Court of Appeals No. 72416-9-I

COURT OF APPEALS, DIVISION ONE
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.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent Forward Technology Industries, Inc. ("FTI") respectfully requests that this Court (1) affirm the trial court's summary judgment dismissal of FTI; (2) affirm the trial court's denial of Appellant Estate of Virgil Victor Becker, Jr.'s ("Becker") motion for reconsideration of the dismissal; (3) affirm the trial court's denial of Becker's post-summary judgment motion for leave to file an amended complaint against FTI; and (4) affirm the trial court's denial of Becker's pre-summary judgment motion for leave to assert punitive damages against FTI. In the alternative, FTI respectfully requests that this Court dismiss Becker's appeal as untimely.

II. COUNTER-STATEMENT OF THE ISSUES

(1) Did the trial court properly grant FTI's motion for summary judgment on the basis of federal preemption? **Yes.**

(2) Did the trial court properly deny Becker's motion for reconsideration of FTI's dismissal? **Yes.**

(3) Did the trial court properly deny Becker's post-summary judgment motion to file a third amended complaint against FTI? **Yes.**

(4) Should this Court affirm FTI's summary judgment dismissal on the alternative basis that all three of Becker's claims are based in the Washington Product Liability Act, to which FTI is not subject? **Yes.**

(5) Did the trial court properly deny Becker's pre-summary judgment motion to assert punitive damages against FTI? **Yes.**

(6) Is Becker's appeal timely? **No.**

III. COUNTER-STATEMENT OF THE CASE

A. Factual background

1. The cause of the crash was not determined by a fact finder

On July 27, 2008, a Cessna aircraft crashed near McMurray, Washington, killing all three on board: (1) Brenda Houston, the pilot; (2) Elizabeth Crews, a passenger; and (3) Becker, another passenger. Clerk's

Papers ("CP") at 55. Jennifer White, as personal representative of Becker's estate, filed a product liability lawsuit on July 23, 2010, against multiple defendants, including FTI. CP at 1488. Becker also named Paul Crews, as personal representative of the estates of Houston and Crews (collectively, "Crews"), as a defendant.[1] CP at 54.

Becker's brief implies that the cause of the crash was determined by a fact finder. Becker asserts, for example, that "[f]ollowing the accident it was discovered that the carburetor float . . . had leaked and filled with fuel, a condition which the evidence shows caused the engine to quit and the airplane to crash." App. Br. at pg. 4. Conspicuously, Becker does not cite to the record in violation of RAP 10.3(a)(5).[2] The absence of any citation to the record is easily explained: The cause of the crash was not determined by a fact finder and was vigorously contested by the parties in the trial court.[3] Becker's assertions about cause of the crash are improper attempts to prejudice FTI on appeal.

2. Becker misrepresents FTI's involvement in the underlying facts of this case

In addition to suing FTI and a number of other defendants, Becker also named AVCO Corporation ("AVCO"), the company that built the aircraft's engine.[4] CP at 1489-1490. The engine was outfitted with a

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[1] Crews filed a parallel product liability lawsuit. The two lawsuits were consolidated in January 2011, and deconsolidated in May 2013. CP at 48, 1445.

[2] RAP 10.3(a)(5) requires that appellate briefs contain "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument. *Reference to the record* must be included for each factual statement" (emphasis added). Becker violates RAP 10.3(a)(5) throughout her brief.

[3] On February 25, 2013, the trial court entered a sanctions order against defendant AVCO Corporation. CP at 1670. The order deemed all of the allegations in Becker's complaint as admitted and imposed liability on AVCO as a matter of law. CP at 1682. Any subsequent trial would be limited to damages. *Id.* FTI was not a party to the litigation at the time, as this order was entered more than seven months after FTI was dismissed on summary judgment. Moreover, the order was a discovery sanction, not a factual determination of the cause of the crash.

[4] AVCO was also referred to in the trial court as Lycoming, which is a division of AVCO. CP at 56.

carburetor built by another defendant, Precision Airmotive, LLC ("Precision"). CP at 1490. A carburetor delivers the appropriate mixture of fuel and air to the engine as part of the engine's fuel delivery system. CP at 63. Inside the carburetor was a "float" – a plastic component that regulated the amount of fuel fed into the engine. CP at 1496. The float was composed of three plastic components, including a base and two lid pieces. CP at 1954.

FTI's involvement in this case was clearly defined and limited to welding the float components for Precision. Becker's representations about FTI's involvement are misleading and inaccurate. Becker claims that FTI "assembled" and "manufactured the defective carburetor float." App. Br. at pgs. 4, 7. To the contrary, FTI did not manufacture or design any components of the float; it simply contracted with Precision to weld the components together according to Precision's instructions. CP at 1966:17-1967:11, 1983:13-15, 1989:23-1990:1, 1996:9. The components were molded by Synergy Systems and Cashmere Molding, Inc., who were both also named in Becker's lawsuit. CP at 54, 360 (102:24-104:3).

Becker also erroneously claims that FTI "sold" the carburetor floats to Precision. App. Br. at pg. 7. FTI never sold any floats to Precision. Scott Olson, FTI's project manager who worked with Precision on the floats, testified that FTI "was paid to weld the parts together. [FTI] did not sell carburetor floats to Precision Airmotive. [FTI] charged [Precision] a fee for a service." CP at 1989:23-1990:1.

Jim Nelson, a shop machine foreman at FTI who also worked with Precision, similarly testified that "[FTI] w[as] contracted just to weld the parts." CP at 1996:9. Sales acknowledgements from 2000 through 2004 show that FTI charged Precision only for welding and welding-related service charges, such as the setup and repair of FTI's prototype welding

tool. CP at 2000-2007. FTI's order entries from 1999-2005 establish the same pattern – FTI was a provider of welding services. CP at 2009-2015. Precision confirmed this in its discovery responses: Precision "sent the molded [float] components to a welding company [*i.e.*, FTI], which welded the pieces together. [FTI] returned [not *sold*] the welded . . . float to Precision." CP at 2018:34-38.

3. **Precision independently tested each float before approving it for use in the field and Precision did not rely on FTI's random testing for quality assurance purposes**

Before approving the floats for sale as carburetor components, Precision inspected and tested "100 percent" of the floats. CP at 1958:10-13, 1960:11-13. Precision followed the specifications set forth in the Precision Engineering Specification ("PES-4495") "Assembly, Testing, and Inspection Procedures for 30-804 Molded Delrin Float Assemblies." CP at 1955:1-1956:2, 2068-70 (PES-4495). The PES-4495 testing specifications establish guidelines for visual, pressure, hot water, and vacuum tests. CP at 2069-70. Using its testing specifications, Precision independently tested each float before it approved the float for sale and use in the field. CP at 1958:10-13, 1960:11-13.

In contrast, FTI conducted its own random float testing for the purpose of calibrating its welding tool. CP at 1975:16-24, 1984:14-25. FTI's test involved submerging random floats in hot water and looking for air bubbles. CP at 1975:16-24. This test was not effective at identifying extremely minor leaks because visual observation could not consistently detect small bubbles. CP at 1985:1-4. Moreover, FTI only tested floats at random. CP at 1970:25-1971:1, 1997:16-17. Precision was aware that FTI's test was rudimentary and not intended to discover every leak. CP at 1976:20-1977:6, 1978:22-25. As Mr. Nielson, Precision's manager, testified, Precision "would always run the parts through [Precision's] own

tests; and even floats that passed leak testing at [FTI] . . . would still . . . fail[] [Precision's] testing afterwards." CP at 1959:12-15. It was "clearly understood" by both Precision and FTI that FTI's tests could not and would not be relied upon for Precision's quality assurance purposes. CP at 1978:24.

In his deposition, Mr. Olson was asked whether he thought Precision's tests were adequate, even though FTI was under no obligation to evaluate Precision's testing methods:

> [*Crews' counsel:*] Okay. Wouldn't [whether Precision had a process in place to ensure that no leaky floats made it into the field] be something important that you would want to know given the high rate of defective floats?
> [*Mr. Olson:*] No.
> [*Crews' counsel:*] And why not? That just wasn't a concern to you?
> [*Mr. Olson:*] It was not.
> [*Crews' counsel:*] Okay.
> [*Mr. Olson:*] To me it's just another plastic widget.
> [*Crews' counsel:*] Okay. Even though you knew that it's a certain percentage of defective floats [] being produced and they're going into aircraft, and if the defect could create a potential safety issue, you knew all that?
> [*FTI's counsel:*] Object to the form. He didn't say that he knew they were going into aircraft.
> [*Mr. Olson:*] I did not know.

CP at 1898. Becker implies that Mr. Olson' statement, "To me it's just another plastic widget" is equivalent to stating that 'safety was not important to FTI because, after all, it's just another plastic widget.' App. Br. at pg. 11; CP at 1898. That is not the import of Mr. Olson's testimony. Mr. Olson's statement, taken in its full context, is consistent with his earlier testimony that FTI welds "to the best of [its] ability . . . regardless of what it is" that is being welded. CP at 1876. Mr. Olson's "just another plastic widget" statement conveyed that FTI has the same approach for each welding project and has the same expectations for the quality of its work, regardless of the purpose. The evidence firmly establishes that

Precision independently tested all the floats it received before approving them, and did not rely on FTI's random and rudimentary testing for quality assurance.

4. **FTI had no knowledge that Precision was installing floats with the potential to leak on airplanes**

FTI knew that Precision intended to use the floats as components of carburetors on general aviation aircraft. CP at 1965:2-25, 1990:1-1991:17. FTI also was aware that some of the floats it welded had the potential to leak, and that some of the floats shipped to Precision had actual leaks. CP at 1986:1-13, 1990:25-1991:4. FTI knew of the leaky floats because Precision sent FTI "discrepancy reports" notifying FTI that Precision had "scrapped the bad [floats]." CP at 1986:10-13.

Contrary to Becker's assertions, *see, e.g.*, App. Br. at pgs. 45-48, FTI did not know that defective floats were passing Precision's testing and being installed on aircraft. Becker relies exclusively on out-of-context quotes from Mr. Olson, who was asked by Becker's counsel during his deposition, "You were selling them defective floats, right?" Mr. Olson answered, "Yes." CP at 369. Mr. Olson was later asked, "You understood, though, that Precision was selling the Delrin floats that your company welded and they were going onto aircraft engines?" Mr. Olson replied, "Yes." CP at 370. Becker claims this testimony is "shocking." App. Br. at pg. 10. But she has completely distorted the context of Mr. Olson's statements. At the beginning of his deposition, Mr. Olson was asked, "At that time were the leak failure rates excessive, in your opinion?" He responded,

> You know, our – our goal is to strive for a hundred percent yield. Any fallout is a bad thing. So there may have been batches or instances of high rates. And there may have been other batches where they were much lesser rates. But, you know, in reality none of it is acceptable. It's – our goal is to eliminate any scrap or fallout.

CP at 1873.

Becker's counsel then asked whether FTI "ever consider[ed] the purpose for which the part would ultimately be used." CP at 1876. Mr. Olson responded that FTI did not consider the purpose because "[FTI] [was] welding plastic. [FTI] do[es] it to the best of [its] ability whether – regardless of what it is" that is being welded. *Id.* Mr. Olson was describing FTI's expectations for the quality of its welding services, which provides the context for his subsequent exchange with Crews' counsel:

> [*Crews' counsel:*] Okay. Would you agree, though, that [the number of floats with leaks] was an unacceptable amount?
> [*FTI's counsel:*] Object to the form.
> [*Mr. Olson:*] I would agree in some batches it was bad.
> [*Crews' counsel:*] I mean, it seemed like over the years it was something that you were concerned with and repeatedly tried to get Precision to address that. Is that right?
> [*FTI's counsel:*] Object to the form.
> [*Mr. Olson:*] You know, we made some suggestions. We offered some tooling. You know, we otherwise worked with them to produce parts for them. Parallel they worked on their end to refine their molding processes and make parts that conformed to their tolerances.
> [*Crews' counsel:*] But it was a concern that you had, and the problem was never fixed, right?
> [*Precision's counsel:*] Object to form.
> [*Mr. Olson:*] 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[al] issues. It was a bad situation. So, yes, in that regard[] I was concerned.
> [*Crews' counsel:*] You were selling them defective floats, right?
> [*Mr. Olson:*] Correct.
> [*FTI's counsel:*] Object to the form.

CP at 1896. Mr. Olson was not admitting that FTI knew carburetor floats with the potential to leak were being installed on airplanes. Indeed, Crews' counsel asked Mr. Olson three times whether he knew that floats

with the potential to leak were being installed on aircrafts. Each time, Mr. Olson's answer was the same:

> [*Crews' counsel:*] [Y]ou're aware that those floats were then being sold by Precision as part of carburetors that were going on to aircraft engines, is that right?
> [*Precision's counsel:*] Object to the form.
> [*FTI's counsel:*] Join.
> [*Mr. Olson:*] I was not aware – I cannot say what became of those parts after we sent them to Precision Air or what process they were subjected to or which – you know, how they were qualified.

CP at 1897. Yet again, he was asked, "And so you knew that a certain amount of defective carburetor floats were out there in the field on aircraft engines?" CP at 1897. Mr. Olson responded, "No, I did not know that." *Id.* Crews' counsel asked a third time, "And you knew that Precision was selling [defective carburetor floats] and they were going onto aircraft engines?" Mr. Olson's answer was the same: "I did not know that they were selling those specific carburetor floats. I don't know what became of them once they delivered to my customer." CP at 1897. Precision never discussed with FTI that "some of the floats that had been sent to Precision may be in the field and may be subject to leak issues." CP at 1973.

5. FTI had no authority to approve the floats for use or for sale in the field, as that authority belonged to Precision

FTI did not know if leaky floats were ending up in the field precisely because FTI did not have any authority to approve the floats for use on aircraft. That authority resided with Precision, who was the holder of the Federal Aviation Administration's ("FAA") "Parts Manufacturer Approval" ("PMA") for the carburetor containing the float at issue here. PMA holders are required by federal regulations to inspect and to ensure that each part is airworthy. 14 C.F.R. § 21.33(b)(1)-(4). In contrast to Precision, FTI is not a PMA holder for the carburetor or the float, and has never held any other FAA certificates. CP at 1969:4-5.

Precision had responsibilities under federal regulations to inspect and to approve the floats for use on general aviation aircraft. FTI did not have any such responsibilities. Mr. Olson testified that FTI did not "in any way approve" the floats. CP at 1982:9. In contrast, Peter Nielson, Precision's manager, testified that "the floats that leaked in the field" were "approved and shipped" by Precision after the floats "had passed [Precision's] production leak tests." CP at 1957:21-25.

FTI possessed no regulatory responsibility, or any other type of responsibility, to approve the airworthiness of the floats. However, FTI still had obligations to Precision to weld "hermetically sealed" floats "to the best of [its] ability" and "to eliminate any scrap or fallout" with their welds. CP at 1968:1-3, 1972:21-24, 1987:21-1988:6. FTI was also required to include a "certificate of compliance" with each shipment of welded floats documenting that the plastic parts were welded according to Precision's "drawing, revision, date, specifications, test results, etc." CP at 2066. But these obligations existed only within a business relationship context. FTI was "concerned" about welding leaky floats because FTI was worried about losing a customer. CP at 1988:16. Although FTI's responsibilities to Precision were exclusively commercial in nature, this arrangement obviously did not give FTI a license to disregard safety concerns. And FTI did not disregard these concerns. But the arrangement establishes that FTI had no regulatory duty to inspect the floats for airworthiness or to approve them for use in the field.

6. Precision declined to purchase additional testing, services, or equipment from FTI, and FTI had no obligation to supervise Precision's testing methods

As the FAA's manufacturer certificate holder, Precision was responsible under federal regulatory law for "mak[ing] all inspections and tests necessary to determine . . . [c]ompliance with the applicable

airworthiness . . . requirements." 14 C.F.R. § 21.33(b)(1). FTI did not hold any FAA certificates and therefore had no such obligation. Nevertheless, FTI offered to sell leak testing equipment and more accurate vacuum testing to Precision, but the offers were rejected by Precision. CP at 1997:7-19, 1979:19-1980:10. FTI did not know why Precision rejected the proposals, but FTI did not need a reason because FTI had no responsibility to supervise Precision's testing methods. The duty to "make all inspections and tests necessary" belonged to Precision, not FTI.

FTI "welded [the carburetor floats] to the best of [its] ability, monitored the process [as] best [it] could with the tools that [it] had," but FTI understood that Precision "[one] hundred percent leak tested everything [FTI] sent [Precision]" and that "it was up to [Precision] to do what [it] . . . deemed fit" with the carburetor floats. CP at 1981, 1998. As such, Becker's allegation that FTI lacked "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" is of no consequence. App. Br. at pg. 10. FTI had no obligation to implement these programs: FTI's proposals for additional testing, equipment, and services were contractual offers which were not accepted, and FTI was under no obligation to demand additional testing from Precision after Precision rejected FTI's proposal.

In sum, Becker's statement of the case is not a "fair" or accurate recitation of the facts. RAP 10.3(a)(5). It misrepresents FTI's involvement in the underlying facts of the case and ignores the allocation of responsibilities among Precision and FTI. Moreover, Becker repeatedly omits references to the record and many of references she does include are simply citations to the motions and oppositions he filed in the trial court. Simply "incorporat[ing]" arguments by reference on appeal is disfavored.

Holland v. City of Tacoma, 90 Wn. App. 533, 537-38, 954 P.2d 290 (1998); *State v. Kalakosky*, 121 Wn.2d 525, 540 n.18, 852 P.2d 1064 (1993) (noting that "end run" around RAPs "will not be sanctioned").

B. Procedural background

Becker filed an original complaint against FTI on July 23, 2010, CP at 1488, a first amended complaint on September 16, 2010, CP at 1, and a second amended complaint on May 10, 2011. CP at 54. All three complaints alleged product liability claims against FTI. Specifically, Becker alleged claims for (1) strict liability; (2) negligence; and (3) breach of warranty. CP at 75-79. Under the strict liability claim, Becker alleges that FTI is "strictly liable" for "creat[ing] a defective and unsafe product in the subject product."[5] CP at 76-77. Becker's negligence claim alleges that "[t]he crash . . . was caused by the negligence . . . of . . . FTI . . . in that the subject product and/or components thereof were negligently . . . designed, manufactured, assembled, [etc.]." CP at 77. The breach of warranty claim asserts that FTI "warranted the subject product and/or components thereof were airworthy, of merchantable quality, fit and safe for purposes for which they were designed, manufactured, [etc.]," and that FTI "breached said warranty." CP at 78-79.

In December 2010, FTI answered Becker's first amended complaint[6] by denying all allegations and expressly "incorporat[ing] any applicable affirmative defense or other defense asserted by any other Defendant in this action." CP at 2487. These affirmative defenses included federal preemption, which Precision asserted in its answer in

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[5] Becker defined "subject product" as "the engine, its fuel delivery system, the carburetor component of the engine's fuel delivery system, and the carburetor's component parts that were on [the aircraft] at the time of the accident." CP at 61.

[6] FTI did not file a separate answer to Becker's second amended complaint because the amendments did not affect FTI. *See Duryea v. Wilson*, 135 Wn. App. 233, 239-40, 144 P.3d 318 (2006).

December 2010 and AVCO asserted in its answer in April 2011. CP at 2477-2478, 2482-2483, 2486-2487, 2490-2491.

Becker's second amended complaint contains only a vague and cursory reference to federal regulations. She alleged that "the design and/or construction of the subject product and/or components thereof was not in compliance with specific mandatory government specifications relating to safe design and construction, including the Federal Aviation Regulations (14 CFR et seq)."[7] CP at 77. Becker did not assert that FTI violated any specific federal regulation or law.

In April 2012, FTI served discovery requests on Becker, asking her to (1) identify the specific regulations within Title 14 of the CFR that FTI violated, and (2) identify any regulations outside Title 14 that FTI may have violated. CP at 2044-2064. These requests also asked Becker to identify what level of government (*i.e.*, local, state, or federal) promulgated any regulations that were allegedly violated.

Specifically, FTI asked Becker in Interrogatory 1(g) to identify the federal regulations that FTI's "construction" of the float allegedly violated. CP at 2048. FTI also requested in Interrogatory 1(h) that Becker enumerate the particular regulations, if any, establishing that FTI's welding was subject to the FAA's governance in the first place. *Id.* Becker's response to Interrogatories 1(g) and 1(h) was to "[s]ee response to [1](c)." CP at 2049. Becker's response to Interrogatories 1(c), in turn, was "With respect to defendant FTI – None." *Id.*

FTI further queried Becker in Interrogatory 2(g) about which federal regulations FTI's "design[]" of the float allegedly violated. CP at 2051. FTI similarly asked Becker to identify the regulations, if any, that

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[7] Title 14 of the Code of Federal Regulations contains thousands of regulations that apply to everything from space shuttles to pilot schools.

subjected FTI to the FAA's oversight in the first place. *Id.* Once again, Becker's response to both interrogatories was "see response [2](c)." CP at 2052. And the response to Interrogatory 2(c) was "Plaintiff Becker is not alleging that FTI violated any specific mandatory government design specification." CP at 2051. FTI also asked Becker to identify the sources of her claims for inadequate instructions, failure to warn post-sale, and breach of warranty. Becker did not identify any specific federal regulations, laws, or standards. CP at 2053-2058. Her only reference to a federal authority was a vague and conclusory statement that "[t]he engine, its carburetor component, including its Delrin float, did not meet federal minimum standards." CP at 2049.

In May 2012, Becker filed a motion to assert punitive damages against FTI under Minnesota law. CP at 88. FTI is a Minnesota corporation doing business in Washington. CP at 33. Becker's motion relied on gross misrepresentations of Mr. Olson's deposition testimony. FTI successfully opposed the motion. CP at 201-214, 231-233. Notably, in her proposed amended complaint, Becker did not allege any violations of specific federal regulations, laws, or standards. *See* CP at 144-172.

FTI filed a summary judgment motion in June 2012, arguing that federal law preempted state law standards of care in the field of aviation safety. Because Becker had failed to allege that FTI violated any federal regulations, laws, or standards, her claims could not survive. FTI alternatively argued that all three of Becker's claims fell within the scope of the Washington Product Liability Act ("WPLA"), ch. 7.72 RCW, and that only "product sellers" or "manufacturers" could be liable under the WPLA. Because FTI did not meet either definition, Becker's claims against FTI were meritless. CP at 234-260. After oral argument, CP at 2281-2343, *see also* Verbatim Report of Proceedings (July 13, 2012), the

trial court granted FTI's motion on federal preemption grounds on July 16, 2012. CP at 666.

On July 25, 2012, Becker filed a motion for reconsideration. For the first time, she argued that FTI had waived federal preemption by not explicitly raising the issue in its answer. CP at 804. Becker also argued that the trial court's federal preemption ruling was erroneous. CP at 800-803. Two weeks later, Becker filed a motion for leave to file a third amended complaint against FTI and the other defendants that alleged violations of specific federal regulations. CP at 828-838. In its opposition to the motion for leave, FTI demonstrated how the amendment would be futile because none of the putative regulations applied to FTI. CP at 1129-1142. On August 24, 2012, the trial court denied Becker's motion for leave as to FTI but granted it against the other defendants. CP at 1224-1225. Six days later, the trial court denied Becker's reconsideration motion. CP at 1397-1398.

After FTI was dismissed, six defendants remained in Becker's lawsuit. Defendant Crest Airpark, Inc. was dismissed by stipulated order filed on October 31, 2012. CP at 1660-1662. Precision filed for Chapter 11 bankruptcy in December 2012 and was subsequently dismissed. CP at 1666-1667. Defendants Synergy Systems, Inc. and Auburn Flight Service, Inc. were dismissed by stipulated orders in May and June 2013. CP at 1685-1689, 1699-1702.

The other defendants in Becker's lawsuit, AVCO and Crews, had a more complicated procedural history. On February 25, 2013, the trial court entered a sanctions order against AVCO for purported discovery violations. CP at 1670-1684. The order deemed the allegations in Becker and Crews' complaints as admitted and struck AVCO's affirmative defense. CP at 1682. Because AVCO's liability had been established as a

matter of law, any subsequent trial would be limited to damages only. *Id.* The order also allowed Becker and Crews to assert punitive damages against AVCO. CP at 1683. The lawsuits of Becker and Crews were deconsolidated, CP at 1445, and Crews proceeded with a damages trial against AVCO, which resulted in separate appeal before this Court.[8] Becker dismissed AVCO in an order dated July 30, 2013. CP at 1766-1767.

Approximately one year later, Becker voluntarily dismissed Crews by stipulated order on July 7, 2014. CP at 1768-1770. Even though Crews was the last remaining defendant in Becker's lawsuit, she asked the trial court to enter a "final judgment," which the trial court signed and filed on August 1, 2014. CP at 1771-1775. On August 28, 2014—48 days after Crews was dismissed—Becker filed a notice of appeal with this Court. CP at 1457-1462. FTI filed a motion to dismiss the appeal before the Commissioner of this Court, arguing that Becker's appeal was untimely. *Spindle* (Motion to Dismiss Untimely Appeal). The Commissioner denied the motion, but invited FTI to brief the issue further before this Court. *Spindle* (Commissioner's Ruling Denying Motion to Dismiss ("Ruling")) at pg. 11. For clarity, the remainder of the procedural background regarding Becker's untimely appeal is set forth in Section IV.F, *supra.*

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[8] *AVCO Corp. v. Crews*, No. 70756-6 (argued Jan. 12, 2015).

IV. ARGUMENT

A. The trial court properly granted FTI's summary judgment motion on the basis of federal preemption

This Court should affirm the FTI's summary judgment dismissal on the basis of federal preemption. The trial court correctly concluded that federal law preempts state law standards of care in the field of aviation safety. Becker acknowledged in her discovery responses that she was not alleging FTI violated any federal regulations or other standards. Accordingly, her claims could not survive summary judgment. On appeal, Becker attempts to salvage her case against FTI by arguing that she was not required to plead specific standards of care. This argument is meritless, as a nonmoving party must assert the specifics of their legal theories to withstand summary judgment. Becker also argues that her second amended complaint adequately alleged violations of federal standards of care. But her second amended complaint only contained general references to a broad swath of federal regulations, which is insufficient to defeat summary judgment.

1. Standard of review

This Court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party is entitled to summary judgment as a matter of law and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). Unsupported conclusory statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987). A nonmoving party attempting to resist a summary judgment "may not rely on speculation [or] argumentative assertions that unresolved factual matters remain"; rather, "the nonmoving party must set forth specific facts that

sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986).

2. FTI did not waive federal preemption in the trial court

Becker argues that FTI waived its federal preemption argument in the trial court. App. Br. at pgs. 38-42. Ironically, Becker did not raise this argument in her summary judgment opposition. *See* CP at 278-284. Instead, she asserted it for the first time in her reconsideration motion, which was denied by the trial court.[9] CP at 804, 1397. Becker has not assigned error to the denial of her reconsideration motion, and does not separately address the reconsideration motion in her brief. Accordingly, she has failed to preserve her waiver argument. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 128, 138 n.4, 331 P.3d 40 (2014).

Becker's waiver argument is meritless in any case. The only Washington state court cited by Becker is *Schneider v. Snyder's Foods, Inc.*, 95 Wn. App. 399, 976 P.2d 134 (1999), which does not support her argument. *Schneider* listed federal preemption as one of four affirmative defenses raised by the defendant. *Id.* at 401. *Schneider* did not hold that federal preemption is waived unless raised as an affirmative defense, nor did it hold that federal preemption is an affirmative defense to begin with. It simply described federal preemption as one of several issues raised by the defendant in response to the complaint.

In the absence of any binding state law authority that federal preemption is an affirmative defense that is waived unless pled, Becker

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[9] Because Becker raised this argument for the first time in her reconsideration motion when she could have asserted it in her summary judgment opposition, the argument should not be considered by this Court. *See Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (refusing to consider arguments on appeal that were raised for the first time on a reconsideration motion when no explanation was provided for why arguments could not have been raised in the trial court earlier); *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (same).

attempts to argue by analogy. First, she claims that federal courts in Washington and elsewhere have held that a party must allege federal preemption in an answer. Second, Becker contends that Washington Civil Rule 8(c) and Federal Rule of Civil Procedure 8(c) "follow each other nearly word for word." App. Br. at pg. 39. She then asserts that in Washington, federal preemption is waived unless pled as an affirmative defense. But this conclusion does not necessarily follow from the premises. "'Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance' in interpreting the state rule." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 750, 310 P.3d 1275 (2013) (quoting *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998)). "However, [courts] follow the federal analysis only if [courts] find its reasoning persuasive." *Id.*

CR 8(c) provides that a responsive pleading "shall set forth . . . any . . . matter constituting an avoidance or affirmative defense." However, CR 15(b) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." This rule is to be liberally construed. *Burlingham-Meeker Co. v. Thomas*, 58 Wn.2d 79, 81, 360 P.2d 1033 (1961). Federal preemption is a legal doctrine that commonly appears in aviation-related lawsuits. Indeed, AVCO and Precision both pled federal preemption as an affirmative defense in their answers in December 2010 and April 2011, respectively, which FTI incorporated by reference. CP at 2477-2478, 2482-2483, 2486-2487, 2490-2491. Additionally, FTI served discovery requests in April 2012 on Becker that clearly indicated that federal preemption was at issue. *See, e.g.*, CP at 2048 (asking Becker to identify the government—federal, state, or local—that promulgated the specific regulations that FTI allegedly

violated). Accordingly, Becker was indisputably on notice that federal preemption was at issue in this case. *See Dep't of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 504, 694 P.2d 7 (1985) (holding that although affirmative defense of statute of limitations was not expressly pled, the defense was a "focus" of the case and raised under CR 15(b) and not waived); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 767-68, 733 P.2d 530 (1987) (issue raised during summary judgment and in discovery was deemed part of the pleadings); *Shaffer v. Victoria Station, Inc.*, 18 Wn. App. 816, 572 P.2d 737 (1977).[10]

In any event, FTI expressly raised federal preemption as an affirmative defense when it explicitly incorporated the affirmative defenses of AVCO and Precision. CP at 2487 (¶ 12.20). CR 10(c) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion." FTI's incorporation by reference of federal preemption was sufficient to sustain summary judgment dismissal. *See Davis v. Bear*, No. 12-330, 2013 U.S. Dist. LEXIS 57873, at *12-13 (W.D. Okla. Feb. 25, 2013) (dismissing defendant on summary judgment based on affirmative defense incorporated by reference in defendant's answer). In sum, FTI did not waive federal preemption in the trial court.

3. The trial court correctly concluded that state law standards of care in the aviation safety field are preempted by federal law

a. *Preemption generally*

Pursuant to the Supremacy Clause of the United States Constitution, Congress has the authority to preempt state law. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007).[11] There are several

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[10] *Rev'd on other grounds*, 91 Wn.2d 295, 588 P.2d 233 (1978)

[11] Ninth Circuit precedent is entitled to "substantial deference." *Lundborg v. Keystone Shopping Co.*, 138 Wn.2d 658, 677, 981 P.2d 854 (1999). Here, the trial court relied on *Montalvo* in granting FTI summary judgment dismissal. *See* CP at 666. Remarkably, Becker never discusses *Montalvo* in her opening brief.

different categories of preemption. The first distinction is between express and implied preemption. In the trial court, FTI conceded that this case does not involve express preemption. CP at 243. Oddly, Becker discusses it extensively in her opening brief, while failing to fully address implied preemption—the actual basis of the trial court's decision. *See* App. Br. at 23-29. Within the implied preemption category, there is conflict and field preemption. FTI did not assert conflict preemption.

Instead, this case concerns implied field preemption, which occurs when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it." *Montalvo*, 508 F.3d at 470 (internal quotation omitted). The "comprehensiveness" of federal law in the field is an indication of "preemptive intent." *Id.* Another indication is the "pervasiveness of the regulations enacted pursuant to the relevant statute to find preemptive intent." *Id.* Federal regulations demonstrate implied field preemption because where "Congress has entrusted an agency," such as the FAA, '"with the task of promulgating regulations to carry out the purposes of a statute, as part of the preemption analysis [courts] must consider whether the regulations evidence a desire to occupy a field completely."' *Id.* at 470-71 (quoting *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 149, 107 S.Ct. 499, 3 L. Ed. 2d 449 (1986)).

b. *There is field preemption in the aviation safety field*

The question of whether federal law preempts state law for aviation safety was answered in the affirmative in *Montalvo*. *Id.*, 508 F.3d at 470-74. In *Montalvo*, the plaintiffs brought, among other causes of action, a state law failure-to-warn claim against several commercial airline companies. The plaintiffs alleged that the airlines failed to warn about the risk of developing a medical condition during prolonged flights. The

district court held that the plaintiffs' failure-to-warn claim was meritless because there was no federal requirement that airlines warn passengers about the risk of developing the condition.

The Ninth Circuit affirmed, holding that "the regulations enacted by the Federal Aviation Administration, read in conjunction with [the Federal Aviation Act of 1958, 49 U.S.C. § 40103 *et seq.*], sufficiently demonstrate an intent to occupy exclusively the entire field of aviation safety and carry out Congress's intent to preempt all state law in this field." *See Montalvo*, 508 F.3d at 471. The Ninth Circuit noted that aviation safety is "not subject to supplementation by, or variation among, *states*" because the field has "long been dominated by federal interests" and "federal air safety regulations[] establish complete and thorough safety standards" for aviation. *Id.* at 471, 474.

The *Montalvo* Court concluded that "it is clear that Congress intended to invest the Administrator of the FAA with the authority to enact exclusive air safety standards," including regulations that cover "*airworthiness standards*." *Montalvo*, 508 F.3d at 472 (emphasis added). The First, Third, Sixth, and Tenth Circuits have all reached the same conclusion. *French v. Pan Am Express, Inc.*, 869 F.2d 1, 5 (1st Cir. 1989); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367-68 (3d Cir. 1999); *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 129 (3d Cir. 2010); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 495 (6th Cir. 2005); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010).

Similar to Ninth Circuit listing "airworthiness standards" as a preempted field, the Third Circuit in *Abdullah* also specifically cited regulations concerning "certification and 'airworthiness' requirements for aircraft parts" as an area preempted by federal law. *Abdullah*, 181 F.3d at

367-68. As the *Montalvo* Court explained:

> Congress could not reasonably have intended an [airplane] on a Providence-to-Baltimore-to-Miami run to be subject to certain requirements in, for example, Maryland, but not in Rhode Island or in Florida. It is equally as doubtful that Congress would have intended the sufficiency of the Airlines' warnings to hinge on where each passenger on each flight was likely to file suit. . . . *[S]uch a result would be an anathema to the [Federal Aviation Act].*

Montalvo, 508 F.3d at 473 (emphasis added).

In 2009, the Ninth Circuit decided *Martin v. Midwest Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009), which clarified *Montalvo*'s expansive holding. In *Martin*, the plaintiff alleged that the airplane's stairs were defectively designed because they only had one handrail. The airline settled the claim then sued the manufacturer for indemnification. *Id.* at 808. The *Martin* Court explained that *Montalvo* "neither precludes all claims except those based on violations of specific federal regulations, nor requires federal courts to independently develop a standard of care when there are no relevant federal regulations." *Id.* at 811. Instead, *Montalvo* means that "when an agency issues 'pervasive regulations' in an area, like passenger warnings, 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.* The *Martin* Court held that since "airstairs" were slightly regulated, but not pervasively, the FAA did not preempt state law.

In 2013, the Ninth Circuit created a two-part test modeled after *Montalvo* and *Martin*. In *Gilstrap v. United Airlines, Inc.*, 709 F.3d 995 (9th Cir. 2013), the Ninth Circuit first analyzed the Third Circuit's leading FAA preemption case, *Abdullah*. *Abdullah* holds that '"federal law establishes the applicable *standards of care* in the field of air safety"' but does not preempt state remedies. *Gilstrap*, 709 F.3d at 1005 (quoting

Abdullah, 181 F.3d at 367 (emphasis in original)).

In so holding, *Abdullah* followed the Supreme Court's reasoning in the landmark case of *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). *Silkwood* established, in the context of atomic energy regulation, that "federal preemption of [state and territorial] standards of care can coexist with state and territorial tort remedies." *Abdullah*, 181 F.3d at 375. The Ninth Circuit soundly adopted the holding of *Abdullah* "that federal law generally establishes the applicable standards of care in the field of aviation *safety*." *Gilstrap*, 709 F.3d at 1005 (quoting *Montalvo*, 508 F.3d at 468) (emphasis in original)).

The *Gilstrap* Court also adopted from *Abdullah* the Third Circuit's "division of the FAA's field preemptive effect into two components: state standards of care, which may be field preempted by pervasive regulations, and state remedies, which may survive even if the standard of care is so preempted." *Gilstrap*, 709 F.3d at 1006.

With this in mind, the Ninth Circuit established a two-part framework for evaluating whether field preemption applies under the FAA. *Id.* "First, we ask whether the particular *area* of aviation commerce and safety implicated in the lawsuit is governed by 'pervasive [federal] regulations.'" *Id.* (quoting *Martin*, 555 F.3d at 311) (emphasis added). If yes, then any applicable state standards of care are preempted. *Id.* Second, "[e]ven in those *areas*, however, the scope of field preemption extends only to the standard of care." *Id.* (emphasis added). Accordingly, "local law still governs the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies." *Id.* (internal quotes omitted).

Applying this framework, *Gilstrap* held that the federal Air Carrier Access Act and its implementing regulations preempted the state standard

of care under which airlines must provide assistance to passengers with disabilities moving through airports. "The ACAA does not, however, preempt any state remedies that may be available when airlines violate those standards." *Id.* at 1010.

In 2014, the Eastern District of Washington relied on the two-part test of *Gilstrap* and held that based on field preemption, "federal law *exclusively* establishes the standard of care as to the design, test, and approval of the [aircraft] stall/spin characteristics, *preempting any state standards*." *McIntosh v. Cub Crafters*, No. 13-3004, 2014 U.S. Dist. LEXIS 21491, at *14 (E.D. Wa. Feb. 19, 2014) (emphasis added) (holding that 14 C.F.R. § 21 *et seq.*, which contained the FAA's federal standards for airworthiness certification, pervasively regulate the design, testing, and approval of manufactured parts for light-sport aircraft).

Applying *Gilstrap* here, two conclusions are made clear. First, the particular *area* of aviation commerce and safety implicated in Becker's lawsuit is governed by pervasive federal regulations. 14 C.F.R. § 21 *et seq.*—a section governing aircraft products, parts, airworthiness, and certification procedures for airworthiness—contains *hundreds* of regulations administered by the Federal Aviation Administration. *See* www.ecfr.gov. Likewise, the Federal Register, Parts 13 and 33 establish standards of federal compliance for issuing certificates for engines used on aircraft. *See* CP at 2524-39 (explaining the 1956 federal rules and regulations for airworthiness standards). As such, any applicable state standards of care are preempted. Second, in those areas, the scope of implied field preemption extends only to the standard of care. Thus, under *Montalvo* and progeny, Becker's claims could have survived only if they alleged violations of federal standards of care, which she did not.

c. *The trial court's preemption ruling is supported by contemporaneous legislative history*

Becker relies on the legislative history of the General Aviation Revitalization Act ("GARA"—a federal statute of repose) to suggest that "Congress did not intend FAA implied field preemption." App. Br. at pg. 25. However, GARA is not helpful because—unlike the FAA—GARA contains an express preemption provision. GARA's legislative history discusses preempting complete "state liability law"—not preempting a state-based standard of care or regulation as discussed in *Montalvo* and *Martin*. Again, Becker conflates causes of action with the applicable federal standard of care.

In this case, there is a significant contemporaneous legislative history favoring preemption (directly from the FAA—not other congressional acts, such as GARA, which are wholly unrelated to this case). Supportive legislative history is particularly persuasive because the United States Supreme Court held that "contemporaneous legislative history" is illuminating when divining Congress's purpose. *Edwards v. Aguillard*, 482 U.S. 578, 595, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987); see also *Ventress v. Japan Airlines*, 747 F.3d 716, 721 (9th Cir. 2014) cert. denied, 135 S. Ct. 164 (2014) ("The purpose, history, and language of the FAA leads us to conclude that Congress intended to have a single, uniform system for regulating aviation safety.") (internal quotations omitted); *Abdullah*, 181 F.3d at 369 (the "legislative history reveals that Congress intended the Administrator, on behalf of the Federal Aviation Administration, to exercise sole discretion in regulating air safety. And that is exactly what Congress accomplished through the FAA.")

First, in the section entitled "Purpose of Legislation," a House Report on the Federal Aviation Act of 1958 explained that one of the purposes of the Act is to give "[t]he Administrator of the new Federal

Aviation Agency . . . full responsibility and authority for the advancement and promulgation of civil aeronautics generally, including promulgation and enforcement of safety regulations." H.R. Rep. No. 2360, 1958 U.S.C.C.A.N. 3741 (emphasis added).

Second, in a letter to the House Committee on Interstate and Foreign Commerce, the Chairman of the Airways Modernization Board, an executive agency, explained the motivation behind the Act: "It is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation." *Id.* at 3761.

Finally, a Senate Report describing the Act supports preemption:

> [A]viation is unique among transportation industries in its relation to the federal government—it is the only one whose operations are conducted almost wholly within the federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.

S. Rep. No. 1811, 85th Cong., 2d Sess. at 5 (1958) (emphasis added). Based on the foregoing, implied field preemption is supported by contemporaneous legislative history.

In sum, Becker has failed to establish any errors in the trial court's preemption ruling. Precedent from the Ninth Circuit and the United States Supreme Court, legislative history, and extensive federal regulations all support the trial court's conclusion. It should not be disturbed.

4. Becker's second amended complaint did not adequately plead violations of federal standards of care

Becker's second amended complaint made only cursory references to Title 14 of the Code of Federal Regulations ("C.F.R."). *See* CP at 77. Becker did not allege that FTI violated any regulations. However, because Title 14 of the C.F.R. regulates everything from space shuttles to pilot

schools, FTI served interrogatories asking Becker to identify the specific provisions within Title 14 of the C.F.R. that FTI allegedly violated, as well as any other applicable federal regulations outside Title 14 of the C.F.R. Becker's responded that FTI did not violate any particular federal regulations. *See* CP at 2049 (for her construction defect claim, stating "none" in response to interrogatory requesting identification of any federal regulations outside Title 14 of the C.F.R. that FTI allegedly violated and adopting the "none" answer in response to interrogatory requesting identification of any regulations within Title 14 of the C.F.R.), 2051-2052 (same answers for design defect claim), 2053 (no identification of any federal regulations regarding claim for inadequate instructions), 2055 (same for post-sale duty to warn claim), 2058 (same for breach of warranty claim).

FTI served these interrogatories because it was "entitled to know exactly which statutes, regulations, rules or other laws it is alleged to have violated." *Sheehy v. Ridge Tool Co.*, No. 05-01614, 2007 U.S. Dist. LEXIS 24215, at *3 (D. Conn. April 2, 2007); *see also United States v. Am. Airlines, Inc.*, No. 05-4254, 2006 U.S. Dist. LEXIS 75388, at *1-2 (E.D.N.Y. Oct. 17, 2006). When it became clear that Becker was not claiming that FTI violated any particular federal regulations, FTI moved for summary judgment, arguing that state law standards of care were impliedly preempted by federal law. FTI did not argue that the state law causes of action (*e.g.*, negligence, breach of warranty, etc.) were preempted.

As explained above, Becker attempts to conflate these two issues by arguing that "if the state law claims remained 'intact', they could not be dismissed on the theory they were preempted." App. Br. at pg. 35. Not so. A distinction must be drawn between (1) preempting a state law cause

of action, which is comprised of several elements, and (2) preempting the state law standard of care, which is only one element in the cause of action.[12] FTI acknowledged that Becker's state law causes of action were not preempted, but argued that the claims could only survive if they alleged federal standards of care. Becker did not identify any such standards applicable to FTI, and her claims were rightly dismissed.

Becker now claims that the trial court erred by dismissing FTI on summary judgment because her second amended complaint adequately pled violations of federal standards of care and, alternatively, that she was not required to plead particular standards of care because Washington is a notice pleading state. App. Br. at pgs. 34-36. Both arguments fail because Becker misunderstands the relevant pleading standard. FTI moved for summary judgment, which required Becker to respond by "articulat[ing] the legal grounds for [her] claim." *McGahuey v. Hwang*, 104 Wn. App. 176, 184, 15 P.3d 672 (2001) (summary judgment was proper where plaintiffs failed to articulate specific legal grounds for retaliation claim); *see also Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 814, 6 P.3d 30 (2000). Contrary to Becker's argument, she was required to articulate all the elements of her claim to survive summary judgment. She could not rely on vague references to an entire title of federal regulations.[13]

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[12] *See Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (holding that parties were free to bring state law indemnification cause of action but because the particular field was preempted by the federal Employee Retirement Income Security Act ["ERISA"], the parties had to use ERISA's "prudent man" standard for determining when indemnification was required, not the state law "gross negligence" standard). In *Johnson*, the state law indemnification cause of action was not preempted, merely the standard applied within the cause of action.

[13] Becker's only references to federal standards of care were (1) a vague allegation in her second amended complaint that "the design and/or construction of the subject product and/or components thereof was not in compliance with specific mandatory government specifications relating to safe design and construction, including the Federal Aviation Regulations (14 CFR et seq)," CP at 77; and (2) a conclusory statement in her discovery responses that "[t]he engine, its carburetor component, including its Delrin float, did not meet federal minimum standards." CP at 2049. These were woefully inadequate to survive summary judgment.

In sum, this Court should affirm FTI's summary judgment dismissal on the basis of federal preemption. The trial court correctly concluded that federal law preempts state law standards of care in the field of aviation safety. Becker acknowledged in her discovery responses that she was not alleging FTI violated any federal regulations or other standards. She attempts to backtrack on that position by asserting that her second amended complaint adequately pled violations of federal standards of care and that, in any event, she was not required to plead such violations. Both arguments are meritless. Accordingly, the trial court properly dismissed FTI on the basis of federal preemption.[14]

B. The trial court properly denied Becker's reconsideration motion

Becker sought reconsideration of FTI's dismissal. CP at 798. Although Becker's notice of appeal designates the order denying her reconsideration motion, her brief does not assign error to the order. CP at 1458; App. Br. at pg. 2; RAP 10.3(a)(4). Nor does her brief separately address the order. For example, there is no discussion of the relevant standard of review for an order denying a motion for reconsideration. She also does not identify how the trial court specifically erred regarding her motion. Accordingly, Becker should be precluded from appealing the trial court's order denying her reconsideration motion. *SentinelC3*, 181 Wn.2d at 138 n.4. But if this Court addresses the denial of Becker's reconsideration motion, it should affirm the trial court.

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Meridian Minerals Co. v. King*

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[14] Becker asserts that after FTI was dismissed, Synergy filed a motion for summary judgment that was denied, "[d]espite [Synergy's] nearly identical argument and component part supplier status." App. Br. at pg. 18. This is irrelevant and certainly not a basis for reversing the trial court in this appeal. Becker's vague comparison of FTI to Synergy is not sufficient to show that the trial court applied a double standard. If Synergy disagreed with the trial court's ruling, it could have sought discretionary review, which it did not.

Cnty., 61 Wn. App. 195, 203-04, 810 P.2d 31 (1991). A trial court's decision will be reversed as an abuse of discretion only if it is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *SentinelC3, Inc.*, 181 Wn.2d at 144.

Becker argued in her reconsideration motion that FTI should not have been dismissed on federal preemption grounds because carburetor floats are not "pervasively regulated at the federal level." CP at 803. She now contends that "[t]he only general [federal] regulation [applicable to carburetor floats] is that they be airworthy and in a safe condition," and that this general regulation "does not conflict with Washington product liability law." App. Br. at pg. 31. This argument is without merit.

Becker's error is twofold. First, she assumes that implied field preemption occurs only when a particular *component*, as opposed to an *area* of aviation, is pervasively regulated. Second, she asserts that the float at issue in this case was not pervasively regulated. *See* App. Br. at pg. 28-29. Becker heavily relies on *Martin* while completely ignoring the Ninth Circuit's discussion and holdings in *Montalvo*, upon which the trial court relied in the case at bar. However, both *Montalvo* and *Martin* hold that implied field preemption can exist when an area within aviation—rather than a particular component—is thoroughly regulated by federal law. *See Montalvo*, 508 F.3d at 472-75; *see also Martin*, 555 F.3d at 811.

Montalvo involved regulation of passenger warnings—which is a category, not a particular component—but the Ninth Circuit found implied field preemption anyway. *Montalvo*, 508 F.3d at 472-75. Moreover, the key passage from *Martin* states that "[*Montalvo*] means that where the agency issues 'pervasive regulations' in an area, the FAA preempts all state claims in that area." *Martin*, 555 F.3d at 811. Thus, contrary to

Becker's reading, implied field preemption can exist when an area of aviation, rather than a particular component, is regulated.

The FAA has extensively regulated the field of aviation safety, especially the process for testing and certifying aircraft component parts for airworthiness. Here, Chapter 21 of Title 14 of the Code of Federal Regulations, entitled "Certification Procedures for Products and Parts," sets forth pervasive regulations in the area of airworthiness. *See Montalvo*, 508 F.3d at 472; *see also* CP at 2288:10-11 ("[W]ithin Title 14 is Chapter 21, which is the chapter that's at issue here.") Because this field is preempted, Becker's claims fail insofar as they are based on state law standards of care. And Becker has admitted that FTI violated no federal standards, regulations, or laws, so the dismissal of Becker's claims against FTI should be affirmed.

Becker also suggests that the type of preemption involved in this case is conflict preemption, as opposed to implied field preemption. *See* App. Br. at pg. 31 ("[N]or does the standard conflict with Washington product liability law.") But Becker ignores the language of *Montalvo*: "Here, the regulations enacted by the Federal Aviation Administration . . . sufficiently demonstrate an intent to occupy exclusively the entire field of aviation safety and carry out Congress' intent to preempt all state law in this field." *Montalvo*, 508 F.3d at 471. This language mirrors the definition of implied field preemption: "Implied preemption exists when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it." *Id.* at 470. As such, the language of *Montalvo* itself establishes that it is an implied field preemption case.

Because she did not assign error or devote a specific section of her brief to the order denying her reconsideration motion, FTI has responded

to the other arguments from Becker's reconsideration motion throughout this brief.[15] In any event, Becker has not shown that denying Becker's reconsideration motion was an abuse of discretion. Accordingly, this Court should affirm the denial of her motion for reconsideration.

C. The trial court properly denied Becker's post-summary judgment motion for leave to file an amended complaint against FTI

In August 2012, two weeks after moving for reconsideration, Becker filed a motion for leave to file a third amended complaint alleging that FTI violated specific federal regulations. CP at 828. This was the second recent attempt by Becker to amend her complaint against FTI. Months before FTI filed its summary judgment motion, Becker had unsuccessfully attempted to amend her complaint to assert punitive damages against FTI. CP at 88-98, 231-232. Becker did not include any allegations about specific federal regulations in that complaint. Once FTI had been dismissed on federal preemption, Becker apparently recognized the inadequacy of her second amended complaint and sought leave to amend. However, none of the regulations in Becker's third amended complaint applied to FTI. Accordingly, Becker's proposed third amended complaint was both untimely and futile.

1. Standard of review

This Court reviews a trial court's denial of a motion to amend pleadings for abuse of discretion. *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986). Under the abuse of discretion standard, a trial court's decision will be reversed only if it is

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[15] Becker also argued in her reconsideration motion that she adequately pled violations of federal standards of care and that, in the alternative, she should not be held to such a pleading standard. CP at 801-802. That argument is addressed in Section IV.A.4, *supra*. The other contention was Becker's waiver argument, address in Section IV.A.2, *supra*. These were both arguments that Becker raised for the first time in her reconsideration motion, even though nothing precluded her from raising them in her summary judgment opposition. Accordingly, this Court should not consider these arguments. *Wilcox*, 130 Wn. App. at 241; *JDFJ Corp.*, 97 Wn. App. at 7.

manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *SentinelC3, Inc.*, 181 Wn.2d at 144.

2. Becker's post-summary judgment motion for leave to file an amended complaint against FTI was untimely and futile

"'The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.'" *Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 889, 155 P.3d 952 (2007) (quoting *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 350, 670 P.2d 240 (1983)). "In determining prejudice, a court may consider undue delay and unfair surprise as well as the futility of amendment." *Id.* (citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987)). Becker argues that a post-summary judgment amendment would have not prejudiced FTI. App. Br. at pg. 38. She is mistaken.

Becker had ample opportunity to amend her complaint before FTI was dismissed on summary judgment. "When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation." *Doyle v. Planned Parenthood of Seattle-King Cnty.*, 31 Wn. App. 126, 130, 639 P.2d 240 (1982) (citing *Trust Fund Servs. v. Glasscar, Inc.*, 19 Wn. App. 736, 577 P.2d 980 (1978); 3A WASH. PRAC. § 5182 (3d ed. 1980)). Precision and AVCO both asserted federal preemption as an affirmative defense in December 2010 and April 2011, respectively. CP at 2483-2485, 2490-2493. FTI explicitly incorporated by reference the affirmative defenses of Precision, AVCO, and its other co-defendants. CP at 2486-2489. Additionally, the United States Court of Appeals for the Ninth Circuit issued then-recent opinions in 2007 and 2009 regarding federal

preemption in the field of aviation safety.[16] Finally, Becker had unsuccessfully attempted to amend her complaint in May 2012 to assert punitive damages against FTI but did not use that opportunity to also allege violations of specific federal regulations, even though FTI had served discovery on Becker in April 2012 asking her to identify specific federal regulations that FTI allegedly violated. CP at 88, 2044-2064.

There was no reason why Becker could not have amended her complaint earlier to assert violations of specific federal regulations and standards. Accordingly, Becker's post-summary judgment motion for leave to amend was untimely. *Haselwood*, 137 Wn. App. at 890 ("RV Associates waited until after suffering an adverse ruling on summary judgment to amend its pleadings, even though nearly one and one-half years elapsed between the time RV Associates filed its answer and counterclaim, and the trial court granted summary judgment.").

Becker's post-summary judgment motion for leave to amend was also futile. "In addition to timeliness, the court may consider the probable merit or futility of the amendments requested." *Doyle*, 31 Wn. App. at 130. "A lawsuit is futile where there is no evidence to support or prove existing or additional allegations and causes of action." *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 279, 191 P.3d 900 (2008). "Futility is a reasonable ground for denying a motion to amend a complaint." *Id.* Becker's proposed third amended complaint cited nine provisions of the Federal Aviation Regulations ("F.A.R.")[17] and six provisions of the Civil Air Regulations ("C.A.R."). CP at 897. In the trial court, FTI presented a chart establishing why none these provisions applied to FTI. CP at 1137-1139. The chart is reproduced as Appendix A to this brief.

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[16] *Montalvo* and *Martin*.
[17] Title 14 of the Code of Federal Regulations is commonly known as the Federal Aviation Regulations or FAR.

Asserted Regulation No. 1 does not apply to FTI because the regulation does not create any relevant obligation or duty whatsoever, much less one applicable to FTI. Asserted Regulation Nos. 2-8 are inapposite because FTI is not a PMA or Type Certificate holder. Asserted Regulation No. 9 is not applicable because FTI is not an aircraft operator.

Asserted Regulation Nos. 10-15 refer to Chapter 13 of the C.A.R., which has not existed since 1964, when it was recodified as Chapter 33 of the F.A.R. (*i.e.*, 14 C.F.R. §§ 33.1-33.201). CP at 2533-2539. FTI is not subject to regulations that have not existed for nearly 50 years. In any event, Chapter 13 of the C.A.R. applied only to Type Certificate holders. *See* former 14 C.F.R. § 13.0 (1956) ("This part establishes standards with which compliance shall be demonstrated for the issuance of and changes to type certificates for engines used on aircraft.").

Becker's proposed third amended complaint also included a catch-all phrase of "including but not limited to." CP at 897. This language does not adequately plead a federal standard of care because it is the same type of vague and general statement that was contained in Becker's second amended complaint, which did not survive summary judgment. *McGahuey*, 104 Wn. App. at 184.

The only authority potentially adverse to FTI is *Sikkelee v. Precision Airmotive Corp.*, in which the district court found implied field preemption and allowed the plaintiff to amend her complaint "so that she can list violations of federal regulations by number." *Id.*, 731 F. Supp. 2d 429, 439 (M.D. Pa. 2010). The plaintiff did not set forth what regulations she intended to assert and there was no analysis of whether those regulations applied to the defendants. Here, Becker set forth the federal regulations that she sought to assert against FTI and none of them

applied.[18] Thus, "there [wa]s no legal basis for her claim to stand." *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 339, 229 P.3d 893 (2010).[19] Accordingly, the trial court properly denied Becker's post-summary judgment motion to file a third amended complaint against FTI.[20] *See Oliver v. Flow Int'l Corp.*, 137 Wn. App. 655, 664-65, 155 P.3d 140 (2006) (affirming denial of motion for leave to amend complaint, concluding that amendments were "futile" and "mistaken").

D. This Court should affirm FTI's summary judgment dismissal on the alternative basis that all three of Becker's claims are grounded in the WPLA and FTI is not a product seller or manufacturer

This Court may affirm a trial court's disposition of a summary judgment motion on any ground supported by the record. *Washburn*, 178 Wn.2d at 753 n.9; *Fagg v. Bartells Asbestos Settlement Trust*, 184 Wn. App. 804, 815 n.6, 339 P.3d 207 (2014). This Court may affirm FTI's dismissal on the alternative ground that (1) all three of Becker's claims are based in the Washington Product Liability Act ("WPLA"); (2) only product sellers or manufacturers may be liable under the WPLA; and (3) FTI does not meet the definition of either.

1. All three of Becker's claims are based in the WPLA

Becker's second amended complaint asserts three claims against FTI: (1) strict liability; (2) negligence; and (3) breach of warranty. CP at

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[18] Although Becker made no reference in her appellant's brief, Becker and Crews responded to FTI's summary judgment dismissal by disclosing an expert witness at the eleventh hour. CP at 1051-1070. This expert, however, did not opine that FTI was subject to any regulations; instead, he concluded that the carburetor float had to comply with federal regulatory standards. This was never disputed before the trial court. But only PMA and Type Certificate holders bear the obligation of ensuring that aircraft components meet federal regulatory standards. FTI has never been a PMA or Type Certificate holder. The disclosure of this expert witness was not only extremely untimely, but his testimony also had no probative value.

[19] *Rev'd on other grounds*, 173 Wn.2d 643 (2012).

[20] Becker will likely argue that the trial court applied a double standard because Becker was allowed to file a third amended complaint against the remaining defendants other than FTI. Becker cannot be heard to complain on this point. Unlike the remaining defendants, FTI had already been dismissed from the action when Becker sought leave to amend her complaint.

75-79. All three of Becker's claims against FTI sound in product liability. Becker herself refers to her claims as such. App. Br. at pg. 2 ("The trial court erred in holding that federal regulations impliedly preempt state law standards of care in aircraft *product liability actions.*") (emphasis added).

The WPLA is Washington's exclusive product liability law.[21] *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853, 774 P.2d 1199 (1989). There is no common law for products liability. *Id.* ("[T]he WPLA means nothing if it does not preempt common law product liability remedies."). Although Becker does not explicitly reference the WPLA in his second amended complaint, all three claims against FTI clearly arise out of the WPLA. App. Br. at pg. 49 (referring to her action as a "product liability action[]").

First, under the strict liability claim, Becker alleges that FTI is "strictly liable" for "creat[ing] a defective and unsafe product in the subject product." CP at 76-77. This claim falls under RCW 7.72.030(2) of the WPLA, which imposes strict liability on a product manufacturer for products that are not reasonably safe in construction. Second, Becker's negligence claim alleges that "[t]he crash . . . was caused by the negligence . . . of . . . FTI . . . in that the subject product and/or components thereof were negligently . . . designed, manufactured, assembled, [etc.]." CP at 77. This claim mirrors the cause of action under RCW 7.72.040(1)(a) of the WPLA, which creates liability for negligent product sellers. Third and lastly, Becker's claim for breach of warranty arises out of the RCW 7.72.040(1)(b) and RCW 7.72.030(2) of the WLPA because the WPLA is the only source of warranty claims related to product liability actions. CP at 78-79; *Wash. Water Power Co.*, 112 Wn.2d at 853.

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[21] The WPLA is attached herewith as Appendix B.

2. **Only "product sellers" and "manufacturers" may be liable under the WPLA**

The WPLA imposes liability on only two types of parties: product sellers and manufacturers. *See* RCW 7.72.030-.040. Product sellers may be liable for (1) negligence, (2) breach of an express warranty, or (3) intentional misrepresentation or concealment about facts related to the product. RCW 7.72.040(1). Manufacturers may be liable for (1) a product that was not reasonably safe as designed or (2) inadequate warnings or instructions. RCW 7.72.030(2). Manufacturers may be strictly liable for (1) products that are not reasonably safe as constructed or (2) a breach of an implied or express warranty. RCW 7.72.030(1). The WPLA does not impose liability on any other type of party.

Further, whether a party is a product seller or manufacturer is a question of law. *Almquist v. Finley Sch. Dist. No. 53*, 114 Wn. App. 395, 404-05, 57 P.3d 1191 (2002) (holding that "[t]he question of what legal consequences might flow from these activities—whether this constitutes manufacturing—was then properly decided by the court as a matter of law"); *see also Progressive N. Ins. Co. v. Fleetwood Enters., Inc.*, No. 04-1308, 2006 U.S. Dist. LEXIS 34395, at *6-18 (W.D. Wash. April 14, 2006); *Sepulveda-Esquivel v. Central Mach. Works., Inc.*, 120 Wn. App. 12, 17-20, 84 P.3d 895 (2004). The undisputed facts establish that FTI does not fall within the scope of the WPLA as a matter of law.

3. **FTI is not a "product seller" under the WPLA**

A product seller is defined as any person or entity that is "engaged in the business of selling products, whether the sale is for resale, or for use or consumption." RCW 7.72.010(1). The person must be in the business of selling the specific product that gives rise to the product liability lawsuit. *Pardo v. Olson & Sons*, 40 F.3d 1063, 1066-67 (9th Cir. 1994) (interpreting the WPLA). Importantly, the WPLA excludes from the

definition of product seller "[a] provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider." RCW 7.72.020(1)(b).

FTI is not a product seller because it is not "engaged in the business of selling" carburetor floats. RCW 7.72.010(1). Mr. Olson, FTI's product manager, testified that "[FTI] did not sell carburetor floats to Precision Airmotive." CP at 1989.[22] There is no evidence that FTI sold any other engine or carburetor component of the aircraft. The carburetor float components were shipped to FTI, who then welded them together. FTI then returned the welded floats back to Precision. CP at 2018. The order entries and sales acknowledgements show that FTI charged Precision only for welding and welding-related services, such as costs associated with repairing the prototype tooling. CP at 2000-2007, 2009-2015.

If anything, FTI was a "provider of professional services," which is expressly excluded from the definition of product seller. RCW 7.72.020(1)(b). To determine whether a party is a product seller or provider of professional services, courts look to the "primary purpose" of the contract. *Anderson Hay & Grain Co. v. United Dominion Industries, Inc.*, 119 Wn. App. 249, 260, 76 P.3d 1025 (2003), *review denied*, 151 Wn.2d 1016 (2004). The undisputed evidence establishes that primary purpose of the contract between FTI and Precision was for professional welding services. Mr. Olson testified that "[FTI] was paid to weld the

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[22] In the trial court, Becker tried to create a genuine issue of material fact by citing to an excerpt from Mr. Olson's deposition when he was asked, "You were selling [Precision] defective floats, right" and he responded, "Yes." CP at 272, 369. This out-of-context quote does not create a genuine issue of material fact. Read in context, the excerpt establishes Mr. Olson was concerned that the carburetor floats returned to Precision may have had leaks. Mr. Olson was not testifying that FTI was "engaged in the business of selling" carburetor floats. Becker was attempting to create an "unreasonable inference," to which he was not entitled on summary judgment. *Marshall v. Ac&S, Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (1989).

parts together" and "[FTI] charged [Precision] a fee for a service." CP at 1989-1990. Mr. Nelson, FTI's machine shop foreman, testified that FTI was "contracted just to weld the parts." CP at 1996.

This case is directly analogous to *Anderson Hay*, in which the plaintiff contracted with a designer and a builder to create a home. The designer provided prefabricated parts, which the builder agreed to construct into a finished building. When the roof of the home collapsed after a heavy snowstorm, the plaintiff sued the builder, arguing that it was a product seller under the WPLA. The Court of Appeals affirmed the builder's dismissal, holding that the builder's contract was primarily for a service and that the prefabricated building components were "incidental" to the services. *Id.*, 119 Wn. App. at 261. Although the Court of Appeals also concluded that the builder did not contribute to the collapse of the roof, *id.* at 261-62, this was a separate inquiry under the plaintiff's breach of contract claim and was not part of the WPLA analysis. There, as here, the primary purpose of the contract was for a service. The components of the carburetor float were "incidental" to FTI's welding service, just as the building parts were "incidental" to the builder's construction service. Lastly, the service provider exception is not limited to professions such as architects and engineers. *Anderson Hay* confirms this, as the Court of Appeals held that a builder fell within the service provider exception.

In sum, FTI was not "engaged in the business of selling" carburetor floats. RCW 7.72.010(1). Instead, the "primary purpose" of the contract between FTI and Precision was for welding services. CP at 1996. Accordingly, FTI is not a product seller as defined by the WPLA.

4. **FTI is not a "manufacturer" under the WPLA**

Under the WPLA, the definition of a manufacturer "includes a *product seller* who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer." RCW 7.72.010(2) (emphasis added). As demonstrated above, FTI is not a product seller and therefore does not qualify for this definition of a manufacturer.

The WPLA also defines a manufacturer as an "entity not otherwise a manufacturer that holds itself out as a manufacturer." RCW 7.72.010(2). The entity must hold itself out as the manufacturer of the specific product that gives rise to the product liability lawsuit, and not as a manufacturer generally. *Progressive N. Ins. Co.*, 2006 U.S. Dist. LEXIS 34395, at *13. There is no evidence that FTI represented itself to be a manufacturer of the carburetor floats, or of any other component of the engine or carburetor in question. Nor did Becker allege that FTI held itself out as a manufacturer.

In the trial court, Becker argued that there were other implied definitions of manufacturer within RCW 7.72.010(2). CP at 269-271. Becker relied on the repeated use of the word "includes" within the provision. *Id.* However, if the legislature wanted to create other implied definitions of manufacturer, it would have used the phrase "includes, but is not limited to." The legislature used this phrase in another section of the WPLA, which provides the definition of a "product liability claim." RCW 7.72.010(4). If the legislature sought to create a non-exhaustive list of definitions for a manufacturer, "it would have used language to that effect." *Mahoney v. Shinpoch*, 107 Wn.2d 679, 685, 732 P.2d 510 (1987).

In sum, Becker's claims undeniably fall within the scope of the WPLA, which only imposes liability on "product sellers" or "manufacturers." FTI does not meet either definition. As such, this Court may affirm FTI's summary judgment dismissal on this alternative basis.

E. The trial court properly denied Becker's motion for leave to assert punitive damages against FTI

Before FTI moved for summary judgment, Becker filed a motion for leave to assert punitive damages against FTI under Minnesota law. CP at 88. Becker's motion relied on erroneous legal arguments and glaring misrepresentations of the deposition testimony of FTI's product manager, Mr. Olson. Because the trial court correctly dismissed FTI on summary judgment, this Court need not reach the question of punitive damages. If it does, however, it should affirm the trial court.

1. Standard of review

This Court reviews a trial court's denial of a motion to amend pleadings for abuse of discretion. *Del Guzzi Constr. Co.,* 105 Wn.2d 878 at 888. A trial court's decision will be reversed under this standard only if it is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *SentinelC3, Inc.*, 181 Wn.2d at 144.

Without explanation, Becker assumes that Minnesota's de novo standard of review applies. App. Br. at 42-43. Becker provides no analysis of why this Court should apply the standard of review used by Minnesota courts. This Court should not consider arguments that are unsupported by pertinent authority or meaningful analysis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989). In any event, where the choice of law is disputed, Washington's standard of review should apply. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 266, 259 P.3d 129 (2011); *McKee v. AT&T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008); *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 691, 167 P.3d 1112 (2007); *Fluke Corp. v. Hartford Acc. & Indem.*, 102 Wn. App. 237, 255, 7 P.3d 825 (2000).

2. **Under the "most significant relationship" test, Washington law controls the issue of punitive damages**

In the trial court, Becker failed to establish that Minnesota law applied to the issue of punitive damages. To settle choice of law questions, Washington uses the most significant relationship test as articulated by Restatement (Second) of Conflict of Laws § 145 (1971). *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 967, 331 P.3d 29 (2014) (citing *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580-81, 555 P.2d 997 (1976)). These factors include (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicil, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

The only connection between this case and Minnesota is that FTI performed its welding services there. In contrast, Washington has an overwhelming number of contacts: (1) the aircraft crash occurred in Washington; (2) the decedents were all Washington residents; (3) the aircraft was rented at a Washington airport owned by a Washington corporation; (4) the aircraft was overhauled in 2001 by a Washington corporation; (5) a Washington corporation performed yearly inspections on the aircraft; (6) Precision, who designed the float and manufactured the carburetor, is a Washington corporation; (7) the companies who molded the plastic parts for the floats are both Washington corporations; and (8) after the float was welded in Minnesota, it was shipped to Washington, where it was inspected, tested, and sold by Precision, a Washington corporation. CP at 55-60, 1832.

Under the most significant relationship test, Washington law clearly controls the issue of punitive damages because a vast majority of the contacts occurred here. In Washington, punitive damages are prohibited absent express legislative authorization. *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996). The legislature did not authorize punitive damages under the WPLA, under which Becker brings all three of her claims. *See, e.g., McFarland v. App. Pharms. LLC*, No. 10-11746, 2011 U.S. Dist. LEXIS 62560, at *13 (W.D. Wash. June 13, 2011) ("However, plaintiffs' claim for punitive damages cannot be saved by repleading because the WPLA does not provide for punitive damages.") (citation omitted).

Singh v. Edwards Lifesciences Corporation, the only cased relied on by Becker, is inapposite. There, a California corporation manufactured a heart monitor device with faulty software. During a heart bypass surgery in Washington, the monitor overheated and damaged the patient's heart. The California corporation knew about a flaw in the software for six years prior to the surgery, but did not recall the monitor or warn any users of the monitor. Instead, the corporation fixed the software flaw only if the monitors were returned to California for other repairs. The hospital in Washington had returned three of its eleven monitors to California for repairs. The corporation fixed the software flaw on those three monitors, but knew that the remaining eight monitors at the hospital remained defective.

The Court of Appeals upheld the award of punitive damages because the corporation committed fraud, and "Washington has no interest in protecting companies who commit fraud." *Singh*, 151 Wn. App. 137, 147-48, 210 P.3d 337 (2009). In contrast, the governmental interest of California was significant: "The conduct that serves as the basis of the

punitive damages award here occurred in California and that state has an interest in deterring its corporation from engaging in such fraudulent conduct." *Id.* at 148. This case is distinguishable from *Singh* because a vast majority of the contacts occurred in Washington, whereas in *Singh* there were significant contacts in California and the government of California had a strong interest in having punitive damages applied to a California corporation that engaged in fraud. Accordingly, the trial court correctly refused to allow Becker to plead punitive damages.[23]

3. Assuming Minnesota law applies to the issue of punitive damages, Becker failed to offer any evidence to establish a prima facie case that FTI's conduct demonstrated a "deliberate disregard for the rights or safety of others"

Minnesota allows recovery of punitive damages only "upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20(1)(a). A defendant has "deliberate disregard for the rights or safety of others" if the defendant "has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others" and either (1) "deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others" or (2) "deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others." Minn. Stat. § 549.20(1)(b). The defendant's conduct must be "done with malicious, willful, or reckless disregard for the rights of others." *Admiral Merchants Motor Freight v. O'Connor & Hannan*, 494 N.W.2d 261, 1992 Minn. LEXIS 371, at *17 (Minn. 1992).

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[23] The trial court allowed Becker and Crews to seek punitive damages against ACVO at trial. CP at 1683. However, this permission was given as part of the trial court's sanctions order against AVCO. There was no choice of law analysis performed by the trial court. The trial court's sanctions order also deemed as admitted Becker and Crews' complaints against AVCO and struck AVCO's affirmative defenses. CP at 1682-1683.

Under Minnesota law, a plaintiff is allowed to plead punitive damages only if the plaintiff's motion and supporting affidavits would "reasonably allow a conclusion that clear and convincing evidence will establish" that the defendant's conduct met the standard under § 549.20. *McKenzie v. Northern States Power Co.*, 440 N.W.2d 183, 184 (Minn. Ct. App. 1989). "Punitive damages are an extraordinary remedy to be allowed with caution and within narrow limits." *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 904 (Minn. Ct. App. 2009). Becker offered no evidence to satisfy this high threshold.

As in the trial court, Becker's argument for punitive damages relies on a gross distortion of Mr. Olson's deposition testimony. *See* CP at 203-207. Becker claims that this testimony "establishe[s] that FTI knew it was selling defective floats that were being installed on aircraft." App. Br. at pg. 47. As thoroughly explained above, Mr. Olson's testimony establishes no such thing. Accordingly, this case is distinguishable from *Singh*, in which the corporation demonstrably engaged in fraud. Here, FTI had no knowledge of any leaky floats ending up as aircraft components. FTI had no authority in the first place to approve any float for sale or use in the field. That authority belonged to Precision, the holder of the PMA, which independently tested every float prior to approval and distribution.

Becker also cites to a declaration of Dr. Paul Gramann, which was submitted by Becker in opposition to FTI's summary judgment motion. CP at 642-646. Becker did not submit this declaration with her motion for leave to assert punitive damages, and therefore Dr. Gramann's declaration should not be considered as support for her punitive damages request. *See* CP at 99-200. In any event, the speculative opinions of Dr. Gramann do not satisfy the prima facie evidentiary threshold. *Swanlund v. Shimano Industrial Corp.*, 459 N.W.2d 151 (Minn. Ct. App. 1990) (denying motion

for leave to assert punitive damages in a products liability action in which the defendant provided an allegedly defective bicycle hub to the company that assembled the bicycle); *Stroud v. Hennepin Cnty. Med. Ctr.*, 556 N.W.2d 552, 556 (Minn. 1996) (broad and conclusory expert declarations insufficient to support causation).

Because FTI was properly dismissed on summary judgment, this Court need not reach the punitive damages question. If it does, this Court should affirm the trial court's denial of Becker's motion for leave to assert punitive damages against FTI. Minnesota law does not apply because Washington has the vast majority of contacts with this case. In any event, Becker has offered no evidence to satisfy the high burden of pleading punitive damages under Minnesota law. Becker's motion for leave to assert punitive damages against FTI was rightly denied.

F. Becker's appeal is not timely

Finally, this Court need not reach any of the substantive issues discussed above because Becker's appeal is untimely and should be dismissed. Becker's dismissal of Crews with prejudice on July 10, 2014, was the "final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties." CP at 1768-1170; RAP 2.2(d). Becker had 30 days from July 10, 2014, to file her notice of appeal. RAP 5.2(a). She did not file until August 28, 2014. CP at 1457-1462. This was 48 days after Crews had been dismissed.

FTI filed a motion to dismiss Becker's appeal heard by the Commissioner of this Court. In her opposition, Becker argued that her dismissal of Crews was not a final judgment under RAP 2.2(d) because it did not contain the necessary language and was not served on all former parties to the litigation. The Commissioner correctly dismissed this argument as hypertechnical. *Spindle* (Ruling) at pgs. 8-9; *see Nestegard v.*

Inv. Exch. Corp., 5 Wn. App. 618, 623, 489 P.2d 1142 (1971) (When interpreting the effect of an order, "substance controls over form.") (citing *State ex rel. Lynch v. Pettijohn*, 34 Wn.2d 437, 209 P.2d 320 (1949)); *Rhodes v. D & D Enters.*, 16 Wn. App. 175, 177-78, 554 P.2d 390 (1976).

Becker also argued that Crews' dismissal was not a final judgment because several claims remained unresolved after Crews was dismissed. Becker contended that Premier Aircraft Engines ("Premier") and Synergy Systems ("Synergy") were dismissed without prejudice and Becker could have refiled her claims against them even after Crews was dismissed. CP at 1607-1615, 1685-1687. This contention does not withstand scrutiny. Premier was dismissed on August 30, 2011.[24] When Becker filed her third amended complaint on September 4, 2012, he did not bring any claims against Premier. CP at 1632-1659. Becker already had an opportunity to refile her claims against Precision, but did not. Synergy settled with Becker and filed an agreement under Civil Rule 2A in February 2013, which dismissed Becker's claims against Synergy "with prejudice." CP at 1668-1669. The order dismissing Synergy was entered on May 31, 2013 but dismissed the claims "without prejudice." CP at 1685. Nevertheless, it is clear that Becker settled with Synergy and did not intend to refile her claims. As such, the claims against Precision and Synergy were not unresolved at the time of Crews' dismissal.

Becker also argued that the dismissal of her claims against AVCO did not expressly address AVCO's contribution or indemnity cross-claims against Crews. As the Commissioner noted, however, "Becker does not

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[24] Due to an apparent clerical error, the order dismissing Premier was not designated in the Clerk's Papers. The order dismissing Premier is listed on the trial court docket as Sub No. 149A. It appears that docket Sub No. 148A was designated instead, which is an order transferring the case to a different judge that FTI did not designate. CP at 1619. FTI has filed a supplemental designation of the order dismissing Premier. FTI expects this order to begin at Clerk's Papers 2539.

explain how AVCO could have re-filed its contribution or indemnity cross-claims against [Crews] after AVCO was dismissed 'entirely from this action' and 'with prejudice' in July 2013 and [Crews] was dismissed 'with prejudice' in July 2014." *Spindle* (Ruling) at pgs. 8 n.33; CP at 1766-1767.

The Commissioner did not deny FTI's motion to dismiss Becker's appeal because Becker had any outstanding claims. Instead, the Commissioner concluded that AVCO may have had an outstanding claim, count, right or liability when Crews was dismissed. *Spindle* (Ruling) at pg. 10. After the trial court denied AVCO's motion to withdraw the previously-entered sanctions orders, CP at 1698, Becker filed a motion to dismiss AVCO with prejudice. CP at 1703. AVCO opposed this motion, arguing that dismissal was premature because AVCO intended to seek reconsideration of the trial court's refusal to withdraw the previously-entered sanctions orders. CP at 1709-1713. Five days later, AVCO filed the reconsideration motion. CP at 1756-1763. The trial court did not rule on the reconsideration motion; instead, it granted Becker's motion to dismiss AVCO with prejudice. CP at 1766-1767.

The Commissioner expressed reservation that when Crews was dismissed in July 2014, AVCO's motion for reconsideration may still have been pending. *Spindle* (Ruling) at pg. 10. However, the trial court's dismissal of AVCO necessarily denied AVCO's motion for reconsideration. Once AVCO was no longer a party to the action, the reconsideration motion served no purpose. *Cf. VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309, 331, 111 P.3d 866, 877 (2005) (trial court did not err when it declined to rule on a motion to compel after the action had been dismissed on summary judgment). This conclusion should not change because AVCO was seeking reconsideration of a

refusal to withdraw sanctions orders. The language of RAP 2.2(d) is broad. There is no textual basis to assume that sanctions are not included under "all the claims, counts, rights, and liabilities of all the parties." RAP 2.2(d); *see Fluor Enters., Inc. v. Walter Constr., Ltd.*, 141 Wn. App. 761, 771, 172 P.3d 368 (2007) (discussing a Commissioner's ruling implying that sanctions orders fall within the scope of RAP. 2.2(d)). Moreover, withdrawing the sanctions orders would have had no effect whatsoever on the litigation after AVCO was dismissed, which further establishes that AVCO's reconsideration motion was necessarily denied by AVCO's dismissal. *See* CP at 1430-1444, 1621-1627.

In sum, when Crews was dismissed on July 10, 2014, there were no outstanding "claims, counts, rights, and liabilities." RAP 2.2(d). Even though it did not contain the precise language of a final judgment, Crews' dismissal order nevertheless represented the final judgment that brought up previous orders for appeal. Because Becker did not file her notice of appeal within 30 days, this Court should dismiss her appeal as untimely.

V. CONCLUSION

For the reasons above, FTI respectfully requests that this Court affirm the trial court on all grounds or, in the alternative, dismiss Becker's appeal as untimely.

Dated this 27th day of March, 2015.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.

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CERTIFICATE OF SERVICE

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

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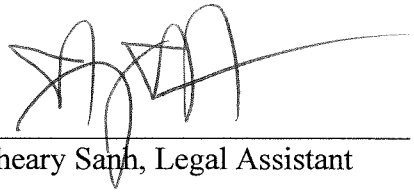

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APPENDIX A

Brief of Respondent FTI

(Clerk's Papers 1137-1138)

No.	Asserted Regulation	Why the Regulation is Inapplicable to FTI
1	Federal Aviation Regulation 3.5 (*14 C.F.R. § 3.5*)	Merely defines the word "airworthy." Does not impose any standard of care or obligation regarding the construction or design of aircraft components. *See* 14 C.F.R. § 3.5.
2	Federal Aviation Regulation 33.15 (*14 C.F.R. § 33.15*)	Part of Chapter 33, which applies to Type Certificate holders only. *See* 14 C.F.R. § 33.1(a)
3	Federal Aviation Regulation 33.19 (*14 C.F.R. § 33.19*)	*Same.*
4	Federal Aviation Regulation 33.35(a) (*14 C.F.R. § 33.35(a)*)	*Same.*
5	Federal Aviation Regulation 21.31 (*14 C.F.R. § 21.31*)	Part of Chapter 21, Subpart B, which applies to Type Certificate holders only. *See* 14 C.F.R. § 21.11(a).
6	Federal Aviation Regulation 21.31 (*14 C.F.R. § 21.33*)	*Same.*
7	Federal Aviation Regulation 21.303 (*14 C.F.R. § 21.303*)	Part of Chapter 21, Subpart K, which applies to PMA holders only. *See* 14 C.F.R. § 21.301.
8	Federal Aviation Regulation 21.316 (*14 C.F.R. § 21.316*)	*Same.*
9	Federal Aviation Regulation 91.7 (*14 C.F.R. § 91.7*)	Merely requires that aircraft operators only operate aircraft that are airworthy. Does not impose any standard of care or obligation regarding the construction or design of aircraft components. *See* 14 C.F.R. § 91.7.
10	Civil Air Regulation 13.15 (*former 14 C.F.R. § 13.15*)	Recodified in 1964. Additionally, applied to Type Certificate holders only. *See* former 14 C.F.R. § 13.0 (1956).[1]
11	Civil Air Regulation 13.18 (*former 14 C.F.R. § 13.18*)	*Same.*
12	Civil Air Regulation 13.100 (*former 14 C.F.R. § 13.100*)	*Same.*
13	Air Regulation 13.101 (*former 14 C.F.R. § 13.101*)	*Same.*
14	Civil Air Regulation 13.104 (*former 14 C.F.R. § 13.104*)	*Same.*
15	Civil Air Regulation 13.110(a) (*former 14 C.F.R. § 13.110(a)*)	*Same.*

[1] The 1956 version of C.A.R. Chapter 13 is located at Clerk's Papers 2524-2532.

APPENDIX B

Brief of Respondent FTI

Chapter 7.72 RCW
PRODUCT LIABILITY ACTIONS

RCW Sections

Notes:

Contributory fault: Chapter 4.22 RCW.

7.72.010
Definitions.

For the purposes of this chapter, unless the context clearly indicates to the contrary:

(1) Product seller. "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. The term "product seller" does not include:

(a) A seller of real property, unless that person is engaged in the mass production and sale of standardized dwellings or is otherwise a product seller;

(b) A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider;

(c) A commercial seller of used products who resells a product after use by a consumer or other product user: PROVIDED, That when it is resold, the used product is in essentially the same condition as when it was acquired for resale;

(d) A finance lessor who is not otherwise a product seller. A "finance lessor" is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

(e) A licensed pharmacist who dispenses a prescription product manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed prescribing practitioner if the claim against the pharmacist is based upon strict liability in tort or the implied warranty provisions under the uniform commercial code, Title 62A RCW, and if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules as provided in RCW 7.72.040. Nothing in this subsection (1)(e) affects a pharmacist's liability under RCW 7.72.040(1).

(2) Manufacturer. "Manufacturer" includes a product seller who designs, produces, makes, fabricates,

constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of RCW 7.72.030(1)(a).

(3) Product. "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

The "relevant product" under this chapter is that product or its component part or parts, which gave rise to the product liability claim.

(4) Product liability claim. "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

(5) Claimant. "Claimant" means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm. A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.

(6) Harm. "Harm" includes any damages recognized by the courts of this state: PROVIDED, That the term "harm" does not include direct or consequential economic loss under Title 62A RCW.

[1991 c 189 § 3; 1981 c 27 § 2.]

Notes:

Preamble -- 1981 c 27: "Tort reform in this state has for the most part been accomplished in the courts on a case-by-case basis. While this process has resulted in significant progress and the harshness of many common law doctrines has to some extent been ameliorated by decisional law, the legislature has from time to time felt it necessary to intervene to bring about needed reforms such as those contained in the 1973 comparative negligence act.

The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

It is the intent of the legislature to treat the consuming public, the product seller, the product

manufacturer, and the product liability insurer in a balanced fashion in order to deal with these problems.

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation." [1981 c 27 § 1.]

7.72.020
Scope.

(1) The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.

(2) Nothing in this chapter shall prevent the recovery of direct or consequential economic loss under Title 62A RCW.

[1981 c 27 § 3.]

7.72.030
Liability of manufacturer.

(1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

(a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product: PROVIDED, That a firearm or ammunition shall not be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) A product is not reasonably safe because adequate warnings or instructions were not provided with the product, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

(c) A product is not reasonably safe because adequate warnings or instructions were not provided after the product was manufactured where a manufacturer learned or where a reasonably prudent manufacturer should have learned about a danger connected with the product after it was manufactured. In such a case, the manufacturer is under a duty to act with regard to issuing warnings or instructions concerning the danger in the manner that a reasonably prudent manufacturer would act in the same or similar circumstances. This duty is satisfied if the manufacturer exercises reasonable care to inform product users.

(2) A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW.

(a) A product is not reasonably safe in construction if, when the product left the control of the

manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

(b) A product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.

(c) Whether or not a product conforms to an implied warranty created under Title 62A RCW shall be determined under that title.

(3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.

[1988 c 94 § 1; 1981 c 27 § 4.]

7.72.040
Liability of product seller other than manufacturer — Exception.

(1) Except as provided in subsection (2) of this section, a product seller other than a manufacturer is liable to the claimant only if the claimant's harm was proximately caused by:

(a) The negligence of such product seller; or

(b) Breach of an express warranty made by such product seller; or

(c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

(2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if:

(a) No solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington; or

(b) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer; or

(c) The product seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the product seller; or

(d) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect in the product; or

(e) The product was marketed under a trade name or brand name of the product seller.

(3) Subsection (2) of this section does not apply to a pharmacist who dispenses a prescription product in the form manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed practitioner if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules.

[1991 c 189 § 2; 1981 c 27 § 5.]

7.72.050
Relevance of industry custom, technological feasibility, and nongovernmental, legislative or administrative regulatory standards.

(1) Evidence of custom in the product seller's industry, technological feasibility or that the product was or was not, in compliance with nongovernmental standards or with legislative regulatory standards or administrative regulatory standards, whether relating to design, construction or performance of the product or to warnings or instructions as to its use may be considered by the trier of fact.

(2) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a specific mandatory government contract specification relating to design or warnings, this compliance shall be an absolute defense. When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with a specific mandatory government specification relating to design or warnings, the product shall be deemed not reasonably safe under RCW 7.72.030(1).

[1981 c 27 § 6.]

7.72.060
Length of time product sellers are subject to liability.

(1) Useful safe life. (a) Except as provided in subsection (1)(b) hereof, a product seller shall not be subject to liability to a claimant for harm under this chapter if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired.

"Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this chapter, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold. In the case of a product which has been remanufactured by a manufacturer, "time of delivery" means the time of delivery of the remanufactured product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

(b) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life, if:

(i) The product seller has warranted that the product may be utilized safely for such longer period; or

(ii) The product seller intentionally misrepresents facts about its product, or intentionally conceals information about it, and that conduct was a proximate cause of the claimant's harm; or

(iii) The harm was caused by exposure to a defective product, which exposure first occurred within the useful safe life of the product, even though the harm did not manifest itself until after the useful safe life had expired.

(2) Presumption regarding useful safe life. If the harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by a preponderance of the evidence.

(3) Statute of limitation. Subject to the applicable provisions of chapter 4.16 RCW pertaining to the tolling and extension of any statute of limitation, no claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm

and its cause.

[1981 c 27 § 7.]

7.72.070
Food and beverage consumption.

(1) Any manufacturer, packer, distributor, carrier, holder, marketer, or seller of a food or nonalcoholic beverage intended for human consumption, or an association of one or more such entities, shall not be subject to civil liability in an action brought by a private party based on an individual's purchase or consumption of food or nonalcoholic beverages in cases where liability is premised upon the individual's weight gain, obesity, or a health condition associated with the individual's weight gain or obesity and resulting from the individual's long-term purchase or consumption of a food or nonalcoholic beverage.

(2) For the purposes of this section, the term "long-term consumption" means the cumulative effect of the consumption of food or nonalcoholic beverages, and not the effect of a single instance of consumption.

[2004 c 139 § 1.]

Notes:

Short title -- 2004 c 139: "This act may be cited as the commonsense consumption act." [2004 c 139 § 2.]