of 2013. Almost 12 months later, despite notifying the Court on the second day of trial that it was dropping its claims against Crews, the Crews order was entered. Thank you.

COMMISSIONER KANAZAWA: Okay.

MS. WHITE: Good morning, Your Honor. My name is Melissa White, and I represent AVCO.

COMMISSIONER KANAZAWA: Good morning.

MS. WHITE: I'm just going to speak for a very short period of time. We can just keep the clocking running down and we'll share our time.

COMMISSIONER KANAZAWA: Okay.

MS. WHITE: To start off with, Your Honor has issued an order that did decline to consolidate the two appeals, and so my client is only a party to the appeal -- to one appeal, though FTI's motion has come in a separate appeal.

COMMISSIONER KANAZAWA: Do you agree that we don't need to reach the applicable portion?

MS. WHITE: Yes. If Your Honor determines that the -- that the appeal is timely, then AVCO need not be -- the AVCO sort of follow-on arguments need not be addressed.

If I could just very briefly remind Your Honor what the motion for reconsideration was that was pending just to clear up some of the --

COMMISSIONER KANAZAWA: Um-hmm.

MS. WHITE: -- the confusion I just heard -- is that Becker and AVCO settled. As part of that settlement, they together asked the judge to withdraw the order.

COMMISSIONER KANAZAWA: Um-hmm.

MS. WHITE: Then, as part of the settlement, AVCO and Becker -- AVCO and Becker no longer had claims they were asserting against each other because they settled. AVCO did object to that dismissal order. But, in any event, the reconsideration motion was still pending.

COMMISSIONER KANAZAWA: Right. But, then, on the motion for reconsideration, isn't that -- the part of the thing is while there is still a motion to a -- opposing the dismissal entirely from the case, was pending, wasn't it? That you were objecting to the dismissal based on the motion for reconsideration.

MS. WHITE: If I understand you correctly, I think that is correct, Your Honor, is that as -- certainly we were waiting on a response from the Court and believed this was still active and it was -- it was a joint motion.

COMMISSIONER KANAZAWA: So -- okay. So in that context that the trial court issued an order dismissing AVCO entirely from this action, didn't that -- how -- that did not deny effectively that motion for reconsideration being pending?

MS. WHITE: Because whether or not the judge withdrew a sanctions order that had been entered some time ago, that was what she was deciding. That's a separate issue than whether or not Becker and AVCO are going to keep fighting with each other. We went forward to the second half of trial on punitive damages without Becker as a party. We all agreed we're not going to keep fighting with Becker. That was one issue. The separate issue is the sanctions order that was a joint stipulation that asked the Court to rule on. And we were hopeful that she would agree as both of us wanted her to do so.

COMMISSIONER KANAZAWA: Um-hmm.

MS. WHITE: Very briefly, because I know there's a lot that my colleague would like to say, is that I've been -- I've been handling appeals in this court as a law clerk and outside for 18 years, and I've never heard of appeals having -- moving forward this way. If FTI's motion is granted, that is contrary to Rule 54 and everything I've ever seen in all of the appeals I've had. For whatever that's worth, Your Honor, is that we -- appellate practice will change fundamentally if the rule is as FTI has asked.

COMMISSIONER KANAZAWA: Okay.

MS. WHITE: So I will cede the rest of my time, unless you have any questions for me.

COMMISSIONER KANAZAWA: And so how can you reconcile

that -- what you said with the case law that looks at each order to determine the finality of the judgment -- finality of the order in multiple claim cases?

MS. WHITE: Well, there are specific procedures that you can follow in order --

COMMISSIONER KANAZAWA: Um-hmm.

MS. WHITE: -- to get a final order entered that is immediately appealable. Another option is discretionary review, which is not something, obviously, that a party is penalized for not seeking.

The 54(f) notice of presentation of judgment is taken very, very seriously. Everyone gets served with that, whether you were dismissed from the case five years ago or last week. And that is a notice to everybody that this time limit is about to start, and that -- when that came in, everyone stood up, paid attention, counted out their 30 days and got the notices of appeal on file.

And as a practical matter, whether it's a convoluted case or a simple case, that's the only practical way that anyone can really tell when an order is appealable. We don't know. FTI didn't know if Becker had abandoned the appeal or was planning to appeal the whole time. And that's the point of 54(b), to make sure everyone is on notice and that everyone comes in and realizes that now is the time when the appeal could be filed.

COMMISSIONER KANAZAWA: So even when, practically speaking, all the defendants have been dismissed, still if a plaintiff seeks presentation of judgment under CR 54, then that's the judgment; is that what you --

MS. WHITE: Absolutely. And presentation of judgment can happen in court with everyone there or the notice gets filed later. But I have been in several cases where we thought we'd like to file our notice of appeal and can't do it until the judgment gets entered or it gets kicked out or it's deemed -- I've been called in to say, Is this a discretionary review? And so it just seems like it's just creating a lot of confusion, a lot of -- a lot of traps that could be set by other parties, and just a fundamental way that that appellate practice will happen if we're having to constantly figure out whether or not a proposed order provided by a party that was just signed by a judge actually includes exactly the right language or it doesn't. The notice of presentation of final judgment is what's sure and everybody knows and can rely on.

COMMISSIONER KANAZAWA: Okay.

MS. WHITE: Okay. Thank you, Your Honor.

MR. ANDERSON: Good morning, Your Honor.

COMMISSIONER KANAZAWA: Good morning.

MR. ANDERSON: James Anderson for Aviation Law Group on behalf of the Estate of Becker here.

Counsel for AVCO has answered many of the Court's questions, I assume, but FTI's motion should really be denied for three reasons: And the first one is that the language of the final judgment itself establishes it as the operative pleading for the purposes of appeal. The Court need not even go into statute of limitations and all of -- all of the outstanding orders because CR 54(b) and RAP 2.2(d) work together to outline the requirements of a final judgment, and that simply is -- and I won't read them to the Court because the Court is familiar.

COMMISSIONER KANAZAWA: So you know what? Again, so you're saying that no matter how long time passes, then if the plaintiff presents the final judgment under CR 54, that's the final judgment regardless of the effect of the previous orders?

MR. ANDERSON: Well, the previous orders -- the final judgment has to act as a final judgment. It has to contain the language that's in a final judgment. And where a previous order does not contain the language that's in a final judgment, it can't be a final judgment.

COMMISSIONER KANAZAWA: Well, typically, you know, like, for example, summary judgment against one defendant and then summary judgment against a second defendant and a summary judgment against a third defendant, and there are three defendants and that would conclude the case, no order

does -- states any CR 54 language. But we treat the last dismissal order as the final judgment.

MR. ANDERSON: But in this court -- in this case, Your Honor, the last order, the order that FTI would have this Court hinge as a final judgment specifically excludes claims. It specifically states in the order itself that there are claims that are excluded and can't be a final judgment by its own terms because it doesn't meet the requirements of 2.2(d) or CR 54(b). It states specifically in it FTI wants the Court to go through and add up all the puzzle pieces and see if there's a complete puzzle. But where the -- where the last order doesn't even contain that language, it's impossible to have it as a final judgment. And it would be unfair to the parties to allow that to happen.

To just clear up a couple things on the record, the sanctions order sought to -- was sought to be undone by the last waiver before the Court. So that last motion to withdraw and the motion for reconsideration, that was sought to undo the sanctions order. So that was very much still active in the case.

And, also, counsel for Becker never informed the Court that we were dropping claims against the Estate of Houston. That's nowhere in the record, just to correct an inaccuracy from FTI here.

You know, and FTI's position creates all -- looking at it broadly, Your Honor, FTI's position creates this confusion because it runs contrary to the rules. The rules that we're looking at are designed to provide a clear path to appeal for all the parties at the same time. That's what these rules in these cases are about.

Your Honor asked about the cases earlier. Do these cases say -- what do these cases say about a final judgment? Most of the cases address whether an earlier order is appealable with the final order, and they hold that, yes, you can appeal an earlier order with the final order. That's what they stand for. None of the cases go so far as to exclude a final judgment such as FTI is proposing.

COMMISSIONER KANAZAWA: What about the -- this Court's Hoppe v. King County decision that discusses the timeliness of the appeal in moving multiple claims?

MR. ANDERSON: And which case is that, Your Honor?

COMMISSIONER KANAZAWA: It's the 162 Wn. App. 40.

MR. ANDERSON: Is that one that was briefed by the parties, Your Honor?

COMMISSIONER KANAZAWA: Maybe or maybe not. If that's the case, I will allow you to address that.

MR. ANDERSON: What's the citing?

COMMISSIONER KANAZAWA: 162 --

MR. ANDERSON: Um-hmm.

COMMISSIONER KANAZAWA: -- Wn. App. 40.

MR. ANDERSON: And that's a published opinion, Your Honor?

COMMISSIONER KANAZAWA: Yes.

MR. ANDERSON: Okay.

COMMISSIONER KANAZAWA: So that's the 2011 decision.

So I will give you -- how long do you need to -- if you address the issue?

MR. ANDERSON: Would you like the end of next week, Your Honor?

COMMISSIONER KANAZAWA: Is that okay for you, Counsel, or...

MR. WEIGEL: The only problem I have, by chance, is I'm scheduled to be on family vacation from the 21st through the 26th. So if my response is due the following week, that's going to present a problem.

COMMISSIONER KANAZAWA: Okay.

MR. WEIGEL: I would prefer to push it out a little bit further, given the holidays.

COMMISSIONER KANAZAWA: So any suggestion as to that?

MR. WEIGEL: Three weeks?

COMMISSIONER KANAZAWA: Three weeks?

MR. ANDERSON: Yes, Your Honor. That'd be fine with me.

COMMISSIONER KANAZAWA: Okay.

MR. ANDERSON: And that's the Hoppe v. King County, Your Honor?

COMMISSIONER KANAZAWA: Hoppe and Associates v. King County.

MR. ANDERSON: Thank you, Your Honor.

COMMISSIONER KANAZAWA: Um-hmm. Okay. So one more question before you leave.

MR. ANDERSON: Of course.

COMMISSIONER KANAZAWA: You said the statute of limitations is not an issue.

MR. ANDERSON: Because this Court need not reach the statute of limitations --

COMMISSIONER KANAZAWA: Um-hmm.

MR. ANDERSON: -- because the text of the rules and the language of the orders mandates that a final judgment was required in this case. It's not necessary to even reach the statute of limitations. But if the Court does go to the statute of limitations, then it's FTI's burden -- and this is clear in Wachovia vs. Kraft. It's FTI's burden to show that the statute of limitations has expired. They haven't.

The last argument that FTI put before this Court truly on the statute of limitations was that while based on this second amended complaint, the statute expired two months before the Estate of Houston dismissal. They never even mentioned the third amended complaint, which brings additional claims and would --

COMMISSIONER KANAZAWA: Additional claims against either

of the defendants at issue -- the Synergy --

MR. ANDERSON: All the -- it brought federal claims against all of the defendants --

COMMISSIONER KANAZAWA: Okay.

MR. ANDERSON: -- and would move it past -- and that would put the statute of limitations to September of next year, Your Honor.

COMMISSIONER KANAZAWA: Okay.

MR. ANDERSON: Thank you, Your Honor.

COMMISSIONER KANAZAWA: Thank you.

MR. WEIGEL: I apologize in advance if I start coughing. I'm starting to be a little scratchy.

Your Honor, first of all, I'd like to address a factual issue that may or may not be relevant. It concerns the dropping of Becker's claims against Houston. If the Court looks at Appendix H of FTI's motion to dismiss, it's Page 3 of 39. It's the trial court's record of proceedings. And it goes through day by day, and it clearly indicates that Becker is dropping the claims against Crews.

COMMISSIONER KANAZAWA: How about the statute of limitations with respect to the third amended complaint?

MR. WEIGEL: The third amended complaint had no effect. The only way the statute of limitations comes into play is if the discovery rule is an issue. There's no discovery of new parties. There are no new facts. All it is is a

tactical change from asserting strictly state law causes of action to -- in response to FTI's motion for summary judgement now asserting federal causes of action as well. There were no new parties. There's no discovery issue there. It doesn't apply that their amended complaint isn't operative for purposes of establishing any statute.

COMMISSIONER KANAZAWA: Um-hmm. You know, when -- a situation like this where you're claiming only 45 days or some -- not a big time period -- the untimeliness. And there are many, many parties and -- to -- without prejudice, and statute of limitations doesn't seem to be so clear-cut. So is it one of those cases that technically we should --

MR. WEIGEL: I'm sorry. Is it one of the -- one of the cases that --

COMMISSIONER KANAZAWA: One of the cases that we should over- -- you know, that overlook the technicality of the dismissals and then --

MR. WEIGEL: I don't think so, and the reason is this: Looking back at the -- at the trial record and the dropping of the claims against Houston and then not filing the order of dismissal until, you know, 17 months later, AVCO is dismissed by stipulation in July of 2013. Everything substantive in this case happened over a year ago. This isn't like, you know, something happened recently and -- all that happened recently was that Becker decided

that they should submit an order of dismissal of the claims against Houston because they hadn't submitted an order on that. And then they decided that they were going to put form over substance and file a final judgment which would allow them to dictate when they filed their notice of appeal. Filing the notice of appeal didn't take very long. It's an easy thing to do. They had already actually filed the motion for discretionary review against FTI previously in 2012 and withdrew it. So easy for them to have done.

Final judgment in the rule is with a lower case F and a lower case J. It's not -- it doesn't have to be designated a final judgment. It's the last operative order or judgment that adjudicates all the claims against all the parties. That happened -- the latest date that happened was July 10, 2014. I can make an argument that it happened well before then.

COMMISSIONER KANAZAWA: Okay. Thank you.

MR. WEIGEL: Thank you, Your Honor.

COMMISSIONER KANAZAWA: So the parties may submit any -- may, but need not -- anything on the Hoppe and -- within three weeks from today. So any Friday within three weeks. Then I'll make a ruling.

MR. WEIGEL: Yes, Your Honor. And just to be sure --

COMMISSIONER KANAZAWA: Um-hmm.

MR. WEIGEL: -- I have the cite, 162 Wn. App. 40.

COMMISSIONER KANAZAWA: 162, yes, 40. Um-hmm.

MR. WEIGEL: Thank you.

COMMISSIONER KANAZAWA: Thank you.

MS. WHITE: Your Honor, it's simultaneous briefings, is that what you said --

COMMISSIONER KANAZAWA: Yes.

MS. WHITE: -- with everybody? Okay.

COMMISSIONER KANAZAWA: Um-hmm.

MS. WHITE: Thank you.

COMMISSIONER KANAZAWA: Yes. The Court is in recess. Thank you.

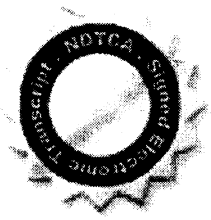
(December 12, 2014 hearing concluded.)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of May, 2015.



Angela J. Dutenhoffer

Angela Dutenhoffer, CET